THE

LAW JOURNAL REPORTS

FOR

THE YEAR 1881:

COMPRISING

REPORTS OF CASES

IN

The House of Lords and in the Privy Council,

IN

The Court of Appeal, the Court for Crown Cases Reserved, and the Court of Bankruptcy;

AND IN

THE HIGH COURT OF JUSTICE

VIZ.

Chancery; Queen's Bench; Common Pleas; Exchequer; Probate, Divorce and Admiralty, Divisions; And in other Divisional Courts.

MICHAELMAS, 1880, TO MICHAELMAS, 1881.

The Appellate Cases, in the House of Lords, and in the Court of Appeal, are with the Reports of Cases in the Divisions and Courts from which the Appeals respectively come. These Cases form four distinct Volumes, having separate Indexes of Subjects and Tables of Cases; viz., the Chancery Volume; the Bankruptcy Volume; the Bench, Pleas and Exchequer Volume; and the Probate, Divorce and Admiralty Volume.

THE CASES RELATING TO THE POOR LAW, THE CRIMINAL LAW, AND OTHER SUBJECTS CHIEFLY CONNECTED WITH THE DUTIES AND OFFICE OF MAGISTRATES, ARE SEPARATELY ARRANGED, AND FORM A DISTINCT VOLUME OF REPORTS, VIZ. THE MAGISTRATES' CASES.

THE PRIVY COUNCIL CASES HAVE THEIR OWN INDEX AND TABLE OF CASES, AND FORM A DISTINCT VOLUME OF REPORTS.

THE REPORTS ARE EDITED BY

MONTAGU CHAMBERS, ESQ., ONE OF HER MAJESTY'S COUNSEL,
FREDERICK HOARE COLT, ESQ.,
AND
JOHN GEORGE WITT, ESQ., BARRISTERS-AT-LAW.

QUEEN'S BENCH, COMMON PLEAS AND EXCHEQUER, VOL. L.

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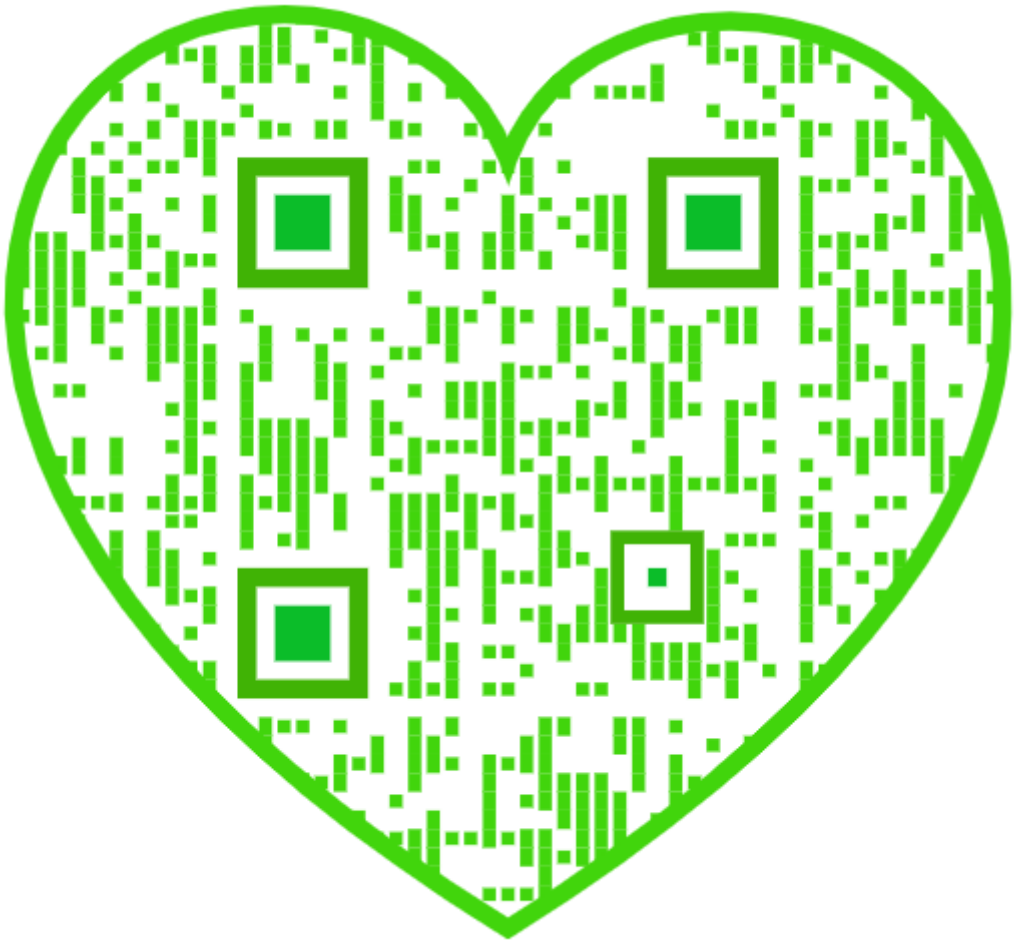

ceeded to try the case, when judgment was given for the plaintiff.

The defendant obtained in the Court of Appeal an order *nisi* for a new trial, on the ground that the learned Judge had no power to try the case without a jury. The defendant also appealed from the judgment of the learned Judge on the merits.

Murphy and *J. G. Witt*, for the defendant. — The defendant objected to the jurisdiction of the Judge, and it is contended that there was no trial at all, inasmuch as the order was in the usual form, directing the parties to proceed to "the trial of an issue;" and yet, that order being uncancelled, the plaintiff gave notice of trial before a Judge alone. This it was not competent for him to do. Proceedings in interpleader are governed by 1 & 2 Will. 4. c. 58 and 23 & 24 Vict. c. 126. By the former of these statutes provision is made for the trial of feigned issues, and by the latter it is enacted that a Judge may summarily dispose of trifling cases, and may in more difficult cases order a Special Case to be stated. By Order I. rule 2 (1) of the rules of Court, the practice in interpleader is preserved. If it be suggested that the plaintiff had a right by Order XXXVI. rules 2 and 3 (2) to choose his own mode of trial, it is submitted in answer that these rules apply to the trial of actions, whereas the trial of an interpleader issue is not the trial of an action, for an action is defined in section 100 of the Judicature Act, 1873, to be "a civil proceeding commenced by writ or in such other manner as may be prescribed by rules of Court;" so that the word "action" cannot apply to an interpleader issue, which is not an action, but a proceeding in or incident to an action; and rule 1 of Order I. further explains what is meant by the word "action" in the rules of Court, and shews that it does not cover an interpleader issue.

An interpleader issue is directed by the Master, and then a feigned issue is settled; this feigned issue must be tried by a jury. This view is strengthened by reference to 8 & 9 Vict. c. 109, which, after referring to the practice of trying questions in the form of feigned issues by stating that a wager was laid, declares that such questions may be tried without such form, and then proceeds, "Be it therefore enacted, that in every case where any Court of law or equity may desire to have any question of fact decided by a jury;" thus shewing that where there is a feigned issue, there must of necessity be a jury. (See also Schedule 2 to that Act for the form of an issue.)

Willis and *Edward Pollock*, for the plaintiff. The defendant has waived any objection which he might have taken and insisted on, for he proceeded with the trial and called witnesses, so that he has lost his right to object to the jurisdiction of the Court—*Andrews* v. *Elliot* (3). It is, moreover, contended that the plaintiff had a right to give this notice, and to try the issue before a Judge alone. All the proceedings in interpleader are now subject to the rules by which other trials are governed, for the effect of rule 2 of Order I. (1) is to confer this jurisdiction in interpleader on the divisions of the High Court and to extend it to the Chancery Division. This was necessary, inasmuch as the provisions contained in 1 & 2 Will. 4. c. 58 only applied to the Courts at Westminster, Lancaster and Durham.

(1) Rules of Court, Order I. rule 2: "With respect to interpleader, the procedure and practice now used by Courts of common law, under the Interpleader Acts, 1 & 2 Will. 4. c. 58, and 23 & 24 Vict. c. 126, shall apply to all actions and all the divisions of the High Courts of Justice; and the application by a defendant shall be made at any time after being served with a writ of summons and before delivering a defence."

(2) Rules of Court, Order XXXVI. rule 2: "Actions shall be tried and heard either before a Judge or Judges, or before a Judge sitting with assessors, or before a Judge and jury, or before an official or special referee with or without assessors."

3: "Subject to the provisions of the following rules the plaintiff may with his reply, or at any time after the close of the pleadings, give notice of trial of the action, and thereby specify one of the modes mentioned in rule 2; and the defendant may, upon giving notice within four days from the time of the service of the notice of trial, or within such extended time as a Court or Judge may allow, to the effect that he desires to have the issues of fact tried before a Judge and jury, be entitled to have the same so tried."

(3) 5 E. & B. 502; 25 Law J. Rep. Q.B. 336.

Hamlyn v. *Betteley* (*App.*), *C.P.*

[SELBORNE, L.C.—The rules do not give jurisdiction, they regulate the exercise of jurisdiction conferred by statute. COLERIDGE, C.J.—The exercise of the jurisdiction is regulated by section 23 of the Act of 1873, and section 16 of the Act of 1875.]

Rule 2 of Order I. (1) brings interpleader within the rules of Court, so that it is competent for a plaintiff to choose a mode of trial under Order XXXVI. rules 2 and 3 (2), and to give notice of it to the defendant, as was duly and properly done here.

[SELBORNE, L.C.—Is not that tantamount to saying that one action is a proceeding in another action?]

In *McAndrew* v. *Barker* (4), the Master of the Rolls having directed an interpleader issue to be settled, it was tried before him without a jury; the orders made by him were appealed from, but the objection here taken was never suggested.

[COLERIDGE, C.J.—The opinion of the Court there was that interpleader issues are not actions.]

If the plaintiff did not wish to have the trial before a Judge alone he should have given a counter-notice.

Murphy, in reply.—The defendant was not bound to give a counter-notice; he was entitled to rely on the direction in the order as to the mode of trial, which direction the plaintiff could not validly alter or depart from.

SELBORNE, L.C.—We are all of opinion that there must be a new trial. I do not think it necessary to say anything on the question of the alleged waiver. It is well established that a party can in the case even of arbitrations protest against the jurisdiction of a tribunal, and that, if his protest be overruled, he can proceed to prove his case, and afterwards take such steps as may be necessary to set aside the proceedings. In the present case the jurisdiction of the learned Judge was duly protested against, and I cannot agree that it was necessary for the protesting party to withdraw from the case and to take the risk of allowing it to be heard as undefended. Nor do I think that the defendant who received this notice of trial before a Judge, without a jury, was bound to give a counter-notice if it was not competent for the plaintiff to give such a notice of trial. The question for decision, therefore, is, whether this notice was one which in the circumstances of this case it was competent for the plaintiff to give. It is not necessary in my view of the case to determine any question as to the proper mode of trying interpleader issues, or any question as to the power of a Judge to direct any particular mode of trial, on any particular questions, under the provisions of rule 6 of Order XXXVI. In the present case the interpleader was strictly statutory. Now the Judicature Acts enact that the procedure and practice used under the Interpleader Acts shall apply to all the divisions of the High Court; there was, therefore, jurisdiction to make the order in pursuance of which this interpleader issue was directed to be tried by a jury. The question then arises, whether any Court has doneanything in the way of regulating the trial of this interpleader. It appears that what I may call the common interpleader order was made, that the parties were directed to settle an issue, and that it was drawn up by them in the usual form, and that it concluded with the words, "It has been ordered pursuant to the statutes on that behalf that the truth of the matters aforesaid be tried by a jury." This it would seem was the construction put on the order by both parties. With respect to the rules of Court it appears that the 2nd rule of Order I. (1) is the only rule which refers in express terms to interpleader; and the effect of that rule may well be that the practice therein referred to may apply to all actions and all the divisions of High Court; and if there is no regulation of any Court to the contrary effect that practice will apply. It has further been suggested that the provisions of rule 3 of Order XXXVI. (2) apply to this case, and that the plaintiff could therefore give notice of trial in any one of the modes mentioned in rule 2 of the same Order (2). It appears to me, however, that this interpleader is not within the rules referred to—that it is not

(4) 47 Law J. Rep. Chanc. 340; Law Rep. 7 Ch. D. 701.

an action within the definition given in section 100 (5) of the Judicature Act, 1873. I do not find any rule which shews that an interpleader issue is an action: it would seem rather to be an interlocutory proceeding in an action; and if this be so, then this interpleader issue is not an action within the meaning of that word in the rules of Court, so that it was not competent for the plaintiff to give a notice for the trial of the issue in any mode other than that directed by the order in pursuance of which the first trial was held before a Judge and jury. The learned Judge, therefore, had no jurisdiction to try this issue without a jury. The appeal must be allowed, and there must be a new trial. It has been said that the case of *McAndrew* v. *Barker* (4) is an authority for the position that interpleader issues can be tried without a jury. I have said that it is not necessary to lay down any general rule, that there was in this case an order that the issue should be tried with a jury, and that, that order standing, it was not competent for the plaintiff to disregard it. It also appears from the report of the case referred to, which is, however, reported with reference to quite another point, that the orders made by the Master of the Rolls were made in the two actions of *The Dock Company* v. *Locke* and *Barker* v. *The Dock Company*, which were then proceeding in his Court, so that it cannot be said that what was there done affords any support to the contention of the plaintiff in the present case.

COLERIDGE, C.J. and BRETT, L.J. concurred.

The order was made absolute for a new trial of the interpleader issue, and the plaintiff was ordered to pay all the costs of the order and of the abortive trial. The defendant was permitted to withdraw his appeal on the merits without costs.

Solicitors—Evans & Peacock, for plaintiff; Betteley & Co., for defendant.

(5) Judicature Act, 1873, s. 100: "'Action' shall mean a civil proceeding, commenced by writ or in such other manner as may be prescribed by rules of Court."

[IN THE COMMON PLEAS DIVISION.]

1880. Nov. 4.

CARTER *v.* STUBBS.

Appeal—Enlarging Time for Appeal after Expiration thereof—Special Circumstances—Power to rescind Order dismissing Action—Order LVII. rule 6.

In exercise of the discretion given to it by Order LVII. rule 6, *the Court will in a proper case enlarge the time limited for the performance of a certain act, after the expiration of the time so limited, even though the non-performance of the said act was not induced by the conduct of the opposite party nor due to inevitable accident.*

On the 17th of June, 1880, Master Francis made an order that unless the plaintiff in this action filed his affidavit in answer to certain interrogatories administered by the defendant within seven days of the said order the action should be dismissed.

On the 25th of June the plaintiff filed his affidavit in answer—that is, on the eighth day after the date of the order of Master Francis aforesaid.

On the 9th of July Master Gordon, on the application of the plaintiff, rescinded the order of Master Francis. From this order the defendant appealed to Hawkins, J., in chambers, who adjourned the appeal indefinitely.

On the 15th of July the plaintiff took out two summonses—one to enlarge the time for appealing from the order of Master Francis, and a second to vary the said order by allowing fourteen instead of seven days within which the plaintiff might file his answers.

On the 20th of July these summonses came on for hearing before Hawkins, J., in chambers, who made orders thereon, enlarging the time to appeal, and varying the order as prayed. Hawkins, J., also adjourned the defendant's appeal summons.

The defendant appealed from the orders of Hawkins, J., and on the 31st of July the Court adjourned the hearing of that appeal, and directed that all the appeals should be heard before the Court on the 4th of November, 1880.

Carter v. *Stubbs*, C.P.

Gould, for the defendant.—The Court has no jurisdiction to rescind the order of Master Francis, as the action is dead —*Whistler* v. *Hancock* (1). The special circumstances under which the Court will give relief are such as shew that there is no fault on the part of the party seeking relief, or that his fault (if any) was induced by the act of the other party —*Burke* v. *Rooney* (2). In this case the time limited by the Statute of Limitations had expired since the date of the order, and the time cannot be enlarged where, in the absence of such enlargement, the claim would be barred by the Statute of Limitations (21 Jac. 1. c. 16).

Doyle v. *Kaufman* (3), *The International Financial Society* v. *The City of Moscow Gas Company* (4), *Krehl* v. *Burrell* (5) were also cited.

Reid, for the plaintiff.—The action is dead by virtue of the order of Master Francis; but that order is subject to appeal within the proper time, therefore the action is not dead beyond all possibility of revival.

It is admitted that *Whistler* v. *Hancock* (1) is against the order of Master Gordon rescinding the order dismissing the action, but the Court has power, under Order LVII. rule 6 (6), to enlarge the time for appealing. *Burke* v. *Rooney* (2) is in point. There is no pretence of injury to the defendant: no allegation of a defence on the merits. It was the usual practice before the Judicature Act to set aside judgment upon terms.

Gould replied.

(1) 47 Law J. Rep. Q.B. 152; Law Rep. 3 Q.B. D. 83.

(2) 48 Law J. Rep. C.P. 601; Law Rep. 4 C.P. D. 226.

(3) 47 Law J. Rep. Q.B. 26; Law Rep. 3 Q.B. D. 340.

(4) 47 Law J. Rep. Chanc. 258; Law Rep. 7 Ch. D. 241.

(5) 47 Law J. Rep. Chanc. 352; Law Rep. 10 Ch. D. 241.

(6) Order LVII. rule 6 is as follows: A Court or a Judge shall have power to enlarge or abridge the time appointed by these rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.

LINDLEY, J.—I am of opinion that these orders of Mr. Justice Hawkins are correct. The plaintiff in this case sues for the recovery of a sum of money by way of damages. At the date of the issuing of the writ the time limited by the Statute of Limitations had not expired. The defendant obtained an order on the 17th of June, 1880, for the dismissal of the action in the event of the plaintiff failing, within seven days from the date of such order, to file answers to certain interrogatories administered to him—that is, the plaintiff was put upon terms. The plaintiff failed by some slip to comply with those terms. The defendant says that the action, in consequence of such failure, is dead, that the plaintiff is to be debarred for ever from his right, and that the defendant, by reason of the action becoming dead, through no fault of his, has acquired a right to have the advantage of such bar to the plaintiff's claim.

Now Order LVII. rule 6 gives us power to deal with this case by enlarging the time for filing the affidavit in question, and no construction has been put on this rule such as would preclude us from so dealing with it. The authorities only go so far as this in restraint of the use of the discretion given to the Court by the said rule—that the Court ought not to exercise it merely out of benevolence to the party seeking relief. In *Blyth* v. *Young* (7) Lord Justice James, referring to *M'Andrew* v. *Barker* (8), says, "I think it was a little too strong to say that the Court has no discretionary power to enlarge the time for appealing, unless there has been conduct on the part of the respondent raising an equity against him. The Court did not intend to lay down a positive rule in every case —it was not intended, for instance, to apply to the case of inevitable accident."

It is, therefore, not necessary that the Court should find something in the conduct of the defendant which would raise an equity against him to entitle the plaintiff to the relief he seeks. The case of *Whistler* v. *Hancock* (1) has been

(7) Law Rep. 13 Ch. D. 416.

(8) 47 Law J. Rep. Chanc. 340; Law Rep. 7 Ch. D. 701.

cited for the defendant, as precluding us from affirming the order of Master Gordon rescinding the order of Master Francis dismissing the action, but in accordance with the powers given by Order LVII. rule 6, and the principles laid down in *Burke* v. *Rooney* (2), we can enlarge the time in the said order of Master Francis limited for the delivery of the affidavit in answer from seven days to fourteen, and we can also enlarge the time for appealing from that order. I am, therefore, of opinion that the order of Master Gordon should be discharged, but that the orders of Mr. Justice Hawkins should be affirmed. Under the circumstances, the costs of all the applications at chambers must, of course, be paid by the plaintiff; but as each has partially succeeded on this occasion, no order will be made as to the costs of this appeal.

LOPES, J.—I am of the same opinion. The case of *Burke* v. *Rooney* (2) shews that the Court has full power to extend the time for appeal, and I am of opinion that this is a proper case for extension. This is only assimilating the present to the old practice of setting aside a judgment upon terms. The order of Master Gordon must be discharged, and the appeals from the orders of Mr. Justice Hawkins be disallowed. The costs of the proceedings prior to this appeal must be the defendant's; but, as regards this appeal, there will be no order as to costs.

Order of Master Gordon, dated the 9th of July, 1880, discharged. Orders of Mr. Justice Hawkins, dated the 20th of July, 1880, affirmed. Plaintiff to pay all costs at chambers. No costs of appeal to either side.

Solicitors—Wild, Browne & Wild, for plaintiff; Hunter, Gwatkin & Haynes, for defendant.

[IN THE EXCHEQUER DIVISION.]

1880. Nov. 4. THE MIDLAND WAGGON COMPANY *v.* THE POTTERIES, SHREWSBURY AND NORTH WALES RAILWAY COMPANY.

Railway Company — Execution against Rolling Stock or Plant—30 *&* 31 *Vict. c.* 127 (*The Railway Companies Act*, 1867), *s.* 4 —*Railway closed for Traffic.*

Rolling stock and plant of a railway company, whose railway had fallen into disrepair, and who had been obliged by financial difficulties to close their railway, were seized in execution:—Held, *that* 30 *&* 31 *Vict. c.* 127. *s.* 4, *restricting execution against the rolling stock and plant of a railway company, was not confined to a railway which was open for traffic, but applied, although the railway had been closed for traffic and it was doubtful whether it would ever be re-opened.*

This was a summons under the Railway Companies Act, 1867, ss. 4 and 5 (1), referred by Lopes, J., at chambers, to

(1) The Railway Companies Act, 1867 (30 & 31 Vict. c. 127) s. 4, enacts: "The engines, tenders, carriages, trucks, machinery, tools, fittings, materials and effects, constituting the rolling stock and plant used or provided by a company for the purposes of the traffic on their railway, or of their stations or workshops, shall not, after their railway or any part thereof is open for public traffic, be liable to be taken in execution at law or in equity, . . . where the judgment on which execution issues is recovered in an action on a contract entered into after the passing of this Act, or in an action not on a contract commenced after the passing of this Act; but the person who has recovered any such judgment may obtain the appointment of a receiver, and, if necessary, of a manager of the undertaking of the company, on application by petition in a summary way to the Court of Chancery . . .; and all money received by such receiver or manager shall, after due provision for the working expenses of the railway and other proper outgoings in respect of the undertaking, be applied and distributed under the direction of the Court in payment of the debts of the company and otherwise according to the rights and priorities of the persons for the time being interested therein; and on payment of the amount due to every such judgment creditor as aforesaid the Court may, if it think fit, discharge such receiver, or such receiver and manager."

Section 5 enacts that where property of a company has been taken in execution and a question arises whether it is liable to be so taken, not-

the Court, whereby the defendants called upon the plaintiffs and the sheriff of Salop to shew cause why the sheriff should not be ordered to withdraw from possession of office furniture, fittings, materials and effects seized by him under writ of *fi. fa.* issued in the action against the goods of the defendants, on the ground that by virtue of section 4 of the above-mentioned Act the same were not liable to be so taken.

From the affidavits filed for and against the application, it appeared that the defendants' railway had been for many years open for public traffic, and the defendants had carried traffic thereon, and for such purpose had provided rolling stock and station and office furniture and fittings, materials and effects for their railway stations and workshops; that in June, 1880, the railway was inspected on behalf of the Board of Trade, and a report was made to the Board of Trade by their inspector, which shewed that the line was greatly out of repair; that in a correspondence which ensued between the Board of Trade and the defendants, the defendants stated that there were no funds available for carrying out the suggested repairs, and asked for directions as to whether the whole or only a portion of the line should be closed; that the Board of Trade replied that for the public safety the line ought to be closed at once; that, consequently, the defendants closed their line; that the execution issued after such closing; that the goods seized by the sheriff were or included rolling stock and plant which the defendants had, as above mentioned, provided for the purpose of traffic on their line. According to the affidavits filed on the part of the defendants, arrangements were being made for working the goods traffic on portions of the line; and the defendants intended to take steps for raising money to carry out the repairs suggested by the Board of Trade.

withstanding this Act, the question may be determined on an application by either party, by summons in a summary way, to the Court out of which the execution issued; or if the Court is one of the Superior Courts of law, then to a Judge of any one of those Courts, and such determination shall be final and binding.

J. W. Batten, for the defendants.—The protection afforded by 30 & 31 Vict. c. 127. s. 4 (1), is not limited to the rolling stock and plant of a railway company whose line is, at the time, open for traffic. The words of the Act are not "after and so long as" the railway is open for traffic, but "after" the railway is open for traffic. The Legislature intended to protect both the public and debenture holders. The public being interested in a re-opening of the line, this seizure is contrary to its interest, although the line is for the time being closed; and the desirability of protecting the interest of debenture holders would be a sufficient reason for prohibiting seizure of rolling stock and plant even in the case of a railway permanently closed. There being in the present case not only no reason for regarding the line as permanently closed, but good reason in the facts appearing upon the affidavits for regarding it as closed only temporarily, and moreover for regarding the temporary closing as likely to be short, the case is clearly within the Act.

W. G. Harrison (*Archibald* with him), for the plaintiffs.—The Act applies only to a railway which is open for traffic. The Act would be inconsistent with itself if the protection, which is only to commence when the railway is open for traffic, were continued by it after the railway is closed for traffic. And the terms of the enactment are incompatible with any such construction. If a railway is closed, and there is consequently no traffic upon it, there cannot be "rolling stock and plant used or provided for the purpose of the traffic upon the railway." The direction as to making "due provision for the working expenses of the railway" implies that the railway is working. If a railway which is only temporarily closed for traffic is within the Act, the defendants' railway is, nevertheless, not within it, there being no sufficient reason to suppose that the railway will ever be re-opened. He contended also that some of the chattels seized were such as could not be considered to be in any sense "rolling stock or plant;" but upon suggestion from the Court this question was left to be disposed of by agreement between counsel.

Farwell appeared for the sheriff.

Batten, in reply.—The rolling stock and plant are part of the capital of the company. Under section 23, the debenture holders have "priority against the . . . . property . . . . of the company over all other claims on account of any debts incurred or engagements entered into . . . . after the passing of the Act."

POLLOCK, B.—The question arising in this case, which has been ably and clearly argued, is of considerable importance, and there appears to have been as yet no decision upon it. I say "the question," for we may address ourselves to the main question alone, and lay aside questions as to what constitutes "rolling stock and plant," our suggestion that those questions should be left to be settled between counsel having been accepted.

Mr. Harrison has satisfied us that the closing of the railway is occasioned by financial difficulties which make it doubtful whether the railway will ever be reopened. The question we have to consider is, whether the Act 30 & 31 Vict. c. 127. s. 4 (1) applies notwithstanding such a state of things.

My opinion upon the construction of the enactment will rest upon section 4 itself together with section 23. Very little help if any in construing section 4 is to be derived from sections 6 to 22, which deal with schemes of arrangement by insolvent companies; and it has not been suggested that any other part of the Act is material to be considered.

Before examining the terms of the Act, let us see what were the circumstances which preceded the passing of the enactment. Railway companies possessed rolling stock as well as land. And if a creditor of a railway company wanted payment he would naturally enough cause its rolling stock to be seized in execution, and so inconvenience the public by stopping the working of the line. Consequently, and by reason particularly of a well-known case, this enactment was passed. The Act, however, be it observed, besides giving protection to the rolling stock and plant of a railway company, deals with the priorities thereafter to exist between the company's creditors. Let us now see what is the language of the enactment. [The learned Judge read section 4.] Nothing could well be fuller than that language. I should have a difficulty in narrowing the word "used" (in the words "rolling stock and plant used or provided by a company for the purposes of the traffic upon their railway") to rolling stock and plant which is either being used or going to be used again. But the word "used" is followed by the words "or provided;" and it appears to me clearly that rolling stock and plant which a company have once provided for the purpose of traffic upon their railway is not by the fact that the railway has been closed prevented from being "rolling stock and plant provided by the company for the purpose of the traffic upon their railway." The direction as to making "due provision for the working expenses of the railway," though it affords some ground for the argument that the section is limited to a railway which is at the time a working railway, is very far from necessitating such limitation. The Act is there simply providing for the more frequent state of things. There appears to me, therefore, to be nothing in section 4 so to extend the limitation by the words "after the railway . . . . is open for public traffic" as to make the section apply only when the railway is and remains open for traffic. Section 23, which, subject as there mentioned, gives to debenture stockholders "priority against the company and the property from time to time of the company over all other claims on account of any debts incurred or engagements entered into by them after the passing of this Act," is strong to shew that section 4 is not intended to apply only when the railway is open for traffic. I am of opinion that the sheriff must be ordered to withdraw.

STEPHEN, J., concurred, adding that the Court had not to consider whether the enactment would apply to the case of a railway altogether abandoned and ceasing to be a railway.

Order accordingly, with costs.

Farwell asked that the sheriff might have his costs on the ground that the

sheriff was not, as in interpleader, seeking protection.

THE COURT (Stephen J. saying that the sheriff was "between two fires") gave the sheriff costs and possession money.

Solicitors—Sharpe, Parkers, Pritchard & Co., agents for Ryland, Martineau & Co., Birmingham, for plaintiffs; S. F. & H. Noyes, for defendants.

[IN THE QUEEN'S BENCH DIVISION.]

1880. Nov. 12, 17. ROBINSON *v.* CURRY.

Action for Penalty—Limitation—Party grieved, 3 & 4 Will. 4. c. 42. s. 3—Goldsmiths' Company—Counterfeit Hall Marks—7 & 8 Vict. c. 22.

To an action for penalties brought by the Goldsmiths' Company of London against a defendant for having sold divers silver wares bearing a counterfeit of their mark, under section 3 of 7 & 8 Vict. c. 22, the defendant pleaded the Statute of Limitations, 3 & 4 Will. 4. c. 42. s. 3, that the plaintiff was a "party grieved" within that Act, and could not sue after two years:—Held, *on demurrer, a good plea.*

Semble, *that section 3 of 7 & 8 Vict. c. 22 applies to all the specified Companies of Goldsmiths, so as to entitle any one of them to sue a defendant for penalties in respect of a counterfeit not only of its own mark, but of the mark of any other of the companies.*

Demurrer to a defence of the Statute of Limitations.

The statement of claim alleged in paragraph 1 that the plaintiff was the deputy-warden of the Company of Goldsmiths in London, and sued as such officer, for and on behalf of the said Company of Goldsmiths, by virtue of the statute 7 & 8 Vict. c. 22, intituled "An Act to Amend the Laws now in force for preventing fraud and abuses in the marking of gold and silver wares in England."

2. The defendant is, and at all times hereinafter mentioned was, a dealer in silver wares, carrying on business at Great Sutton Street, Clerkenwell.

3. The defendant at divers times in the year 1872, being such dealer in silver wares, sold to Charles Hill divers wares of silver, amounting, in the whole, to 643 articles.

Paragraph 4 set out the articles.

5. At the several times when the said wares of silver were so sold by the defendant, each of the said wares had thereupon, against the form of the said statute, a counterfeit imitation of the mark of an instrument theretofore used by the said Company of Goldsmiths in London for marking silver wares.

6. By reason of the premises and by virtue of the said statute, the defendant forfeited and became liable to pay for every ware so sold by him the sum of 10*l.*—amounting in the whole to 6,430*l.*

7. The plaintiff, as such officer of the said Company of Goldsmiths in London, for and on behalf of the said company, claims 6,430*l.*

The statement of defence, after denying the allegations of the offences charged in the claim, pleaded in paragraph 4 that the alleged cause of action did not accrue within two years before this action was brought.

To this paragraph the plaintiff demurred, "on the ground that this action is not an action for penalties, damages or sums of money given to the party grieved, and is therefore not bound by the statute 3 & 4 Will. 4. c. 42. s. 3, or by any other statute in that behalf."

A. Wills (*Coxon* with him), in support of the demurrer.—The Goldsmiths' Company are not parties grieved within the Statute of Limitations, but they have a public duty to perform, in the course of which they sue for penalties against persons infringing the Acts.

The companies were constituted guardians of the purity of the gold and silver standards for the public benefit. And that the fines do not go to enrich themselves appears from the provisions in the old Act, 12 Geo. 2. c. 26. s. 19, where it was enacted that the assay fees should be reduced by the overplus of fines not wanted for actual expenses incurred.

Then there is very good reason for there being no limitation with reference to these actions, because it is often impossible to find out such frauds within the time of prescription. A dealer would only need to forge a mark and wait two years and then he would be safe if he had passed the wares into the hands of some one not a dealer, and where they would not be exposed for sale.

Sir J. Holker (*Crump* with him), in support of the plea.—Each of these companies has its separate mark, and when that is forged, the company is aggrieved. Section 3 shews that it was intended that each company should sue in respect of counterfeits of its own mark, for on referring to section 10, it will be seen that the penalties are recoverable, and recoverable in the name of an officer of any of the said several companies respectively entitled to sue. And the penalties do go to the benefit of the assay office of the particular company.

[FIELD, J.—What is the grievance to the Goldsmiths' Company?]

It is not necessary that an action should lie, it is enough if the matter complained of jeopardises the interest of the company. And the interest of the companies generally, as representing the trade, is affected by the sale of counterfeit ware.

Then it must be remembered that this is a penal action, and all penal actions are barred by some limit—such is the policy of the law; but there would be no limit here at all if this case does not fall within 3 & 4 Will. 4. c. 42, unless, indeed, the statute of Elizabeth applies. There is considerable authority for this; and this plea will be supported, in the second place, by regarding the Goldsmiths' Company as an informer within 31 Eliz. c. 5, and so limited to one year.

In *Dyer* v. *Best* (1) it was held that that statute applied to every class of action on statutes imposing penalties. *Lookup* v. *Frederick* (2), cited there is an authority that it was not intended to leave any actions unrestrained in time—*Buller's Nisi Prius*, p. 195; *Barrett* v. *Johnson* (3).

(1) 35 Law J. Rep. Exch. 105; Law Rep. 1 Exch. 152.
(2) 4 Burr. 2018.
(3) 2 Jones Ir. Ex. Ca. 197.

A. Wills, in reply.—The last argument is founded on a misapprehension of *Dyer* v. *Best* (1). In all cases where there could be a trade of informing, the statute of Elizabeth is held to apply. But it does not follow that it applies where penalties are given to public bodies for public ends. The Goldsmiths' Company cannot be a common informer. A corporation cannot sue for penalties as a common informer, unless expressly authorised by statute to do so—*St. Leonard's, Shoreditch* v. *Franklin* (4).

A common informer is one of the public who has a right to sue in common with any other of the public.

At the time it was passed the 31 Eliz. may have covered all actions for penalties, as seems to be assumed in *Buller's Nisi Prius*, but this class of actions has grown up since, in which, for the public benefit, a special body is empowered to sue. There is also a conflicting decision of Lord Holt in *Cullifford* v. *Blandford* (5), in which case, as here, the whole of the penalty going to the informer or person suing prevented the statute applying. Then on the first point section 10 has not qualified the other section—it merely provides that if an officer act, he is to be the officer of the company bringing the action. It is attempted to make this company a party grieved by limiting the powers of suing given by the Act to each company in respect of its own mark; but this construction is not right, otherwise the object of the Act would be defeated, and London counterfeit marks would be sold with practical impunity in other towns, and *vice versa*. There is no area assigned to each company or town. The provisions are wholly for the public protection, and the officers who put them in force are not parties grieved.

Cur. adv. vult.

The following judgments were (on November 17) delivered by

FIELD, J.—This was a demurrer to a statement of defence raising the defence of the Statute of Limitations in bar to an action for penalties.

(4) 47 Law J. Rep. C.P. 727; Law Rep. 3 C.P. D. 377.
(5) 2 Shower, 353.

The action was brought by a party other than a common informer, being in fact the officer representing the Goldsmiths' Company of London, and was brought to recover penalties for offences alleged to have been committed against the provisions of a statute.

The defendant has put in issue all the allegations as to the offences charged, and also pleaded exemption which is given to him by a proviso in a subsequent section of the statute. But the plea to which the argument in the case before us was really addressed was a plea setting up in bar the Statute of Limitations, that the cause of action (if any) did not arise within two years of the action brought, this defence being founded upon the Act, 3 & 4 Will. 4. c. 42. s. 3, which enacts that "all actions for penalties given to the party grieved by any statute now or hereafter to be in force shall be commenced and sued within two years after the cause of such actions or suits, but not after."

That plea was demurred to. There was no demurrer to the statement of claim, nor was any objection made to it in argument. It must, therefore, be taken that the plaintiff's cause of action is that stated in the claim, and that it constitutes a good cause of action in the plaintiff.

The plaintiff, as I have said, is really a corporation, and at the bar it was argued that, independently of the two years' limitation imposed by the above Act, and formally set up upon the record, the defendant might also justify his plea by shewing that the plaintiff ought to be confined within the narrower limits of one year.

So that the defendant's case is, first, that the plaintiff was a party grieved within 3 & 4 Will. 4. c. 42, and had only two years within which to bring his action; and secondly, if not, then he was a common informer and had only one year by virtue of 31 Eliz. c. 5.

It is unnecessary to decide the latter question, because we are both agreed that the plaintiff is a party grieved and that therefore the plea is a good bar to the action.

How then do we construe the statute as to the meaning of the words "party grieved"? I do not think that the cases upon the statutes giving appeals from Justices will be of any assistance, but we must construe the Statute of Limitations with reference to the *status* of the plaintiff. First, then, who is the party in this case? The party is the Incorporated Goldsmiths' Company, and the way in which they come to be grieved, if at all, is this: In early times, when every trade had its own guild, the traders in gold and silver were incorporated in the various towns of London, Edinburgh, York, Newcastle, Exeter and Bristol, and from time to time—certainly, I think, at the time of Hen. 6—all the companies or assayers of gold in those places had imposed on them certain functions by the State; that is to say, the State adopted the functions exercised before. Previously, the manufacturers in every town had been in the habit of taking their wares to the companies to be "touched," as it was called, but there had been no statutory recognition of the practice. But then it was, to secure the genuineness of plate which is, from its nature, liable to be mixed with alloy or counterfeited, enacted that no one should sell plate without its having been so touched. Besides this duty of marking plate, the Legislature some years afterwards gave the companies the power of levying, and required them to receive, the duties on the manufacture of plate, and to hand such duties over to the Treasury, deducting a small fee for their own trouble in testing and marking. There was, however, but little further legislation till the 7 & 8 Vict. c. 22. That statute in the first two sections reenacts some provisions of earlier Acts making the forging and uttering of dies and marks to be a felony; and then by section 3 imposes a penalty on a dealer for selling, exchanging, exposing or keeping for sale any wares of gold or silver or base metal with forged marks of any of the several companies thereupon.

That is a provision for a case where counterfeit marks may exist quite consistently with the innocence of the person sued for the penalty, and under it the plaintiff here sues. But in order to see whether the plaintiff is a person grieved,

we must see under what circumstances, and why, he is empowered to sue, and what is to become of the penalties he may recover. Now, in reading section 3, and pausing at the words "forfeit and pay the sum of 10*l.*," let us see, supposing no other language had been used, what it would have been reasonable to suppose the Legislature would have intended. It is well known that in a majority of statutes it is said that a moiety of the penalty shall be paid to the Crown, and a moiety to the person who shall sue and prosecute. Some statutes say that the whole shall be paid to the Crown, some to the person who shall prosecute; and some that the penalty shall go to the poor of the parish, or to somebody against whom the offence is supposed to have been committed. There being no such direction in the present case, as the word "pay" implies that there is some one to receive, it might be difficult without further words to say who was to receive the penalty. Upon this point, then, I refer to the earlier Act of 12 Geo. 2. c. 26, which, though repealed, may be of use as a matter of construction. Section 22 makes one moiety of the penalty payable to the Crown, and the other moiety to the person who shall sue for the same.

It is the same statute which forbids the Goldsmiths' Companies to make any profit out of the assay, but directs them to use all the money they receive on the expense of the assay or in the prosecution of offenders. It seems, therefore, to me that if there had been nothing more, it would not have been unreasonable, although the penalty is given in terms, neither to Her Majesty nor the person suing, to have inferred the intention of the Legislature, nevertheless, to have been that it was to be paid to the Company of Goldsmiths, or some or one of them. But looking further, the section says that the moneys are "to be sued for and recovered by any of the said several Companies of Goldsmiths in manner hereinafter provided."

Now I agree that the companies have no special areas assigned to them, and that any one of them might sue a dealer for having or selling wares with the counterfeit mark of any other company at any place. A subsequent section of the same Act weighs much with me in adopting this view, and that is section 8. A dealer being bound to take his wares to one of the several companies to be touched is compelled to leave his address and place of business with the company he so selects, and then, as the object was to enable the company to go to his place of business to see if he had any counterfeit ware, it was further provided that if he changed his place of business he must notify the fact not to any company, but to the same company, and if he fail to do so he shall pay a penalty. Now the recovery of that penalty is described in very different language from that used in section 3. It is to be "recovered by the Company of Goldsmiths, in respect whereof such default shall have been made." That seems to me to shew that the Legislature knew perfectly well the meaning of the general language which they used in section 3, namely, that these penalties are to be recovered by any of the said companies.

We must next look at section 10, to see the manner in which these penalties are to be recovered, and it amounts to a distinct enactment that the Company of Goldsmiths, or one of the companies, is entitled to sue for the penalty; but it goes further, and says that they are not only the persons entitled to sue, but are also entitled to hold and apply the money. It therefore comes to this, that there is created an offence of keeping for sale plate with a forged mark, quite irrespective of all property in that mark, and the penalty is put upon the person committing such offence, and he is to pay it to any one of the specified companies. When paid to any one it would be bar to any action by another company. But, without going into further questions as to the rights of the companies among themselves, the proposition I lay down, which is in accordance with what I find stated in *Buller's Nisi Prius—Shinler* v. *Roberts*, p. 197—is that the statute here, having given the plaintiffs a power to sue for the penalty, and having provided that they shall recover the amount and apply it to their own purposes, has given them what would in old days be called an

action of debt, and that cause of action does make them a party grieved within the meaning of 3 & 4 Will. 4. c. 42.

I will add a few words as to the reasonableness of the construction I have put upon the statute, for though we cannot supplement the omissions of the Legislature, I think it is useful to look at the general course of legislation for the purpose of arriving at the intention of a particular Act.

The law as to limitation came into existence about the time of Henry 8, and was amended in the reigns of Elizabeth and James, and thenceforward there was nothing further till the 3 & 4 Will. 4.

It is a reasonable law to begin with, and is one found to be necessary in all countries. The Act of Elizabeth struck at the common informer, and down to 3 & 4 Will. 4. c. 42 there was no limitation, so far as I know, in the case of the party grieved.

The introduction of penalties given to the party grieved may have been subsequent to those earlier statutes of limitation; but it would be most unreasonable, I think, to suppose that when the Legislature was passing an Act dealing with actions upon statutes by parties grieved, it should have omitted so large a class of cases as the present, namely, where the penalty was given to the person who sued, in a certain sense on the part of the public, but still who sued to recover it for himself. It would, I think, be very unreasonable to hold that it was intended to omit them; and I am of opinion that we are carrying out the intention of the Legislature, as well as acting strictly upon the language in both statutes, in holding this to be a good plea, and that unless the Goldsmiths' Company can prove a cause of action within two years judgment will be for the defendant.

MANISTY, J.—I am of the same opinion. It seems to have been the policy of the law with regard to this class of action and all penal actions, that there should be a limit; and if it were necessary to decide whether this case comes within the statute of 31 Eliz., I should hesitate a long time before saying that it was not within it. In penal actions, except where the penalty went to the Crown, it was reasonable, and I think it was the intention of the Legislature, that there should be a short limit, and *Dyer* v. *Best* (1) is a strong authority that such limit is one year only. But the Legislature thought good that parties aggrieved should have a longer time, and the Act 3 & 4 Will. 4. c. 42 gave them the extension to two years. It would, I think, be a startling anomaly if it should turn out to be the law that there is no limit whatever for a person suing for a penalty, if he were neither a common informer nor a party aggrieved. However, this does not arise here, for we are both of opinion that the Goldsmiths' Company is a party grieved. One cannot read the statutes as a history of legislation without seeing that the companies had certain powers given to them to prevent abuses in the sale of gold and silver wares. Whether the company derive profit directly from the duty of marking plate or not may be a question, but they clearly do so indirectly, and they have a substantial interest in preserving the purity of the wares and preventing their dies being forged. It seems, therefore, to be beyond argument that the companies specified in the statutes have very substantial and important interests in the enforcement of the provisions of the Act; and that being so, as by section 3 of 7 & 8 Vict. c. 22 a penalty is imposed of 10*l.* on every piece of gold and silver ware sold or kept contrary to the Act, and such penalty is given to them, it is no less clear that the particular company which sues for the penalty and recovers it is a party grieved.

They are not common informers and not one of the public, so that I do not see what they can be if not parties grieved. There are but few cases on the subject of parties grieved, and I do not think they help us much; but I see that in *Boyce* v. *Higgins* (6) Mr. Justice Maule said that a party grieved must shew some particular grief as distinguished from what is common to all the public, and that if you can shew there is a particular grievance as distinguished from that applicable to all the public, that lets that party in.

(6) 14 Com. B. Rep. 1; 23 Law J. Rep. C.P. 5.

Robinson v. *Curry*, Q.B.

The only other question it is hardly worth while further to discuss, as it does not arise here; but I am inclined to agree that any of the companies may sue in respect of a counterfeit of the marks of any other company as well as of its own.

Upon all the grounds I have stated, I think that judgment should be for the defendant.

Demurrer overruled.

Solicitors—Prideaux & Sons, for plaintiff; J. Bannister Brown, for defendant.

[IN THE HOUSE OF LORDS.]

1880. May 4. THE METROPOLITAN DISTRICT RAILWAY COMPANY *v.* SHARPE.

Statute, Construction of—Consolidation Act—Incorporation with Special Act—Lands Clauses Consolidation Act, 1845 (8 *&* 9 *Vict. c.* 18), *s.* 34—*Costs of Arbitration—Action for Costs before Taxation—Lands Clauses Consolidation Act*, 1869 (32 *&* 33 *Vict. c.* 18), *s.* 1.

By a private Act of Parliament a special tribunal was provided for arbitration in respect of claims for compensation for injury to land by the works of a railway; but no provision was made as to costs.

The same Act incorporated the Lands Clauses Consolidation Act, 1845, "*except where expressly varied*" *by the Special Act:*—

Held, *that the provisions of section* 34 *of the Lands Clauses Consolidation Act*, 1845, *were not* "*expressly varied*" *by the section of the special Act, which provided a different tribunal of arbitration; but that those provisions applied to arbitrations under the section of the special Act.*

The assessment of costs by a Master under section 1 *of the Lands Clauses Consolidation Act*, 1869, *is not a condition precedent to the claimant's right to bring an action for such costs where the right to costs is disputed.*

This was an appeal from a judgment of the Court of Appeal (reported 48 Law J. Rep. Q.B. 325; Law Rep. 4 Q.B. D. 645) affirming with a modification an order made by Manisty, J.

The Metropolitan District Railway Company were authorised by a special Act (38 & 39 Vict. c. ccviii.), among other things, to alter the level of the roadway in Mansion-house Street and Cambridge Road, Hammersmith.

Section 2 of the Act incorporates the Lands Clauses Consolidation Acts, 1845, 1860, and 1869, "except where expressly varied" by the special Act.

Section 14 enacts that "the company shall compensate the owners and lessees of any houses not purchased by the company abutting upon such portion of Mansion-house Street and Cambridge Road aforesaid as shall be lowered under the powers of the Act, in respect of the deterioration in value (if any) which may be caused to such houses by reason of such lowering, and the amount of such compensation (if any) shall be determined, in the event of dispute, by a single arbitrator, to be appointed by the Board of Trade on the application of the parties or the company; and all questions of compensation arising out of the interference by the company with the said street and road shall be referred to the same arbitrator: provided that if the company shall think fit to purchase and take any houses in respect of which such claims for compensation shall be made, they shall be at liberty to do so, and the amount of the purchase-money or other compensation shall be determined by such arbitrator as aforesaid."

The plaintiff claimed compensation in respect of a house adjoining that part of Mansion-house Street which was interfered with by the company.

An arbitrator was appointed by the Board of Trade, who awarded the plaintiff 30*l.* in respect of part of her claim, which amount was paid by the company. The plaintiff afterwards delivered a bill of costs amounting to 134*l.* 11*s.* 1*d.*, with notice of taxation. The company denied their liability; and this action was then brought for 134*l.* 11*s.* 1*d.*, subject to taxation by one of the Masters of the High Court of Justice.

Manisty, J., decided in favour of the plaintiff, and ordered a taxation. The

Court of Appeal affirmed his decision, with a modification limiting the costs to be recovered to those incurred in respect of that part of the plaintiff's claim which was successful.

The company appealed, contending, first, that the provisions of section 14 of the special Act by which a different mode of arbitration was appointed, were an express variation of the Lands Clauses Act; and section 34 of the Lands Clauses Act only applying to arbitration under that Act, there was no right to costs under the special Act; secondly, that the plaintiff could not sue for costs until the amount had been ascertained by taxation.

Sir H. Giffard and *Pollard*, for the appellants, used the same arguments as in the Court below.

W. G. Harrison and *E. G. Man*, for the respondent, were not called upon.

THE LORD CHANCELLOR (LORD SELBORNE).—The first question in this case depends upon the effect of sections 2 and 14 of an Act intituled "The Metropolitan District Railway Act, 1875." The former of these two sections, namely, the 2nd, is in these words: "The Lands Clauses Consolidation Acts and the Railways Clauses Consolidation Acts are (except where expressly varied by this Act) incorporated with and form part of this Act." I pause to observe that it is of the greatest importance, in any case like that with which your Lordships have now to deal, to remember the principles of the scheme of legislation contained in those statutes. They were passed because the Legislature thought that a considerable number of general provisions, which had been ascertained, after sufficient experience, to be proper and necessary to be introduced into Acts authorising undertakings of the character there referred to, had better be enacted once for all in a general form; so that, when any particular undertaking afterwards came to be authorised, the special Act might be introduced in a short form, containing only such clauses as were suggested by the circumstances of the particular case. A general incorporating clause, of which your Lordships have a specimen here, was to supersede the necessity of repeating in every such special Act those provisions which were universally or generally applicable. It appears to me that when this is borne in mind, there is no difficulty in applying the provisions of the general Act to the special Act in the case now before your Lordships; and that, if you were to refuse to do so on the grounds suggested at the bar, the objects of this whole scheme of legislation might be in a great degree frustrated.

The other clause (the 14th) which your Lordships have to construe, deals with the owners and lessees of certain houses abutting upon particular portions of two streets, called Mansion-house street and Cambridge Road. The company had power to lower the levels of the roadways or parts of the roadways of those streets under this special Act. The Legislature foresaw that the exercise of those powers might cause deterioration in the value of the houses abutting upon those parts of the streets or roads, and accordingly, by that clause, it provided that compensation should be made for that deterioration in value, in cases in which the company might not think fit to purchase the houses so affected; or, if the company should think fit to purchase those houses, then, that the purchase-money, to be first properly ascertained, should be paid for them. As to both these alternative heads of claim it is provided, by that clause, that the amount shall be ascertained in a particular manner, namely, by a single arbitrator, to be appointed by the Board of Trade on the application of either party.

That clause is to be read, as far as it can be read, with the general provisions contained in the Lands Clauses Consolidation Act. If clause 14 had not been in the special Act, then (as no claim was made which would bring the case within the jurisdiction of Justices) any damage sustained by reason of the houses being injuriously affected by the lowering of the roadways would (in the one case) have been ascertained under the 68th section of the Lands Clauses Act, and might, at the option of either party, have been

ascertained by arbitration. In the other case (that of the company thinking fit to purchase and take the houses themselves) the purchase-money would in like manner have been ascertained, if the parties did not agree about it, under the clauses in the Act, beginning with the 21st, relating to cases of purchase-money which might be in dispute; and it might have been ascertained, if the parties or either of them thought fit, by arbitration. In either of those cases, if there was an arbitration, the 34th section would have applied, and the costs would have been payable by the company.

It has been argued that there is a difficulty in applying that 34th section to this particular case, because (no other reason has been suggested) the manner of appointing the arbitrator in this case is not that which was contemplated by the 25th section of the Lands Clauses Act, and because the 34th section has in it the word "such," saying that, in case of "such arbitration," the costs should be paid by the company. Now, when your Lordships look at the 25th section, you find that the provisions which follow are to take effect "when any question of disputed compensation by this or the special Act, or any Act incorporated therewith, authorised or required to be settled by arbitration, shall have arisen;" and the word "such" in the 34th section refers to any arbitrations which may fall within that description. What was the question in the case before your Lordships? It was a question of disputed compensation, which by the special Act was required to be settled by arbitration. So far it falls within the exact terms of the 25th section. What difference is made by that which is undoubtedly a variation, the provision that the arbitrator shall be a single arbitrator appointed by the Board of Trade upon the application of either party? Only this, that whereas under the 25th section, if it had not been varied by the special Act, the parties might have agreed upon the appointment of a single arbitrator, or if they did not, there might have been two arbitrators and an umpire; here the Legislature has dispensed with that agreement, and has imposed upon them a single arbitrator, to be nominated, upon the application of either party, by the Board of Trade. With that difference, which is really about as slight a difference as it is possible to imagine, there is not any difficulty whatever in applying those clauses of the general Act, and the 34th section amongst the rest, to this particular case.

Now, let us consider what would happen if you did not apply those clauses. If you did not apply the 34th section, there would be in this case an unexplained departure from the universal principle, founded not upon any arbitrary policy, but upon natural reason and justice, according to which the Legislature has been accustomed, in Acts belonging to the class of which this is one, to provide that if compulsory powers are exercised against the owners of property for some object considered to be of sufficient importance to justify it, the costs either shall necessarily be, or at least in the judgment and discretion of some authority trusted by the Legislature may be, paid, so as to indemnify the person against whom those compulsory powers are exercised. And when your Lordships see that this particular section not only deals with a special case of compensation for one particular kind of consequential damage to property, but also, in the alternative, with the compulsory purchase and taking of the property itself, it is inconceivable that the Legislature can have really intended that to be done, in either case, without any provision whatever being made for costs, either by giving costs as a necessary consequence of the arbitration, or by giving the arbitrator, or anyone else, power to judge whether they ought to be awarded or not. According to the argument of the appellants, if the company had chosen to take and purchase compulsorily all the houses abutting upon the portions of these roads which might be lowered, they would have done so without any obligation to pay one shilling of costs to any one of the owners of the property so taken. Of course there can be no question that if the Legislature had not provided for costs in such a case, a Court of justice could not do so; but in construing Acts of Parliament of this kind, and adjusting the general provisions in the general Act to

the particular provisions of the special Act, considerations of reason and justice, and the universal analogy of such provisions in similar Acts of Parliament, are proper to be borne in mind, and ought to have much weight and force.

I think for these reasons that the Court of Appeal was perfectly right in the view which it took of the principal question, and that the costs were payable by the company.

Then there arises the second question, which is of a more technical kind. It is said that under this Act (the Lands Clauses Act, 1845), if the procedure had been under it alone, the costs ought to have been "settled" by the arbitrator, or they might, under a subsequent Act, have been "taxed and settled" by a Taxing Master of one of the divisions of the High Court; and that it was a condition precedent to any action being brought that they should be so settled or taxed. I am not sorry to find that the Court of Exchequer Chamber, in the case of *Holdsworth* v. *Wilson* (1), has otherwise decided. That decision has since been followed in *Lewis* v. *Rossiter* (2), which was mentioned at the bar; and it has been considered by the Court of Appeal in the present case to be applicable here. It was suggested at the bar that the principle of that decision depended upon the fact that there was in that case a submission to arbitration, which (although it had not been actually done) might have been made a rule of Court; and that, where that element did enter into the case, a settlement and taxation of the costs before action brought was absolutely necessary. I was not able to follow the reason for that suggested distinction; and it does not appear to me that the Courts, in the case of *Holdsworth* v. *Wilson* (1), or in the case which followed it, really went upon any such narrow ground.

If the decision arrived at in the case of *Holdsworth* v. *Wilson* (1) cannot be shewn to be inconsistent with legal principles, I do not hesitate to say that it appears to me to be just and convenient—convenient especially in a case like the present, where the right to any costs at all was in controversy between the parties. In that state of things, what, according to the argument of the appellants, ought to have been done? It is said that the taxation should have been proceeded with *ex parte* before the Master. That, at all events, is not a convenient course. If the Master had been told that his jurisdiction was denied, and that for that reason he would not have the assistance of the party most interested in the taxation, and if he had declined thereupon to proceed, then it is said there ought to have been an application to the Court for a *mandamus* to compel him to proceed. It was admitted that even if that had been done, and if a *mandamus* had been granted, and the costs taxed under it, the respondent might still have been driven to bring an action to recover them. I cannot help thinking that it is a very convenient thing, if the law be so, that all this circuity, with its consequent expense, should not be necessary—a circuity which, according to the argument, would still have been necessary even if there had been no question between the parties as to the amount claimed for costs, but if the question had been purely one of principle.

It appears to me that the judgment in *Holdsworth* v. *Wilson* (1) may be supported upon an intelligible principle. The costs are not created by taxation, nor is the legal right to recover them created by taxation. The right to recover them is given by the statute, the costs have been actually incurred; and in other cases of costs which are subject to taxation it is not generally a condition precedent of a demand, or of an action brought upon a demand for costs, that the costs should have been taxed. "Settlement" or taxation is merely a mode of determining in a *quasi*-judicial manner, by a ministerial officer of the Court, disputed questions of amount when they arise. The action is founded upon the right; and a demand of that which the party considers himself entitled to has been made. In the action the first question to be determined is, Has he the right which he claims or not? If he has, it is possible that there may be

(1) 2 B. & S. 480; 4 B. & S. 1; 31 Law J. Rep. Q.B. 145; 32 Law J. Rep. Q.B. 289.
(2) 44 Law J. Rep. Exch. 136.

no question as to the amount; in that case there will be no need of taxation. But if a question of amount still remains to be determined, the machinery of taxation is convenient; and it is prescribed by the statutes, as subsidiary for the purpose of justice, but not as the foundation of the right. That seems to me to be the principle of the decision in the case of *Holdsworth* v. *Wilson* (1). I think it is one which cannot be shewn to be unsound, although some technical arguments may plausibly be advanced against it; but, it having been so decided, I think your Lordships will do wisely not to dissent from that decision, but to dismiss the present appeal with costs.

LORD HATHERLEY.—I concur in the view suggested by my noble and learned friend on the woolsack on both points.

As regards the first point, I am old enough to remember the form in which these bills for public improvements of various kinds were originally framed. They contained invariably a certain amount of what was called common form, which, although in one sense it was common form, yet formed, in fact, a very operative part of the bill. In a bill of this kind, I do not think I exaggerate in saying that nearly three-fourths of the clauses were of such a character, that they might be made applicable to whole ranges and classes of public enactments for beneficial purposes, undertaken by public companies or bodies—such as gas bills, dock bills, railway bills, and other bills of the same character. Afterwards general Acts were passed containing these common clauses, and since that time special Acts have simply incorporated the general Acts. But such a course could not have been pursued all this time, if a narrow construction were to be put upon the different clauses by which the general Acts are dovetailed into what I may call the principal bill—that is to say, the bill in agitation at the moment—and you were obliged to spell out every syllable and word of the general Act in order to see how far it would or would not tally or agree with the substance of the principal Act as regards the work which the principal Act was passed to effect. The form here adopted is, so far as my memory serves me, pretty nearly the common form. By section 2 of the Act which we have before us, the general Acts are incorporated; that is to say, the Lands Clauses Consolidation Acts of 1845 and 1860, and the Railways Clauses Consolidation Acts also, "except where expressly varied by this Act." When you have to deal with a composite Act of this description, all that can be done is to take up the general Act and read it in. And with reference to clause 2, or analogous clauses which are to be found in every one of these composite Acts, incorporating the general Act in the particular Act, you have to consider according to the fair construction of the general Act and the words there used—your construction being neither too wide on the one side so as to be too inclusive, nor narrowed on the other side by exclusion—how far the provisions which were thought desirable for the particular Act in question can be made to fit in with the general clauses of the general Act, by taking those general clauses, so far as they are not inconsistent with some particular object which the Legislature had in view in passing the special Act, and adopting them.

Now, what creates such an inconsistency? I quite agree that the words "except where expressly varied by this Act" are not to be relied upon in any narrow spirit of construction. I take it that when the special Act is exceptive, it is where it has certain purposes in view which are not contemplated or reached by the general Act, and which could not be carried out consistently with the powers contained in the general Act. When for some special purpose which is before the Legislature at the time an alteration of the law is required with regard to any particular subject-matter, and there is an inconsistency between the clause then under the consideration of the Legislature and the several general clauses, an exception is made by taking out of the operation of those general clauses the particular thing the Legislature wishes to have accomplished.

It would, perhaps, have been convenient to know why clause 14 was inserted in this Act. I cannot tell whether that

would have been desirable or not, because I do not know the facts of the case, but I cannot help thinking that one would have liked to see the special object of the exception in this particular case. Whatever was the cause (we are left to guess at it), it appears to have been thought desirable that there should be some difference between those roads which are specified in the 14th section and the carrying out of the work in other parts of the undertaking where the railway was about to be made; and there was an exception of the particular roads which are here mentioned from the operation of the clauses in the general Act, because it was thought desirable that there should be that special exception. Therefore it was that with regard to the crossing of Mansion-house Street and Cambridge Road there were special enactments made as to the mode in which compensation should be assessed, with reference to the damage done by an operation, which at times creates considerable damage and injury, and which the Legislature thought would not be met duly by section 68 of the general Act. Why these two particular roads were taken up, and not a third, the Clifton Road, which was to be treated similarly, but was not made the subject of a similar exception, we are left in the dark.

All that is done by way of exception upon this matter is this, that whereas there are certain specified ways of ascertaining value in the general clauses of the Lands Clauses Act, these particular roads are subject to a particular enactment in reference to the mode of assessing that value and the trying of the assessment as between the parties; that is to say, the railway directors on the one hand, and the persons from whom they wish to acquire the property, or whose property they wish to be at liberty to injure, if necessary, in the due execution of their works, on the other hand. The Legislature has provided a mode of ascertaining the compensation in a particular form; that is all I can find in the clause we are now dealing with. How is this value of the property so injured directed to be ascertained? It is by a particular mode of valuation—by arbitration, as distinguished from a proceeding before a jury, or the other recognised modes which there are of ascertaining the value of property, by agreement, entering into contracts, and so on. The Legislature takes it out of that category and says, with regard to this particular property, there shall be a special kind of valuation—a valuation by an arbitrator who shall be appointed by the Board of Trade.

How does that expressly exclude all the clauses in the general Acts which have reference to arbitration? According to the argument we have heard to-day, it would be necessary when you came to vary the instrument through whose medium the valuation is to be effected, when you changed it from an ordinary magistrate, or from a jury, to an arbitrator, thereupon to take it wholly out of the category of the different provisions incorporated by section 2 of the Act, and to deal with it as apart from what is contained in those provisions. I cannot read it in that way. It appears to me that all that is done is this: there might have been arbitrators chosen by the parties under the original provision, but that cannot be done when the Act says expressly that the valuation is not to be made in that way. That is an example of what a special exception is. It is not to be done in that way, it is to be done by an arbitrator appointed by the Board of Trade. He must be appointed in that way. When the one arbitrator so appointed proceeds to value, the consents of the two parties may be taken as implied by the Legislature. It amounts to saying, Whilst passing this Act of Parliament, we take it upon ourselves to assume your willingness, or, if you are not wise enough to be willing to do what we consider to be the best for you, then we shall impose upon you the necessity of having the value of this particular property ascertained by arbitration in this particular way. But why are the other provisions wiped out by that? Why are all the other clauses of the bill wiped out with reference to the procedure with regard to the valuation of the property? I apprehend that nothing is wiped out, except what would be inconsistent with the appointment of a single arbitrator by the

Board of Trade in the manner which is here prescribed.

Then it is said, with reference to this matter of costs, you deprive the parties of a remedy which they have in an ordinary case under the 68th section against extremely large costs. You deprive the railway company of the remedy of going before a magistrate, who, if he thinks fit, may go to the extent, in some cases, of depriving the parties whose property is taken of their costs altogether. If that is so, and if that is inconsistent with the special Act, well and good. But that is not what we are dealing with here. If it is not inconsistent with the Act, it has no application at all, but if there is an inconsistency with the Act upon one point, how does it make it inconsistent with the simplest and one of the most obvious suggestions of common sense and justice, namely, that a person whose property is taken from him unwillingly is to be indemnified from all expense. That is a sort of procedure which one would expect to find prescribed in such an Act, and I can find nothing in the Act which can be said to contradict it.

The second part of the case is one which is, no doubt, open to a little more question. It has reference, in great measure, to pleading, namely, whether or not any right of action can be maintained until that is definitely settled in respect of which you are about to bring your action. I think the observations made in one of the cases cited before us really has a strong application to that part of the case. If a person is entitled to costs, it is implied that they are to be taxed costs. The principle of taxing costs is well understood, and I do not think that the circumstance of a reference being made to the Taxing Master, and he being *persona designata*, can make any substantial difference in the case. He must proceed on definite and fixed rules, not as investigating the facts with a dubious result in law attached to those facts, but simply as taxing the bill in the ordinary way in which he acts when any gentleman who wishes to dispute a bill brought against him by his own solicitor applies to have it taxed. If it is decided that that gentleman is bound to pay the solicitor's bill of another person for some litigation which he has entered into, when that is settled and he is once fixed with the liability to pay the bill incurred by another person, or whatever it may be, you have settled everything requiring to be settled judicially. The rest follows, as a matter of course, upon definite and fixed principles; and it has been well described by one of the learned Judges, in one of the cases that were cited, as a "ministerial" act, and not a judicial act, which remains to be done. The judicial act was deciding upon the question of principle, and ascertaining whether the gentleman was liable to pay the costs at all. The case of *Holdsworth* v. *Wilson* (1) has been cited upon this point. I am extremely glad to find that there is such an authority, and I am extremely glad to follow it, and I think it carries the case now before the House.

LORD BLACKBURN.—I am of the same opinion upon both points.

As to the first, it is to be borne in mind what the meaning of the Lands Clauses Consolidation Act was; and it cannot be more shortly described than by the preamble to that Act. [His Lordship read it.] I do not think it is possible to express the reason why that Act was passed, and its object, better than the Legislature itself has expressed it in that preamble.

One of the clauses contained in this Act, which is to be incorporated with every Act that follows, except so far as it is expressly excepted, and then so far as it is not expressly varied, is clause 68, which applies to lands injuriously affected by an undertaking, as distinct altogether from the lands taken before the work was begun. Clause 68 was to apply to cases where the promoters were found to have done mischief without having previously bought the land. Having done the mischief they were made to pay for it. That 68th section is in the following terms. [His Lordship read it.] That declares that compensation in certain cases shall be settled by arbitration in the manner therein provided. That is all that provides for the arbitration. Then comes an alternative clause; if it has to go to a jury there are some very stringent pro-

visions, which I need not trouble your Lordships by reading now.

This particular Act varies slightly from the Lands Clauses Consolidation Act, for, instead of saying in the 2nd section that the provisions of the Lands Clauses Act shall be incorporated, "except where expressly varied or excepted," and that they shall be applicable so far as they can be to the undertaking, it says that they "are (except where expressly varied by this Act) incorporated with and form part of this Act." I suppose those who framed the Act knew that they should not except any of them, and therefore thought there was no use in saying, "Except where expressly excepted by this Act," and they thought that, instead of saying "So far as applicable to the undertaking," it would do to say, "Except where expressly varied by this Act." As to that, I agree with what has been said; I do not think that because the words used in this Act are "expressly varied" it is essentially necessary that there should be express words saying, This particular section or provision shall not apply. I do not think that express words are required for that purpose, but it does require something that indicates an express intention that they shall not apply as far as applicable to the present case. A mere variation from the ordinary type and form would not be sufficient to prevent the clause applying. A variation shewing that the provision was inapplicable would have the same effect as if it were expressly varied. But I do not think that section 68 is altered, deviated from, or varied to such an extent as to make it impossible to apply it, or to make it proper to construe the Act as expressly excluding any application of that section.

The reason of the enactment we are considering seems to have been, as we see from the 13th section, that the railway was intended to be carried over three different streets, with respect to each of which there is a provision that the railway was to be carried over the street by a bridge. In the case of Mansion-house Street, there is a provision that the clear headway of the road under the railway bridge should not be less than fifteen feet. The street was to be altered so as to be of such an inclination as to allow of that; it was to be a considerable inclination —1 in 24. The level of the street was to be brought down so that the railway arch, which was necessarily of about the same level as the railway itself, would give a clear headway of not less than fifteen feet. I think it is pretty obvious that the street was to be considerably lowered: how much I cannot tell—we are not told the facts as to that—but it is evident that it would involve a considerable lowering. In the next case, with regard to the crossing of Cambridge Road, it was provided that the inclination of that road should not be steeper than 1 in 24 on the north side of the railway, and 1 in 29 on the south side, and the clear headway of the road under the railway bridge was not to be less than sixteen feet. And with regard to the crossing over Clifton Road the clause says, "In crossing Clifton Road the inclination thereof shall not be steeper than 1 in 34 on the north side of the railway, and 1 in 40 on the south side thereof." There nothing is said about the headway and the height of the archway that was to be above the road. I cannot tell the reasons for this, but I should conjecture from that that the headway over Clifton Road was certain to be quite high enough, that it was quite obvious that the arch would be quite high enough, and therefore it was not necessary to make any provision for any particular headway there. With respect to the inclination there provided for, namely, 1 in 34, that is not a steep inclination, and not such as to lead to the conclusion that Clifton Road was to be much lowered. But the other two roads would be considerably lowered.

Now, when the roads were lowered as there contemplated, the houses beside the roads must have been affected. I will consider only Mansion-house Street: as soon as Mansion-house Street was lowered, and lowered considerably, the houses adjoining that street must necessarily have been affected by that lowering of the road. The extent to which they would be affected, and how far it would be an injurious affecting, would be matters to be determined afterwards, but it was clear that there was a thing to be done which would have that effect; and if section 68 had been left untouched as

applying to that lowering, every individual person injuriously affected would have had a right to choose whether he would have his compensation ascertained by arbitration (in which case he would appoint one arbitrator, and if the railway company disagreed, and appointed a different arbitrator, there would have been an umpire, and the Board of Trade would have appointed that umpire), or he would have had the option of sending it to a jury. But section 14 does vary that, and varies it very considerably. It is clear that according to that section there is no option left to send it to a jury. The owner of the house cannot do that—it must go to an arbitrator appointed by the Board of Trade; that is settled by the Legislature, the obvious intention being that the Board of Trade should appoint one man, which would greatly diminish the costs of the whole proceeding. So far it is varied very decidedly, but in what other respects it is varied I cannot see. The manner of arbitration is specifically mentioned—the way in which the arbitrator is to be appointed—but what difference does that make in the matter of costs? I do not see that it should make any.

The 68th section has been interpreted to mean—and I think it is plain that it must have meant—that when the value was to be decided by arbitration, the arbitration as to the costs should be in the same manner as it would be under the previous section 34, the effect of which was that it was to be settled by the arbitration; the costs were to be borne by the promoters, unless they had made an offer, and the sum awarded was less than their offer. Now, what is there in the variation of the 14th section in this Local Act from the 68th section in the Lands Clauses Act to affect the application of that Act in that respect? Why should we not, taking this Act and the Lands Clauses Act as one, and construing them together, take them as meaning this: the value shall be decided by arbitration, which shall be varied from the scheme appointed by the Lands Clauses Act, in that the arbitrator shall be appointed by the Board of Trade, instead of there being only an umpire appointed by the Board of Trade in case of dispute between the parties. But all the consequences as to costs shall follow unless the promoters have put themselves in the right by tendering a sum which turns out ultimately to be not less than the amount awarded by the arbitrator? I cannot see why we should not so construe them. Therefore I perfectly agree with your Lordships who have already addressed the House as to the first point, that the company ought to pay these costs, and should be made to pay them.

Then comes the second point, which is much more technical. The scheme of the original Lands Clauses Act was that the costs should be settled by the arbitrator; that of course implied that he himself was to enquire into what the costs were, and to say what they were. That was found to be inconvenient. I do not know any cases upon that, but it was found to be very inconvenient indeed, as anyone would expect. Then came the second Act, saying that a Master of one of the superior Courts might, upon the application of either party, settle and tax those costs. That being so, in order that it might be known what they were to pay, it would be essential that they should go to the Master. The Master having taxed the costs ascertains that so many pounds are to be paid, and until that is done the railway promoters cannot know exactly how much is to be paid. They would know that they were to pay some costs, but whether they were to pay 100*l.* or 50*l.* they could not know at that time. Then comes the question what is to be done when the promoters deny, as they do deny here, their liability for costs, and say, The Master has no jurisdiction to enquire as to taxing them; we will not go before him at all; we deny the liability altogether. How is that to be decided? It certainly would be very inconvenient if the rule of law stood thus: you are first to go before the Master, and then if the Master pleased he might tax the costs *ex parte*, having of course previously given notice to the promoters; in that case, what he had done would be all thrown away if it turned out that they were not liable to pay costs at all. That would be very inconvenient. On the other hand, the Master might say, I have been told that I have no jurisdiction, and I will not

tax until I am told that I am wrong. Upon that it might be said, You may go and get a *mandamus* against the Master compelling him to tax. Upon that the railway promoters might contend that it certainly would be more convenient to do it when the dispute as to the right was decided. They might say, Ascertain the right first, and then when it is ascertained that you have a right to costs, and not till then, go to the Master and tax them.

As to that, although I cannot feel the slightest doubt that that is the more convenient course, I do see considerable difficulty as a matter of pleading in working it out. As the old pleadings used to be, the jurors were asked to find a debt, and were bound to find the exact debt which the Master upon the old system had said it would be. How can they find that exact debt until the amount has been ascertained by the Master? On the other hand, if it is said they are to find the debt generally and leave the amount to be taxed by the Master afterwards, there is a difficulty about that. There is an analogy with the costs at common law: there the jury found 40*s*. costs, but afterwards (I do not know when the practice began) the costs taxed were substituted for the 40*s*. There was in that case an assumption of power to do that; how it originated I do not know; but there would be considerable difficulty in doing it with regard to such legislation as this.

Now, in the case of *Holdsworth* v. *Wilson* (1), the question came before the Court of Queen's Bench, and although I had forgotten it altogether, I see that I was a party to the decision in that case. I see that the Court of Queen's Bench by a majority, of which I was one, thought that it was premature; but I see that Mr. Justice Crompton, who was by far the most learned pleader of the four of us, differed in that case, and upon a point of that sort his view was of very great weight. I suppose he was not very strong in his opposition, or we should not have ventured to decide it offhand against him upon a point of pleading. But he does seem to have thought that it could have been done. The case then went to the Exchequer Chamber, and in the Exchequer Chamber it was held unanimously by the Court that the view of Mr. Justice Crompton was right, and the other was wrong. It was said by Sir Hardinge Giffard that the reasoning of Chief Justice Erle, who delivered the judgment in the Exchequer Chamber, was not pointed precisely to the difficulty which had been felt below; and moreover, in deciding it he is reported to have made a slight mistake as to the facts, for he seems to have said in his judgment that the award had actually been made a rule of Court, whereas it was only a potentiality; it might be made a rule of Court at a future time. No doubt that was so; there was some slight inaccuracy there. Certainly Chief Justice Erle, when he saw justice and convenience on the other side of the hedge, was not a man whom it was easy to keep on the technical side of it. But he did not sit alone, there were three of the greatest pleaders of my time sitting with him, namely, Mr. Justice Williams, Mr. Justice Willes, and Baron Channell; and having regard to that, I certainly should pause greatly before adhering to the notion which I entertained in the Court below. If it were *res integra* I do not know how I should get over that difficulty. But it would be very strong indeed to say that that decision was to be reversed now without a great deal of consideration. When one bears in mind that it is certainly the far more convenient course, and that sixteen years have elapsed since that was decided to be the law, and the decision has never been questioned or found fault with, I certainly think that your Lordships ought not to deviate or depart from it now, without some very good reason; and a good reason I cannot see.

Therefore I think that upon the second point, as well as the first, the decision of the Court below is quite right, and the appeal should be dismissed with costs.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Solicitors—Baxters & Co., for appellants; Thomas Noton, for respondent.

[IN THE COURT OF APPEAL.]

1880. June 8, 23. } BUDD AND ANOTHER *v.* MARSHALL.*

Landlord and Tenant — Covenant — "Duties" — Tenant's Covenant to pay "Duties" charged on Premises or on Landlord in respect thereof — Construction — Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 94, 96, 104.

The defendant was tenant for years to the plaintiffs under a lease containing a covenant by the tenant to "bear, pay and discharge" certain specified rates and taxes, "and all other taxes, rates, duties and assessments whatsoever, whether parliamentary, parochial or otherwise, taxed, charged, rated, assessed or imposed upon the said demised premises or any part thereof, or upon the landlords or tenants in respect thereof."

The sanitary authority duly obtained an order of Justices, under section 96 *of the Public Health Act*, 1875, *against the plaintiffs, as owners, directing them to abate a nuisance arising from defective drainage, and for that purpose to make certain drains. The plaintiffs made the drains accordingly, and sued the defendant for the cost thereby incurred:—*

Held (*by* BRAMWELL, L.J., *and* BAGGALLAY, L.J.; BRETT, L.J., *dissentiente*), *that the plaintiffs were entitled to recover the cost from the defendant under his covenant.*

Appeal from a judgment of Grove, J., in favour of the plaintiffs, after trial without a jury.

The facts of the case, the covenant in the lease and the material parts of the Public Health Act, 1875, are fully set out in the judgment of Baggallay, L.J., *post.*

The arguments of counsel and authorities cited are also sufficiently stated in the judgments.

Willis and *Finlay*, for the defendant.

Joseph Brown and *Bremner*, for the plaintiffs.

Cur. adv. vult.

The following judgments were given on June 23:—

* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Brett, L.J.

BRETT, L.J.—The question in this case is, whether the tenant is bound by the terms of his lease to make a certain payment which the landlord was *prima facie* bound to pay, but which it is said the tenant has taken on himself to pay. The payment in question arises under a statute; the liability is under a covenant in a lease, and the question is, whether the terms of the lease cover the payment the subject of the dispute. I am of opinion that, apart from authority, we ought to consider the lease as if there were no statute; then that we ought to construe the statute as though there were no lease; and then that we ought to see whether the lease so construed covers the payment which results from the statute when so construed. I think that the authorities when looked at will be found to have been determined on that principle. In each case the Judges considered both the terms of the lease and the statute, and then considered whether the lease covered the payment which so arose.

It is necessary, I think, first to consider the covenant. It provides that the tenant shall "at all times bear, pay and discharge the land-tax (if any) sewers rate, borough rate, improvement rate, tithes and tithe rent-charges in lieu of tithes, and all other taxes, rates, duties and assessments whatsoever, whether parliamentary, parochial or otherwise, which at the date of the lease were, or at any time thereafter during the said term should be, taxed, charged, rated, assessed or imposed on the said demised premises or any part thereof, or upon the landlords or tenants in respect thereof." Now it is said that the word "duties" in this collocation will carry the liability of the tenant here. Suppose that there were no statute, what would this word "duties" mean? There is in this covenant an enumeration of several payments before this word "duties" is reached. Now the word "duties" is larger than the words "taxes or rates," and so it means a payment which is not a tax or a rate, but which is a payment of something of the same kind, and in the nature of the same sort of payment. It is a payment of money to be paid in the same way as rates and taxes are paid. It is urged that the word

"duties" would cover an improvement rate if that had not been specified. I think it would. An improvement rate may be charged even if the owner of the house is not benefited by it—that is, as to his actual property—for none of the money spent may be spent on the house or property. Can it, however, be said that the word "duties" would comprise an act to be done by the landlord?—as, for instance, if owners and not occupiers were liable to serve on juries, could it then be said that the occupier undertook that duty? This seems to be the construction of the lease.

Then we have to consider the statute, and we must construe that as though the lease did not exist. In the present case the liability is imposed by section 94 of the Public Health Act, 1875.

That section imposes a duty and an obligation on the owner of the property: it imposes a duty to do an act, to abate a nuisance, to execute works. Now if the owner be so advised, he may do these works with his own hands, he may do them by his own servants, and so he may not actually have anything to pay—he may only have to do the work. This duty, then, is imposed on the owner by section 94. If he fails to do it, then there may be an order by a magistrate, and the expenses incurred under that order are not in the nature of a penalty, but they are payable under the provisions contained in the last part of section 98. The authorities can do the work for the owner if he fails to do it, and they can recover the expenses by instituting proceedings in a particular way. The only duty is the duty to do the work, and the question is, whether the payment which has been made is a payment in the nature of a rate or a tax so imposed as to bring it within the words of the covenant in the lease. It seems to me, with deference, impossible to say that it is. I think that it is a payment like a payment of a carpenter's or a bricklayer's bill, and that such a payment is not a payment in the nature of a rate or a tax within the covenant. An improvement rate is, in my opinion, not like this; an improvement rate is imposed by an Act on a whole district, but this payment is a payment for work done.

It is, however, urged against this view that there are authorities which shew that this is too narrow. The first to which I will refer is *Tidswell* v. *Whitworth* (1). It was there held that the tenant was not liable under his covenant to pay a rate for providing for expenses of paving, because the payment by the landlord was in consequence of a breach of duty by him, and so that was not a "rate, assessment or imposition" payable in respect of the demised premises, but a payment made for that breach of duty. The reasoning of that judgment seems to me to be applicable here, for there was here a payment made in consequence of a breach of duty by the owners, and therefore that case is an authority for the defendant.

In *Thompson* v. *Lapworth* (2) the covenant was to pay all "taxes, rates, duties and assessments whatsoever, which during the continuance of the demise should be taxed, assessed or imposed on the tenant or landlord of the premises in respect thereof, whether parliamentary, parochial or otherwise, except property or income tax." There the Court held that the word "duties" would cover a money payment, and that the tenant was liable, because under the Act on which the case turned, the parish could not order the landlord to do the work, but could only do it themselves and then compel him to pay for it. Now that reasoning is not applicable here, for the word "duties" there was equivalent to a money payment, and there was no duty under the statute to do the act.

I will not go through all the cases cited. The strongest was the case of *Crosse* v. *Raw* (3), in which the covenant contained the word "outgoings," and it was held that that word was large enough to include the expense of making a drain, which the overseer could have been called upon to make, but which the tenant in fact had made under an arrangement by which the expense was to be borne by the party liable. But here the word "out-

(1) 36 Law J. Rep. C.P. 103; Law Rep. 2 C.P. 326.

(2) 37 Law J. Rep. C.P. 74; Law Rep. 3 C.P. 149.

(3) 43 Law J. Rep. Exch. 144; Law Rep. 9 Exch. 209.

[IN THE COURT OF APPEAL.]

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Held (*by* BRAMWELL, L.J., *and* BAGGALLAY, L.J.; BRETT, L.J., *dissentiente*), *that the plaintiffs were entitled to recover the cost from the defendant under his covenant.*

Appeal from a judgment of Grove, J., in favour of the plaintiffs, after trial without a jury.

The facts of the case, the covenant in the lease and the material parts of the Public Health Act, 1875, are fully set out in the judgment of Baggallay, L.J., *post.*

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Cur. adv. vult.

The following judgments were given on June 23:—

BRETT, L.J.—The question in this case is, whether the tenant is bound by the terms of his lease to make a certain payment which the landlord was *prima facie* bound to pay, but which it is said the tenant has taken on himself to pay. The payment in question arises under a statute; the liability is under a covenant in a lease, and the question is, whether the terms of the lease cover the payment the subject of the dispute. I am of opinion that, apart from authority, we ought to consider the lease as if there were no statute; then that we ought to construe the statute as though there were no lease; and then that we ought to see whether the lease so construed covers the payment which results from the statute when so construed. I think that the authorities when looked at will be found to have been determined on that principle. In each case the Judges considered both the terms of the lease and the statute, and then considered whether the lease covered the payment which so arose.

It is necessary, I think, first to consider the covenant. It provides that the tenant shall "at all times bear, pay and discharge the land-tax (if any) sewers rate, borough rate, improvement rate, tithes and tithe rent-charges in lieu of tithes, and all other taxes, rates, duties and assessments whatsoever, whether parliamentary, parochial or otherwise, which at the date of the lease were, or at any time thereafter during the said term should be, taxed, charged, rated, assessed or imposed on the said demised premises or any part thereof, or upon the landlords or tenants in respect thereof." Now it is said that the word "duties" in this collocation will carry the liability of the tenant here. Suppose that there were no statute, what would this word "duties" mean? There is in this covenant an enumeration of several payments before this word "duties" is reached. Now the word "duties" is larger than the words "taxes or rates," and so it means a payment which is not a tax or a rate, but which is a payment of something of the same kind, and in the nature of the same sort of payment. It is a payment of money to be paid in the same way as rates and taxes are paid. It is urged that the word

* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Brett, L.J.

goings" is omitted. It was said that we ought to consider this lease bearing in mind that it was probably drawn by conveyancers who would know of these decisions and cases; but it appears to me that that observation tells against the plaintiffs, and for the defendant, for a conveyancer would know of the case of *Crosse* v. *Raw* (3), and would be aware that the word "outgoings" had been held to be a word of the largest possible signification, and yet it was not put in in this lease. If this lease was not drawn by conveyancers, and is to be considered not from a technical point of view, then I am of opinion that the word "duties" cannot cover such a payment as this; and, as I have said, the argument is all the stronger if the covenant is considered from a technical point of view, so that I think that the judgment should be for the defendant, and that this appeal should be allowed.

BRAMWELL, L.J.—The question is, whether the words of this covenant include a case which was very probably not in the contemplation of the parties to this lease. "I feel compelled" (to quote Mr. Justice Willes in *Thompson* v. *Lapworth* (2)), "however, to come to the conclusion that the charge in question is one which the tenant himself was bound to pay, and consequently the plaintiff is entitled to judgment." It is impossible, as I have said in other cases, to have a very strong opinion on such a question, and it is especially so here, as Lord Justice Brett differs from the view I adopt; but I think that this appeal should be dismissed.

What was the thing to be done here? The local sanitary authority ordered the plaintiffs to make a drain. Now a drain forms part of the permanent condition of a house; it is part of the permanent arrangement and convenience of the premises, and should have been made by the builders when the house was built.

The plaintiffs were summoned, and an order made by the magistrates that they should do the work. They did it, and now seek to recover the expenses incurred in so doing from the defendant under his covenant. The question is, whether the covenant covers the expenses so incurred. The statute, *prima facie*, imposes the duty to do the work on the owner, and the words of the covenant are, "Will at all times . . . . bear, pay and discharge the land tax (if any), sewers rate, borough rate, improvement rate, tithes, and tithe rent-charges in lieu of tithes, and all other rates, taxes, duties and assessments whatsoever, whether parliamentary, parochial or otherwise." Why should not these last words include a duty to make a drain, the making of which involves a considerable outlay? I cannot answer that question satisfactorily to myself. It is said that the covenant applies to things in the nature of a rate; but that cannot be so, for the words are, "And all other," &c.

Then it is said that the covenant applies to things which are recurrent; but this cannot be so, because it is applicable to an improvement rate. The covenant contemplates a duty which is not parliamentary or parochial, which may not be a rate, and which need not be recurrent. Why should the tenant not bear this duty? My brother Brett says that the words do not say he shall bear it; but I confess I do not see what other words could be put in the covenant to make it of a more comprehensive character. It is suggested that the word "outgoings" should have been put in: the word is an awkward one, and I do not know that it would make this case clearer. Perhaps "burthen" might have been inserted; but there was, I daresay, no desire to put in a number of particular words which would have led to the argument that, if perchance any one had been omitted it was intended thereby to exclude all things not so particularly specified. Suppose, however, that the sanitary authority could have done this work themselves, and could then have charged the plaintiffs with the expense, can it be doubted that this charge would have been within the covenant? I think not, nor do I think that there can be any difference between the supposed case and this case; the landlord's liability to be out of pocket is the same.

Again, it is said that it would be unjust to make the tenant pay for a per-

manent improvement to the property of his landlord; this seems plausible in a case where the lease is of short duration. In this case it has, I think, some eight or ten years to run; but if one were dealing with a lease for ninety-nine years, one would see that the tenant ought, in all justice, to pay for the improvement. Of course, actuaries might suggest a scale of allowances, but such a contrivance is too elaborate for daily business.

Leases are generally framed rather in the interest of landlord than tenant, and one is not surprised to find such a covenant as this. The right construction of it seems to me to be in favour of the plaintiff, and I do not see how larger words could have been used to secure the plaintiffs a lump sum of profit without frequent trouble from details as to deductions to be made.

As to the authorities, I would remark, that in citing cases there are generally three things to be remembered, and these three things vary: there is the thing to be done, the statute, and the covenant; but the authorities appear to me to be in favour of the plaintiff.

In *Tidswell* v. *Whitworth* (1) the Act empowered the council to order the owners of premises to sewer and pave the streets, and, on their making default, to do the work, and charge the owners with the expense; and the covenant was to "pay and discharge all taxes, rates, assessments and impositions . . . . payable in respect of the demised premises." I think it was rightly held that the tenant was not liable, because the landlord had made default in a prior obligation. The case of *Crosse* v. *Raw* (3) is the strongest in favour of the landlord. In that case the landlord was the defendant, and I adhere to what I then said; but I would now qualify the words "this seems preposterous," as one would not say so of any legal consequence. In *Rawlins* v. *Briggs* (4) the lessor received notice to abate what was a nuisance under the Public Health Act, and the decision in that case might appear to be adverse to the plaintiff in this case; but I think it is clear that Mr. Justice Lindley did not intend to overrule *Thompson* v. *Lapworth* (2) and *Crosse* v. *Raw* (3), especially as he gave another judgment within a year in *Hartley* v. *Hudson* (5), which tends in favour of the plaintiff in the present case. I am of opinion that the authorities justify the decision of Mr. Justice Grove, and that this appeal must be disallowed.

BAGGALLAY, L.J.—The plaintiffs in this action are the landlords, and the defendant is the tenant of certain premises at Brighton, known as the "Portland Mews," which are held for the residue of a term of twenty-one years from the 25th of December, 1867, created by an indenture of lease dated the 1st of July, 1868; and the question which we have to determine upon the present appeal is, whether the plaintiffs, as such landlords, are entitled to recover from the defendant the amount expended by them in the construction of certain drainage works, pursuant to the requirements of the local sanitary authority.

The circumstances under which the expenditure was incurred are not in dispute, and may be concisely stated as follows:—

In the month of September, 1877, the mayor, aldermen and burgesses of Brighton, being the sanitary authority of that borough and acting under the provisions of the Public Health Act, 1875, caused a notice to be served upon the plaintiffs, requiring them, as the owners of the said premises, to abate a nuisance arising from defective drainage, and for that purpose to drain the said premises into the common sewer and to fill up all cesspools; and the requirements of such notice not having been complied with, an order to the like effect was, upon the application of the sanitary authority, made by a Justice of the peace of the said borough in February, 1878. The proceedings of the sanitary authority were authorised by the 94th and following sections of the Act, and were in all respects regular, and the order so made by the borough Justices became binding upon the plaintiffs as the owners or landlords of the said premises. In obedience to such order, the plaintiffs

(4) 47 Law J. Rep. C.P. 487; Law Rep. 3 C.P. D. 368.

(5) 48 Law J. Rep. C.P. 751; Law Rep. 4 C.P. D. 367.

executed the required works, and expended in so doing a sum of money which it has been agreed shall, for the purposes of this action, be taken at 124*l.* If the plaintiffs had neglected or failed to obey such order, the sanitary authority would have had power, under the 98th section of the Act, to enter upon the premises and to do what might be necessary in execution of the order and to recover from the plaintiff in a summary manner the expenses incurred by them in so doing. It is unnecessary to refer more particularly to those provisions of the Act which bear upon the subject now under consideration: it is clear, from their general scope, that it was the intention of the Legislature to impose upon the landlord, in the absence of any contract to the contrary, the burthen of any expenditure or payment which might be rendered necessary for giving effect to such provisions. It is, however, provided by the 104th section that nothing contained in the Act shall affect any contract whereby it may be agreed that the occupier shall pay or discharge all rates, dues and sums of money payable in respect of the demised property or any contract whatsoever between landlord and tenant, and it is contended by the plaintiffs that the defendant is, as tenant, bound, under a covenant contained in his lease, to repay to them the amount which they have in manner expressed expended.

The covenant in question provides that the tenant shall "bear, pay and discharge the land tax (if any), sewers rate, borough rate, improvement rate, tithes and tithe rent-charges in lieu of tithes, and all other taxes, rates, duties and assessments whatsoever, whether parliamentary, parochial or otherwise, which at the date of the lease were, or at any time thereafter during the said term should be, taxed, charged, rated, assessed or imposed on the said demised premises or any part thereof, or upon the landlords or tenants in respect thereof."

Mr. Justice Grove, by whom the action was tried without a jury, was of opinion that the amount expended by the plaintiffs was a duty charged or imposed upon them as landlords in respect of the demised premises, and gave judgment in their favour, and I am of opinion that his judgment should be affirmed.

Were it not that Lord Justice Brett has arrived at a different conclusion, I should have deemed it sufficient, to support the opinion which I have thus formed, to state, as I have already done, the circumstances under which the payment has been made by the plaintiffs and the terms of the covenant by which the defendant is bound. If the plaintiffs had neglected to obey the order of the borough Justices, and the sanitary authority had executed the required works, and had recovered the costs of so doing from the plaintiffs, I am unable to understand upon what grounds it could have been successfully contended that the payment so made was not imposed upon them in respect of the demised premises; and it cannot, in my opinion, make any difference that they executed the works and incurred the expense of so doing, in obedience to the order, instead of waiting to pay the costs of the execution of the works by the sanitary authority after their disobedience of the order had rendered such a proceeding necessary. Several cases have been referred to in the course of the argument upon the present appeal, in which questions similar to that which we have now under consideration have received judicial solution. The decisions have in some of such cases been favourable to the landlords, and in others to the tenants, but it will be found, upon examination, that the more or less comprehensive character of the covenant has led to the varying results. The charge or payment sought to be recovered from the tenant has been of the same character or description in each of the cases cited. On the part of the appellant much reliance has been placed upon the case of *Tidswell* v. *Whitworth* (1). In that case the covenant was to "pay and discharge all taxes, rates, assessments and impositions whatsoever (except property tax), which during the term should become payable in respect of the demised premises;" and it was held that the tenant was not bound to repay to the landlord the amount assessed upon him in respect of certain paving and draining works which had been constructed under the Man-

chester Improvement Act; but the same four Judges (namely, Chief Justice Bovill and Mr. Justice Willes, Mr. Justice Keating and Mr. Justice Montague Smith) who were unanimous in so holding in *Tidswell* v. *Whitworth* (1), were also unanimous in holding a few months later, in *Thompson* v. *Lapworth* (2), that a tenant who had covenanted to "pay and discharge all taxes, rates, duties and assessments whatsoever, which should be taxed, assessed or imposed upon the tenant or landlord of the premises in respect thereof," was liable to repay to the landlord the amount which he had been required to pay in respect of the paving of a street under the provisions of the Metropolis Management Act. In the former of these cases—*Tidswell* v. *Whitworth* (1)—the Judges were careful to distinguish it from *Sweet* v. *Seager* (6) and *Payne* v. *Burridge* (7), and other cases which had preceded it, and in which the decisions had been in favour of the landlord, pointing out, however, that it was very near the line, whilst in *Thompson* v. *Lapworth* (2) they were equally careful to distinguish it from *Tidswell* v. *Whitworth* (1). It is clear, from the reports of the two cases, that the decision arrived at in the later case was due to the more comprehensive terms of the covenant. The terms of the covenant which we have now under consideration are at least as comprehensive as were those in *Thompson* v. *Lapworth* (2), and whether the decision in *Tidswell* v. *Whitworth* (1) is one which can, or cannot, be defended upon the ground of its special circumstances, it is, to my mind, clear that the Judges who decided it in favour of the tenant must have decided the present case in favour of the landlord, if they adhered to the views expressed by them in *Thompson* v. *Lapworth* (2). The appellant has also relied upon the case of *Rawlins* v. *Briggs* (4), in which the covenant was to "pay and discharge all taxes and all manner of rates, charges, assessments and impositions whatsoever, to be charged, assessed or imposed upon the premises thereby demised or in respect thereof, or in respect of the said rent, by authority of Parliament or otherwise howsoever;" and Mr. Justice Lindley held, upon demurrer, that the tenant was not liable to repay to the landlord the amount expended by him in abating a nuisance pursuant to the requirements of the local sanitary authority of Reading. In so deciding, Mr. Justice Lindley expressed his opinion that the terms of the covenant did not substantially differ from those in *Tidswell* v. *Whitworth* (1), by the decision in which case he considered himself bound; but in *Hartley* v. *Hudson* (5), which was tried by him without a jury, the same learned Judge held that under a covenant to "pay and discharge all rates, taxes, charges, rates and assessments whatsoever, which now are or may be charged or assessed upon the said premises, or upon any person or persons in respect thereof," the tenant was liable to repay the landlord the amount which he had been compelled to pay to the sanitary authority in respect of certain sewerage and paving works executed by them under the provisions of the Public Health Acts, after failure by him to obey an order to execute the works. Mr. Justice Lindley treated the covenant in *Hartley* v. *Hudson* (5) as equivalent to that in *Thompson* v. *Lapworth* (2), and particularly directed attention to the words "taxed, assessed or imposed upon the tenant or landlord of the demised premises in respect thereof," in the covenant of *Thompson* v. *Lapworth* (2), and to the words "charged or assessed upon the said premises, or upon any person or persons in respect thereof," in the covenant which he had under consideration. In the present case we have the equivalent words, "taxed, charged, rated, assessed or imposed on the said demised premises or any part thereof, or upon the landlords or tenants in respect thereof." We have also, as in *Thompson* v. *Lapworth* (2), the word "duties," in addition to rates, taxes and assessments, in the enumeration of charges and impositions to which the covenant is made applicable; and the addition of the word "bear" to the words "pay and discharge," in the earlier part of the covenant, has, in my opinion, the effect of more distinctly developing its very comprehensive character. The case of *Crosse*

(6) 2 Com. B. Rep. N.S. 119.
(7) 12 Mee. & W. 727; 13 Law J. Rep. Exch. 190.

v. *Raw* (3) is to the same effect as *Thompson* v. *Lapworth* (2), though the language of the covenant is slightly different. The result of the authorities to which I have alluded is in favour of the conclusion at which I have arrived. We are not bound by them, except so far as we may agree with the conclusions arrived at, and with the reasons assigned; but, in my opinion, *Thompson* v. *Lapworth* (2) and *Crosse* v. *Raw* (3) were rightly decided, and I assent to the reasons assigned. Before concluding, I must say a few words with reference to an argument which has been somewhat strongly pressed upon us. It has been urged on behalf of the appellant that it would be inequitable to charge upon the tenant an expenditure which is made for the permanent improvement of a property in which he has only a temporary interest, and that a construction which would have that effect should not be put upon the covenant in question, if the language will fairly admit of any other. Now, with reference to this argument, it must be borne in mind that a tenant for a term of years derives a benefit, greater or less, according to the unexpired portion of his term, from any expenditure for the permanent improvement of the property, and that it would be equally inequitable to impose upon the landlord the whole burthen of an expenditure from which he can derive no benefit during the remaining portion of his tenant's term. In the present case at least half of the defendant's term was unexpired at the time when the drainage works were executed. Again, the defendant has, by the terms of the covenant which we are now considering, clearly taken upon himself, and must be presumed to have done so knowingly and willingly, some burthens which may result in a benefit to the demised premises beyond the period of his tenancy — as, for instance, "improvement rates," which under ordinary circumstances are imposed in respect of an expenditure for permanent improvements; and inasmuch as, at the date of the lease, a Public Health Act was in force, under which burthens might have been imposed upon the plaintiffs similar to that which they have been called upon to bear under the existing Act, it is difficult to suppose that such a burthen was not in the contemplation of the parties at the time when the covenant was entered into. But even if the argument has force, to the extent of supporting the view that expenditure of a like character should primarily be thrown upon the landlord, as it has been by the Public Health Act, I can well understand that, for the purpose of obtaining what he might deem in other respects an eligible lease, an intending tenant would willingly subject himself to the obligations to which, but for his consent, he could not be made liable. Again, it is common knowledge that, generally speaking, the object of a landlord is to secure, during the term, a rent of certain amount as free from deductions as law will permit, and to effectuate this object the amount of rent is fixed with reference to all the obligations which the tenant may be willing to take upon himself; and I can see nothing inequitable in holding the tenant to the terms of his bargain.

Judgment affirmed.

Solicitors - - Anderson & Sons, for plaintiffs; Tilleard, Godden & Holme, agents for Freeman & Gell, Brighton, for defendant.

[IN THE EXCHEQUER DIVISION.]

1880. Nov. 16. DURRANT *v.* THE ECCLESIASTICAL COMMISSIONERS FOR ENGLAND AND WALES.

Money paid under Mistake of Fact— Impossibility of restoring Parties to Original Position.

The plaintiff, an occupier of land subject to tithe rent-charge, made over-payments to the defendants, as owners of the rent-charge, under mistake of fact, supposing, without enquiry, that the amounts claimed in notices served upon him by the defendants were correct, whereas such amounts erroneously included rent-charge on land not in his occupation. When the plaintiff, having discovered the mistake, claimed re-

payment, the time for levying the rent-charge upon the land actually liable thereto had run out, so that the defendants had lost all remedy for non-payment of it:—Held, *that the plaintiff was, nevertheless, entitled to recover from the defendants the amounts which he had paid them by mistake.*

This was an appeal, by Special Case, from a judgment of the deputy Judge of the County Court of Norfolk, holden at Downham Market, in favour of the above-named plaintiff for 26*l.* 15*s.* 2*d.*, claimed as money paid by the plaintiff to the defendants, for tithe commutation rent-charge, under mistake of fact.

At Michaelmas, 1870, the plaintiff succeeded one Hodgkinson as tenant of certain lands in the parish of Crimplesham, in Norfolk, held from Sir William Bagge. Together with the lands of which the plaintiff so became tenant, Hodgkinson had been tenant to Sir William Bagge of land of comparatively small extent in the same parish, called Stanks, consisting of about twenty-five acres. The plaintiff never occupied any part of the land called Stanks. The defendants became on the 10th of April, 1874, owners in possession of the tithe of the parish of Crimplesham. As such tithe owners, they received from the plaintiff, between the 10th of April, 1874, and the 1st of October, 1876 (as the preceding tithe owners had done from Michaelmas, 1870, to April, 1874), tithe rent-charge in respect of the land called Stanks, in addition to the tithe rent-charge due in respect of the land occupied by the plaintiff; and this action was brought to recover the amount so paid by the plaintiff to the defendants in respect of the land called Stanks.

The material circumstances appearing, other than the above-stated facts, were the following:—

The apportionment of the tithe rent-charge of the parish (which was confirmed on the 21st of August, 1841) was a farm and not a field apportionment—that is (in the terms of the explanation in the case), a sum in lieu of the tithe was apportioned on the whole land then occupied by the several persons in the parish and not on the respective fields in such occupation. It contained a separate apportionment on the land called Stanks, then in the separate occupation of Philip Winearls. The apportionment had not been altered.

The names of the persons for the time being occupying the respective hereditaments subject to tithe were put down in the collecting book of the person who acted as tithe collector for the defendants, and had previously acted, from a time before Michaelmas, 1870, for their predecessors. Such book was used by the collector at the tithe audits.

Stanks and the other lands occupied by Hodgkinson were for some years previously to 1870 assessed to the tithe in the name of Hodgkinson. In October, 1870, the collector, upon information furnished him by the farm bailiff of Sir William Bagge, altered the name from Hodgkinson to the name of the plaintiff, as well in respect of Stanks as of the lands of which the plaintiff became tenant. No alteration was made in the list as so altered until a period later than October, 1876.

From October, 1870, to October, 1876, the collector gave notices to the plaintiff, as an occupier of lands in the parish, to pay the tithe for the lands which appeared, by the collecting book, to be occupied by him, and included in such notices the land called Stanks, without any knowledge on the part of himself or his principals that the plaintiff did not occupy the said land, or that the plaintiff was not liable to pay tithe for the same, being guided simply, in the notices of audit, by the list above mentioned.

The plaintiff paid his tithe according to the notices in entire ignorance that the amount specified in the notices included the tithe for Stanks. He noticed that the amounts named in such notices did not correspond with the amounts which Sir William Bagge's agent told him he would have to pay in respect of his occupation, but he attributed such difference to variations in the price of corn.

In April, 1877, the plaintiff accidentally discovered that he was paying tithe for land not in his possession, and refused to pay it any longer. He first made such claim as was made in this action by

claiming to set off the amount of which he now claimed repayment against tithe becoming due to the defendants in October, 1878, in respect of the land occupied by him.

The defendants received no more tithe in the aggregate than was due from the whole parish.

The question for the opinion of the Court was, whether, in the above circumstances, the plaintiff was entitled to recover any and what part of the 26*l.* 15*s.* 2*d.* from the defendants.

F. M. White (*J. M. Lloyd* with him), for the defendants.—The plaintiff ought to have known the facts, and consequently there was *laches* on his part. Two years being limited by 6 & 7 Will. 4. c. 71. ss. 81 and 82, for recovery of tithe rent-charge by distress and writ of *habere facias possessionem* (which by reason of section 67 are the tithe owner's only remedies), and two years having elapsed between the time when the rent-charge became due and was paid by the plaintiff and the time when the plaintiff first claimed repayment, the plaintiff is debarred from recovering by the alteration in the position of the parties—*Freeman* v. *Jefferies* (1), *Cocks* v. *Masterman* (2).

Wills, for the plaintiff, was not called upon.

Pollock, B.—This is an action brought to recover money paid by the plaintiff to the defendants for tithe rent-charge under mistake of fact. The defendants' collector thought that the plaintiff had succeeded to Hodgkinson's tenancy of the land called Stanks, as well as to Hodgkinson's tenancy of other titheable lands in the parish, and made out his notices accordingly. The plaintiff, in *bona fide* mistake, paid the tithe rent-charge, in accordance with such notices, and he now seeks to recover the money so over-paid by him. Mr. White, on the part of the defendants, admits that the plaintiff would, if the state of things were simply that, be entitled to recover; but he contends that by reason of the alteration which has taken place in the position of the defendants, and the impossibility of restoring them to their original position, the plaintiff is disentitled to recover.

The action for money received is no doubt in some sense an equitable action; and considerations of equity and fairness may well be advanced by a defendant in it. But Mr. White has, in my opinion, failed to shew any good reason in equity or fairness why the plaintiff should not recover. The present case is unlike cases where a special relation existed between the plaintiff and the defendant which may be said to have equitably disentitled the plaintiff to recover.

On these grounds I am of opinion that this appeal must be dismissed.

Hawkins, J.—I am entirely of the same opinion.

Appeal dismissed.

Solicitors—Jennings, White & Buckston, for appellants; W. B. Brook, agent for E. M. Beloe, King's Lynn, for respondent.

(1) 38 Law J. Rep. Exch. 116; Law Rep. 4 Exch. 181.

(2) 9 B. & C. 902.

[IN THE COMMON PLEAS DIVISION.]

1880. Nov. 5. } *In re* ALICE ELIZA SMITH.

Acknowledgment by Married Woman under 3 *&* 4 *Will.* 4. *c.* 74—*New Zealand*—*Ordinary Commissioner*—15 *&* 16 *Vict. c.* 86. *s.* 22.

The acknowledgment of a disentailing deed by a married woman under 3 *&* 4 *Will.* 4. *c.* 74, *was taken in New Zealand before a commissioner authorised to administer oaths in that colony, instead of before a commission specially appointed under section* 83.

The Court allowed the documents to be filed by virtue of 15 *&* 16 *Vict. c.* 86. *s.* 22, *by which all acknowledgments required for the purpose of enrolling any deed in the Court of Chancery may be sworn in any colony before any person lawfully authorised to administer oaths in such colony.*

Alice Eliza Smith, residing with her husband in New Zealand, was tenant in tail under a settlement of property in England. A disentailing deed had been

In re Smith, C.P.

prepared, with a view to a resettlement of the property, and this deed had been acknowledged by Mrs. Smith in New Zealand before a commissioner authorised to administer oaths.

The officer of the Court, under the Fines and Recoveries Act, 3 & 4 Will. 4. c. 74, having refused to file the certificate and affidavit of verification, on the ground that the acknowledgment had not been taken before a commissioner specially appointed by the Court of Common Pleas, under section 83 (1)—

Arnold Morley moved for an order directing the officer to receive and file the documents. The acknowledgment is valid by 15 & 16 Vict. c. 86. s. 22 (2), by which all acknowledgments required for the purpose of enrolling in the Court of Chancery may be sworn and taken in any colony before any Judge, Court, notary public or person lawfully authorised to administer oaths in such colony. The deed, being a disentailing deed, would have to be enrolled in the Court of Chancery. Although 15 & 16 Vict. c. 86 is entitled "An Act to amend the Practice and Course of Proceeding in the High Court of Chancery," yet it supersedes the 3 & 4 Will. 4. c. 74. s. 83, because, if the former Act only applied to the practice in the Court of Chancery, section 22 would be inoperative, as the certificates of all acknowledgments of married women have, in order to be of any effect, to be filed in the Court of Common Pleas.

PER CURIAM (LINDLEY, J., and LOPES, J.) —You may take the order.

Solicitors—Moresby White & Co.

(1) By 3 & 4 Will. 4. c. 74. s. 83, it is enacted that "in those cases where, by residence beyond seas, or ill health, or any other sufficient cause, any married woman shall be prevented from making the acknowledgment required by the Act before a Judge, or a Master in Chancery, or any of the perpetual commissioners to be appointed as aforesaid, it shall be lawful for the Court of Common Pleas at Westminster, or any Judge of that Court, to issue a commission, specially appointing any persons therein named to be commissioners to take the acknowledgment by any married woman, to be therein named, of any such deed as aforesaid."

(2) 15 & 16 Vict. c. 86. s. 22: All pleas, answers, disclaimers, examinations, affidavits, declarations, affirmations and attestations of honour, in causes or matters depending in the High Court of Chancery, and also acknowledgments required for the purpose of enrolling any deed in the said Court, shall and may be sworn and taken in Scotland, or Ireland, or in the Channel Islands, or in any colony, island, plantation or place under the dominion of Her Majesty in foreign parts, before any Judge, Court, notary public or person lawfully authorised to administer oaths in such country, colony, island, plantation or place respectively, or before any of Her Majesty's consuls or vice-consuls in any foreign parts out of Her Majesty's dominions, &c.

IN THE COURT OF APPEAL.]

1880. May 11, 12. } DARRELL *v.* TIBBITS.*

Fire Insurance—Contract of Indemnity—Landlord and Tenant—Covenant to Repair—Insurer's Right to Benefit of Covenant to Repair where Premises Repaired by Tenant.

The defendant demised premises for years by a lease containing a covenant by the tenant to repair in case of injury by gas, and he insured the same premises under a fire policy. The premises having been injured by an explosion of gas the defendant obtained payment from the insurer, and, subsequently, the tenant, having recovered damages against the persons who caused the explosion, repaired the premises. In an action by the insurer to recover from the defendant the sum paid under the policy, it was,—Held (*reversing the judgment of* LUSH, J.), *that the policy was a contract of indemnity; that on payment of the insurance money a promise by the defendant to repay it in the event of the tenant repairing the premises must be implied; and therefore that the plaintiff was entitled to maintain his action.*

Appeal from a judgment of Lush, J., at the trial.

The material facts are shortly as follow: In 1867 Forbes demised a house in Brighton to Mrs. Bonner, under

* *Coram* Brett, L.J.; Cotton, L.J.; and Thesiger, L.J.

[IN THE COURT OF APPEAL.]

1880. June 8, 23. } BUDD AND ANOTHER *v.* MARSHALL.*

Landlord and Tenant — Covenant — "Duties" — Tenant's Covenant to pay "Duties" charged on Premises or on Landlord in respect thereof — Construction — Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 94, 96, 104.

The defendant was tenant for years to the plaintiffs under a lease containing a covenant by the tenant to "bear, pay and discharge" certain specified rates and taxes, "and all other taxes, rates, duties and assessments whatsoever, whether parliamentary, parochial or otherwise, taxed, charged, rated, assessed or imposed upon the said demised premises or any part thereof, or upon the landlords or tenants in respect thereof."

The sanitary authority duly obtained an order of Justices, under section 96 *of the Public Health Act*, 1875, *against the plaintiffs, as owners, directing them to abate a nuisance arising from defective drainage, and for that purpose to make certain drains. The plaintiffs made the drains accordingly, and sued the defendant for the cost thereby incurred:—*

Held (*by* BRAMWELL, L.J., *and* BAGGALLAY, L.J.; BRETT, L.J., *dissentiente*), *that the plaintiffs were entitled to recover the cost from the defendant under his covenant.*

Appeal from a judgment of Grove, J., in favour of the plaintiffs, after trial without a jury.

The facts of the case, the covenant in the lease and the material parts of the Public Health Act, 1875, are fully set out in the judgment of Baggallay, L.J., *post*.

The arguments of counsel and authorities cited are also sufficiently stated in the judgments.

Willis and *Finlay*, for the defendant.

Joseph Brown and *Bremner*, for the plaintiffs.

Cur. adv. vult.

The following judgments were given on June 23:—

BRETT, L.J.—The question in this case is, whether the tenant is bound by the terms of his lease to make a certain payment which the landlord was *prima facie* bound to pay, but which it is said the tenant has taken on himself to pay. The payment in question arises under a statute; the liability is under a covenant in a lease, and the question is, whether the terms of the lease cover the payment the subject of the dispute. I am of opinion that, apart from authority, we ought to consider the lease as if there were no statute; then that we ought to construe the statute as though there were no lease; and then that we ought to see whether the lease so construed covers the payment which results from the statute when so construed. I think that the authorities when looked at will be found to have been determined on that principle. In each case the Judges considered both the terms of the lease and the statute, and then considered whether the lease covered the payment which so arose.

It is necessary, I think, first to consider the covenant. It provides that the tenant shall "at all times bear, pay and discharge the land-tax (if any) sewers rate, borough rate, improvement rate, tithes and tithe rent-charges in lieu of tithes, and all other taxes, rates, duties and assessments whatsoever, whether parliamentary, parochial or otherwise, which at the date of the lease were, or at any time thereafter during the said term should be, taxed, charged, rated, assessed or imposed on the said demised premises or any part thereof, or upon the landlords or tenants in respect thereof." Now it is said that the word "duties" in this collocation will carry the liability of the tenant here. Suppose that there were no statute, what would this word "duties" mean? There is in this covenant an enumeration of several payments before this word "duties" is reached. Now the word "duties" is larger than the words "taxes or rates," and so it means a payment which is not a tax or a rate, but which is a payment of something of the same kind, and in the nature of the same sort of payment. It is a payment of money to be paid in the same way as rates and taxes are paid. It is urged that the word

* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Brett, L.J.

"duties" would cover an improvement rate if that had not been specified. I think it would. An improvement rate may be charged even if the owner of the house is not benefited by it—that is, as to his actual property—for none of the money spent may be spent on the house or property. Can it, however, be said that the word "duties" would comprise an act to be done by the landlord?—as, for instance, if owners and not occupiers were liable to serve on juries, could it then be said that the occupier undertook that duty? This seems to be the construction of the lease.

Then we have to consider the statute, and we must construe that as though the lease did not exist. In the present case the liability is imposed by section 94 of the Public Health Act, 1875.

That section imposes a duty and an obligation on the owner of the property: it imposes a duty to do an act, to abate a nuisance, to execute works. Now if the owner be so advised, he may do these works with his own hands, he may do them by his own servants, and so he may not actually have anything to pay—he may only have to do the work. This duty, then, is imposed on the owner by section 94. If he fails to do it, then there may be an order by a magistrate, and the expenses incurred under that order are not in the nature of a penalty, but they are payable under the provisions contained in the last part of section 98. The authorities can do the work for the owner if he fails to do it, and they can recover the expenses by instituting proceedings in a particular way. The only duty is the duty to do the work, and the question is, whether the payment which has been made is a payment in the nature of a rate or a tax so imposed as to bring it within the words of the covenant in the lease. It seems to me, with deference, impossible to say that it is. I think that it is a payment like a payment of a carpenter's or a bricklayer's bill, and that such a payment is not a payment in the nature of a rate or a tax within the covenant. An improvement rate is, in my opinion, not like this; an improvement rate is imposed by an Act on a whole district, but this payment is a payment for work done.

It is, however, urged against this view that there are authorities which shew that this is too narrow. The first to which I will refer is *Tidswell* v. *Whitworth* (1). It was there held that the tenant was not liable under his covenant to pay a rate for providing for expenses of paving, because the payment by the landlord was in consequence of a breach of duty by him, and so that was not a "rate, assessment or imposition" payable in respect of the demised premises, but a payment made for that breach of duty. The reasoning of that judgment seems to me to be applicable here, for there was here a payment made in consequence of a breach of duty by the owners, and therefore that case is an authority for the defendant.

In *Thompson* v. *Lapworth* (2) the covenant was to pay all "taxes, rates, duties and assessments whatsoever, which during the continuance of the demise should be taxed, assessed or imposed on the tenant or landlord of the premises in respect thereof, whether parliamentary, parochial or otherwise, except property or income tax." There the Court held that the word "duties" would cover a money payment, and that the tenant was liable, because under the Act on which the case turned, the parish could not order the landlord to do the work, but could only do it themselves and then compel him to pay for it. Now that reasoning is not applicable here, for the word "duties" there was equivalent to a money payment, and there was no duty under the statute to do the act.

I will not go through all the cases cited. The strongest was the case of *Crosse* v. *Raw* (3), in which the covenant contained the word "outgoings," and it was held that that word was large enough to include the expense of making a drain, which the overseer could have been called upon to make, but which the tenant in fact had made under an arrangement by which the expense was to be borne by the party liable. But here the word "out-

(1) 36 Law J. Rep. C.P. 103; Law Rep. 2 C.P. 326.

(2) 37 Law J. Rep. C.P. 74; Law Rep. 3 C.P. 149.

(3) 43 Law J. Rep. Exch. 144; Law Rep. 9 Exch. 209.

indeed as the result of an action, but still he has been paid, and the company could not then have refused to pay. An action was then brought in the name of the tenant against the corporation of Brighton, and money has been paid by the corporation to his tenant, who accordingly did the repairs which were necessary. I do not think that these last facts are, after all, material: the case stands in principle as though the tenant had repaired after payment by the insurance company to the landlord, so that default having been made in the first place by the tenant, still the landlord's interest in the building has since been made good by the tenant.

Then the question arises whether the insurance company can obtain back the money which they have paid to the landlord; and the reason why they should be able to do so is that the tenant has done the repairs, or has paid damages to the landlord.

If the company cannot recover, it will follow that the landlord will be in this position: he will have the building made good by the tenant, and he will also be paid by the insurance company, as though the building had not been repaired by the tenant. If this be so, there is a complete foundering of the doctrine of indemnity: the landlord will, in such a case, not be indemnified, he will be paid twice over, and there will be an absolute abolition of the doctrine of indemnity.

Now this is a technical difficulty, and if it cannot be surmounted, the essence of the doctrine of indemnity will be lost, and circumstances which no one could help or alter will have destroyed it. I am of opinion that the difficulty which lies in the form of the action can be surmounted. I incline to put it on a well-known doctrine. I do not think that the case is within the doctrine of failure of consideration, and that therefore the money ought to be recovered on that ground: there would be a difficulty in holding that, as the premiums have been paid, and they form part of the consideration.

If, however, the difficulty were to stand, there would be a breach of the essence of the doctrine as between the present plaintiff and defendant, and therefore I think that this Court ought to imply a promise in the present defendant to the effect that if, after payment to him by the insurance company when they could not resist, he is relieved from loss, and the damage done is made good by the tenant, he will repay to the insurance company the money paid by them to him, and thus the essence of a contract of indemnity will be maintained.

Or it may be put thus: the doctrine is well established that when the subject-matter of the contract is insurance against loss, whether marine or by fire, and when the assured has been paid by the insurers the loss sustained, then the insurers have a right to be put in the place of the assured with respect to every right to which the assured is entitled by law, and to the benefit of every contract touching the subject-matter assured.

In this case, therefore, the insurance company have a right to be put in the place of the landlord with regard to the rights which belong to the landlord, and the company would therefore have been entitled to sue in the name of the landlord if the tenant had not done the repairs. As the repairs have been done they are entitled to enjoy the advantage of those repairs. It follows, therefore, that the company are entitled to recover the money which they paid to the landlord, in order to effect the repairs which have since been done by the tenant.

The plaintiff, therefore, is entitled to recover the amount which he claims, and this appeal must be allowed; but I repeat that, although it is in form an appeal, we are really giving our own judgment on a case different from that which was presented to the learned Judge who tried the case.

COTTON, L.J.—This case was not argued before Mr. Justice Lush, and the authority which has been cited to us was not cited to him. The first question is, whether a policy of fire insurance is a contract of indemnity. Now that was decided by the case of *The North British and Mercantile Insurance Company* v. *The London, Liverpool and Globe Insurance Company* (9). [The learned Judge went through the facts of that case.]

That case decided two points: first, that a policy of fire insurance is a contract of indemnity; and secondly, that the insurer is in the position of a surety. A surety who pays the debt of the person for whom he is surety is thereby placed in the same position as the original creditor, and he has all the rights and all the remedies against the principal debtor that the original creditor had.

In the present case the landlord of this house had a right to recover the amount insured from the insurance company, and they were obliged to pay that amount to him, consequently the company stand in the position of a surety, and are entitled to call upon the landlord to give them the right to sue the tenant who is, by virtue of his covenant, liable to the landlord. It was admitted on behalf of the defendant that that might be so, but it was urged that that was not so in this case, that the insurance company had no right to require the landlord to allow them to have the benefit of the contracts into which he might have entered. I am of opinion that that has been settled in favour of the appellants by *The North British and Mercantile Insurance Company* v. *The London, Liverpool and Globe Insurance Company* (9), for there is no difference on principle between the right of the surety against a wrong doer and the rights which he has under a contract. Now, the insurance company being the surety, are, as I have said, entitled to the rights to which the person they have paid is entitled. If money had been paid by the corporation of Brighton or by the tenant, then the insurance company could have claimed that money from the landlord; they could have said that that money had come into his hands with a liability attached to it—the liability, that is, of recouping the company the amount which they had paid to the landlord under the policy of insurance. In the present case the landlord has not received the money, but money has been expended on his property, and repairs have been done. It may be difficult to say what is the exact form which the obligation takes: the insurance company have not the right to recover the money paid, but they have the right to have the benefit of what the landlord got after they paid him the amount due under the policy. The difficulty arises from the fact that the money received by the tenant has been expended on the house; but I am of opinion there is an implied contract that the assured shall hold for the benefit of the insurance company whatever he might receive under any covenant made between him and his tenant. Here it is admitted that when the money was paid by the insurance company, the obligation under which the tenant was by reason of the covenant was not known to them, so that it cannot be said that the insurance company gave up any right of which they were aware, and they are therefore entitled to get the benefit of the sum expended by the tenant in repairing the house. This appeal must accordingly be allowed.

THESIGER, L.J.—I am also of opinion that the plaintiff is entitled to recover. Two objections have been taken, one of which is substantial and the other formal.

The first, the substantial objection, is, that the plaintiff has no right to recover the sum paid by him to the defendant, although the defendant has been recouped what he has lost. I am, however, of opinion that this objection is disposed of by the case of *The North British Insurance Company* (facts and judgment quoted).

The position of the parties in that case and that of those in the present case is nearly identical. There there was a bailment of goods, here there is a bailment of a house; there is a lease with an obligation to repair; the lessor insured the premises against injuries caused by gas, and he thereby was protected against the failure to perform the primary obligation which lay upon the lessee to repair the bailed house.

It was argued on behalf of the defendant that there was a distinction between the right of the assured in cases in which the assured had a right and remedy against tort feasors and the right of the same person in cases where the right arises out of a contract with a third person entered into with him in respect of a loss. It may be that there are some exceptional cases in which a difficulty

might occur; but I am of opinion that where a contract of insurance and a contract between the assured and a third party covers the same subject-matter, then, as a policy of fire insurance is a contract of indemnity, the assured cannot take the advantage of both contracts, but if he recovers by means of his contract with the third party, he cannot also recover from the insurance company.

The second objection is only formal; it is urged that there is no means by which the insurance company can recover back money paid by them. I am not pressed by this difficulty. It is clear that the money was paid at a time when the insurance company was bound to pay it. The assured cannot receive a double indemnity; and I am of opinion that the plaintiff is entitled to recover on well-established principles. Either the plaintiff can recover as in an old common-law action for money had and received—because the money was paid on the condition that the person receiving it had sustained a loss, whereas in fact no loss has in this case been sustained by him—or on the equitable principle that, as the assured has been indemnified by the insurance company, the insurance company can claim to be subrogated to the rights of the assured, and thus to have the benefit of the contracts entered into by the assured. It appears to me that in one of these two ways the formal difficulty disappears, and that this appeal should be allowed.

Appeal allowed.

Solicitors—Dawes & Sons, for appellant; Langley & Gibbon, for respondent.

[IN THE COURT OF APPEAL.]
(*Appeal from the Queen's Bench Division.*)

1880. Nov. 24.

SMITH *v.* COWELL.*

Judgment Creditor—Equity of Redemption the sole Property of Judgment Creditor—Receiver—Time and Mode of Application for—Interlocutory Order—27 & 28 Vict. c. 112. s. 1—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25. *sub-s.* 8—*Rules of Court, Order XLII. rules* 1 *and* 23.

A judgment creditor who has sued out an elegit against his judgment debtor, whose only property is an equity of redemption, is entitled to obtain the appointment of a receiver on motion after judgment, in the division in which he has obtained judgment, and it is not necessary for him to bring a fresh action for that purpose.

Appeal from a refusal of the Queen's Bench Division to grant a receiver.

The plaintiff brought an action against the defendant in the Queen's Bench Division on a bill of exchange; judgment was signed for default of appearance. To a writ of *elegit* the sheriff returned *nil*, inasmuch as the only property to which the defendant was entitled was an equity of redemption in certain real property. The plaintiff then applied, by motion in the Queen's Bench Division, for a receiver to receive any rents that might accrue to the defendant.

The Queen's Bench Division refused the motion.

The plaintiff appealed.

Willis-Bund, for the appellant.—The question is, whether a receiver can be applied for in the original action, or whether a new action must be commenced in the Chancery Division in order to obtain a receiver. It is clear from the judgment of the Master of the Rolls in *The Anglo-Italian Bank* v. *Davies* (1) that he thought a plaintiff might in such a case as the present proceed by motion, although the old method of proceeding by action

* *Coram* Baggallay, L.J.; Brett, L.J.; and Cotton, L.J.

(1) 47 Law J. Rep. Chanc. 833; Law Rep. 9 Ch. D. 275.

was not taken away. In *Ex parte Evans* (2) a receiver was appointed on motion after notice, and although it is provided by rule 23 of Order XLII. that "nothing in any of the rules of this Order shall take away or curtail any right heretofore existing to enforce or give effect to any judgment or order in any manner or against any person or property whatsoever," still that does not prevent a judgment creditor from having the benefit of the new procedure introduced by the Judicature Act, 1873. Every Court can now, by sub-section 1 of section 24 of that Act, give the relief which the Court of Chancery could alone give before that Act; therefore an action in respect of this right to an equity of redemption belonging to the judgment debtor can now be brought in the Common Law Division, and it is convenient that all actions relating to the same subject-matter should be brought in one and the same division of the High Court.

[BRETT, L.J.—Does that apply to execution, or only to the relief sought in the original suit?]

It applies to any relief of any kind sought for on some equitable ground. As a rule, receivers are appointed before a final judgment; but they are also sometimes appointed after judgment, and there is no reason why a receiver should not be appointed after as well as before judgment, especially if full effect be given to the wide words of sub-section 8 of section 25 of the Judicature Act, 1873 (3). The only property of the judgment debtor being an equity of redemption, the judgment creditor seeks to have a receiver appointed without the expense and delay of bringing a fresh action.

(2) 48 Law J. Rep. Bankr. 97; Law Rep. 11 Ch. D. 691.

(3) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, sub-s. 8: "A mandamus or injunction may be granted, or a receiver appointed, by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just; and if an injunction is asked, either before or at or after the hearing of any cause or matter, to prevent any . . . . waste or trespass, such injunction may be granted if the Court shall think fit. . . ."

R. Williams, for the defendant.—A receiver is only appointed by interlocutory order before final judgment; therefore one cannot be appointed in this case. The Judicature Act does not create a new mode of getting execution on an equitable estate in an action in the Common Law Division by appointing a receiver after judgment: such an order is made during the progress of the suit, and is intended to be for the protection of the estate. The words of the sub-section referred to (3) support this view, for they provide that "a *mandamus* or injunction may be granted," and then the sub-section goes on to enact that "a receiver may be appointed by an interlocutory order." This is a separate clause, and is introduced by the disjunctive particle "or;" moreover, later on there is an express provision that an injunction may be granted "either before or at or after the hearing" of the suit, so that there is an express enactment that the step here sought to be taken may be taken in respect of one of the three specified processes, and no enactment to the same effect with regard to the other two.

If, however, this view be not adopted, still the plaintiff has not taken the right course, for he should have applied to the Chancery Division for an order—*Hatton* v. *Haywood* (4)—so as to remove the obstacle of the outstanding legal estate.

Further, the statute says that this is to be a question of discretion—"if it shall appear to be just and convenient;" and it is presumably much more convenient that proceedings of such a nature as this should be carried on and pursued in the Chancery Division.

BAGGALLAY, L.J.—This motion raises a question of practical importance which has not yet been the subject of a decision. The plaintiff brought an action in the Queen's Bench Division to recover 20*l.* on a bill of exchange; judgment went by default of appearance. The plaintiff obtained a writ of *elegit* directed to the sheriff of Middlesex, who made his return that the defendant had no goods, tene-

(4) 43 Law J. Rep. Chanc. 372; Law Rep. 9 Ch. App. 229.

ments or lands. It appears that the defendant was the owner of some freehold and leasehold property subject to a mortgage, and that this equity of redemption was the only property of which he was possessed. Before the Judicature Act the plaintiff would have had to file a bill in the Court of Chancery in order to obtain a declaration of a charge for the amount of his judgment. On such a bill being filed he would have obtained a receiver at once before the hearing of the cause. In the present case a similar application for the appointment of a receiver was made to the Queen's Bench Division, without any fresh action being brought. The question is, whether under the Judicature Act the plaintiff can do this. I will not refer particularly to the sub-sections of section 24 of the Judicature Act, for I do not think they affect the case before us in any especial manner. The first rule of Order XLII. provides that "a judgment for the recovery by or payment to any person of money may be enforced by any of the modes by which a judgment or decree for the payment of money of any Court whose jurisdiction is transferred by the said Act might have been enforced at the time of the passing thereof."

Then we have to consider the effect of sub-section 8 of section 25 of the Judicature Act, 1873 (3), which provides that a receiver may be appointed by an interlocutory order of the Court; it also provides that a *mandamus* or injunction may be granted.

Now it is said that the words "interlocutory order" govern all the three different processes here mentioned, and that they are all therefore confined by the necessity of taking such steps as are strictly interlocutory, and to applications which are made by interlocutory order. No doubt the word "interlocutory" is generally confined to an application made in a cause before judgment; but the interpretation of the word "interlocutory" in this connection is found in the sub-section itself. It is clear from that sub-section that the word "interlocutory," when applied to an order for an injunction, means an order which can be made "before or at or after the hearing" of the cause. Now if the word "interlocutory" has this more extended meaning when used in connection with injunctions, it must also have the more extended meaning when applied to the two other processes provided for in this sub-section—that is, to applications for *mandamus* and for a receiver. I am of opinion, therefore, that the plaintiff was right in the step which he took. It is admitted that he could have begun a new action in the Chancery Division. Now that would be a roundabout way of securing the same result, and I should be unwilling to say that the simpler process was not open to him when there is nothing in the statute to compel me to say so. The decision in *The Anglo-Italian Bank* v. *Davies* (1) shews that the old process still exists; but the Master of the Rolls evidently thought that the exercise of the jurisdiction by motion was the preferable way, although, as it was not there necessary to decide it, he did not give judgment on that point.

The appeal must be allowed, and the order for a receiver made.

BRETT, L.J.—The plaintiff applied for this order by motion after judgment had been signed in the action. Before the Judicature Act it is clear that he could not have obtained this order in this way at this time in the Court of Queen's Bench, nor could the Court of Chancery have made such an order on such a motion at such a time. The only way in which he could then have obtained this order would have been by bringing a new action or filing a new bill. The question must be decided on the proper construction of sub-section 8 of section 25 (3). The words in that sub-section are of the largest kind, and, supposing that they are not circumscribed as to time by the phrase "interlocutory order," there is no reason why we should limit their meaning. That sub-section (3) enlarges the power of both the Common Law and the Chancery Divisions; and as the spirit of the Act was to simplify procedure, it is, I think, right to give a large interpretation to these words. It is urged that the word "interlocutory" in that sub-section introduces a limit as to time; but I am of opinion that the word has not that restric-

tive effect—it means any order other than a judgment or decree in the action; so that the application for a receiver can be made after judgment in the action as well as before, and this without bringing a new action. I agree also with what Lord Justice Baggallay has said as to the inference to be drawn from the fact that the word "interlocutory" applies equally to applications for *mandamus*, for an injunction and for a receiver. The appeal must be allowed.

COTTON, L.J.—I think that the plaintiff is entitled to the order for which he asks. But for the provisions of the Judicature Act this judgment creditor would have have had to proceed in a Court of equity in order to obtain execution by equitable process. The case of *Hatton* v. *Haywood* (4) shews that a plaintiff in such a case went to the Court of Chancery, not to enforce an equitable charge, but to enforce a judgment by an equitable execution, to remove a legal impediment and to bind the land of the debtor. Before the Judicature Act that relief could not be given in a Court of common law, and it could only be given in a Court of equity if an independent proceeding were instituted to enforce the judgment. The Common Law Divisions can now, however, give the relief which the Court of Chancery alone could give before the Judicature Act. The Court of Chancery was formerly hampered in some instances in granting receivers; but the provisions of sub-section 8 of section 25 (3) give the Courts a power which they had not before. Following, then, the words of the Act, I agree that it is "just and convenient" that an order for a receiver should be made to enforce the judgment which the plaintiff has duly signed, so as to give the judgment creditor an equitable execution where at law he cannot get execution by means of the sheriff. The words "interlocutory order" refer to applications for *mandamus* and for injunction, as well as for a receiver. The word "interlocutory" in the first part of the sub-section 8 of section 25 (3) refers to all the three kinds of application mentioned therein, so that it appears from the provision in the statute that an injunction may be granted after as well as before final judgment in an action, so that the word "interlocutory" may be applied to any order not being an order on the hearing of the action; consequently this appeal must be allowed.

Appeal allowed, and order for receiver made.

Solicitors—Paddison, Son & Titley, agents for E. T. Ratcliff, Birmingham, for plaintiff; A. F. Barnard, for defendant.

[IN THE COURT OF APPEAL.]

1880. Nov. 11, 12, 13, 15. THE WEST INDIA AND PANAMA TELEGRAPH COMPANY (LIMITED) *v.* THE HOME AND COLONIAL MARINE INSURANCE COMPANY (LIMITED).*

Marine Insurance—Time Policy—Perils insured against—Loss caused by Explosion in Steamer.

Action by the assured on a time policy which contained a clause rendering the insurers liable for perils of the seas, fire and all perils, losses and misfortunes that should come to the hurt of any part of the subject-matter of the insurance. The vessel insured was a steamer, and was damaged by an explosion caused by the bursting of the boiler:—Held (*by the Court of Appeal*), *that the assured were entitled to recover, for that the policy covered the risk of such damage as that which had occurred.*

Appeal from the judgment of Baggallay, L.J., after a trial without a jury.

Action by the plaintiffs, the owners of the steamship *Investigator*, against the defendants, the insurers thereof, under a time policy, the material clause of which was as follows:—

"And touching the adventures and perils which the said company are made liable unto, or are intended to be made liable unto, by this insurance, they are of the seas, men-of-war, fire, enemies, . . . barratry of the master and mariners, and

* *Coram* Selborne, L.C.; Cockburn, C.J.; and Brett, L.J.

of all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the aforesaid subject-matter of this insurance or any part thereof."

The claim by the plaintiffs arose in consequence of the events which will be found detailed in the judgment of

BAGGALLAY, L.J., delivered on further consideration (on Dec. 8, 1879), the material parts of which are as follows:—

Before I proceed to deliver my judgment in this case, perhaps it may be as well that I should mention that this action was set down for trial at the last Hertford Summer Assizes, when it was arranged to be heard before me without a jury; and in consequence of the great length of time which was occupied by the trial of another action, and the necessity of my reaching Huntingdon in time to open the commission there, this action was only formally opened at Hertford, and the further hearing of it adjourned. Since then it was heard by me some two or three weeks ago, and I now proceed to give my judgment.

The question which I have to decide in this action is, whether the loss of the steam-vessel *Investigator*, which was occasioned by the bursting of one of her boilers on the 8th of January, 1879, was, under the circumstances admitted or proved in the action, a loss insured against by a time policy effected by the plaintiffs with the defendants on the 9th of May, 1878. The *Investigator* was a steam-vessel of 569 tons register, and had been purchased by the plaintiffs in the early part of the year 1875 for telegraphic purposes in the seas between the island of St. Thomas and the continent of America. Shortly after the purchase the vessel was thoroughly overhauled and repaired, and her boilers and engines were surveyed by the Board of Trade and Lloyds' surveyors, as well as by surveyors employed by the plaintiffs; and all being found in good order and condition, she was, in April, 1875, sent to St. Thomas's, and from the time of her arrival there until the happening of the accident which has given rise to this action, she was employed in repairing telegraphic cables, for which she was supplied with all proper materials. In the intervals of her actual employment the *Investigator* and her machinery were from time to time examined, and, when necessary, repaired in the factory of the Royal Mail Company at St. Thomas's, and throughout her service her engines worked satisfactorily. It appears from the evidence of the secretary of the plaintiff company that the *Investigator* was in the harbour of St. Thomas, or otherwise out of active employment, for, upon an average, about 140 days in the year.

On the 6th of May, 1878, upon the expiration of a policy which had previously been in force, the plaintiffs effected the policy on which the present action is brought. The insurance covered the period from the 6th of May, 1878, to the 5th of May, 1879, and was for the sum of 5,000*l.*, upon, first, the hull, stores, &c., valued at 7,500*l.*; secondly, the paying-out and picking-up machinery and cable and stores for picking-up and repairing, valued at 4,000*l.*; and thirdly, the machinery, boilers, &c., of the vessel, valued at 3,500*l.*; average payable on each interest, separately or together; and the perils to which the defendants were made liable, omitting words not material to be now considered, were declared to be adventures and perils of the seas, "and all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the aforesaid subject-matter of this insurance or any part thereof."

The following are the circumstances under which the accident occurred: On the 8th of January, 1879, the *Investigator* was lying in the port of St. Thomas, and her master having received orders to repair a break in the telegraphic cable between St. Thomas and San Juan, Porto Rico, weighed anchor about half-past ten on the morning of that day, and set on easy. After making some fifteen revolutions, her engines were stopped to allow of the vessel's head canting round, and within a few seconds of their being so stopped, the port boiler burst, gutting the middle of the ship, and blowing up her decks. A considerable portion of the boiler fell overboard, carrying away the port bulwarks and doing much other

damage to the ship, to the particulars of which damage it is not necessary now to allude. By great exertions on the part of her crew, aided by the boats and crews of other vessels lying in the port, the *Investigator* was got into shoal water; she did not sink, but the wreck of her hull ultimately sold for 250*l.*, and the present action has been brought to recover the loss sustained by the plaintiffs in respect of her hull and stores.

[His Lordship, after reviewing some of the suggestions made as to the cause of the accident, continued:] It is now admitted by both parties that the boiler burst at the place indicated by Mr. Rae (a witness), and that the bursting was due to the reduction of the thickness of the shell at that portion of the boiler.

The fact being thus far admitted, it is contended on the part of the plaintiffs that, upon the further evidence to which I shall have occasion presently to advert, the reduction of the thickness of the shell of the boiler was due to the negligence of those who had charge of it, and that they (the plaintiffs) are consequently entitled to recover the amount of loss sustained by them; while the defendants, on the other hand, insist that the bursting of the boiler, from whatever cause arising, was not a peril insured against or covered by the policy; and, further, that the reduction of the thickness of the shell was not, in fact, due to negligence on the part of those whose duty it was to keep it in proper repair and good working order, but arose from wear and tear in the ordinary service of the vessel. I will first consider the general question, whether the loss of a steam-vessel by the explosion of one of its boilers, at a time when the vessel is being propelled by the aid of her steam machinery, is a loss covered by a policy in terms the same as or similar to those which we have now under consideration. It has occasioned me some surprise to find that the question has not, ere this, been raised in such a form as to have received a judicial decision in an English Court; such, however, appears to be the case, for, though I have had the assistance of counsel of great experience in all matters connected with marine insurance, they have been unable to refer me to any case in which the question has arisen, nor do I gather that any custom or practice has grown up either of recognising or repudiating the view that such a loss is covered by the insurance. The arguments addressed to me have consequently been, for the most part, limited to comments upon authorities in which general principles, now well recognised, have been enunciated and applied to the circumstances of particular cases. I have carefully considered these authorities, and in the absence of any directly bearing upon the point, I have come to the conclusion that the test which I ought to apply in the present case, in order to give full effect to the language of the policy, defining and limiting the perils insured against, is to enquire whether the bursting of a boiler is a peril incident to the navigation of a steam-vessel; and in my opinion it is. There is no question but that injury to the masts, spars or sails of a vessel arising not in the ordinary service of the vessel, but from the action of a wind of extraordinary violence, would, unless coming within exceptions, be covered by the policy; and so also would damage to the upper works of the vessel occasioned by the falling, under the like circumstances, of the masts or spars. But the masts and spars and the sails of a sailing-vessel are but the machinery by which the motive power of the wind is brought to bear upon the vessel; and so, as it appears to me, the engines and boilers of a steam-vessel are the machinery by which the motive power derived from steam is brought to bear upon it and to propel it upon the water. As the masts, in the same case, are liable to injury if subjected to an excessive force of the wind, which excess may be the result of either an extraordinary strength of the wind or a lessening by previous straining of the power of the mast to resist a wind of ordinary strength, so the boilers, in the other case, are liable to injury when subjected to an excessive pressure of steam, whether such excess arises from an actual increase in the pressure of the steam or a reduction in the power of the boiler to resist it. I proceed now to consider the question whether, in the case now under consideration, the reduction of the shell

of the boiler was due to negligence or to ordinary wear and tear. There is a conflict of the evidence upon which this question must be decided. [His Lordship then proceeded to review the evidence on this point, and continued:] Being, then, of opinion that the bursting of the boiler was a peril insured against by the policy, and having arrived at the conclusion upon a full consideration of the evidence that such bursting was due to the negligence of those who had charge of it, it is my duty to give judgment for the plaintiffs.

The defendants appealed.

Benjamin and *Arbuthnot*, for the defendants.—The contention on behalf of the defendants is, that they are not liable because the explosion which caused the loss was not a peril of the sea insured against by the policy; and, further, even if the terms of the policy did cover such a peril as this, the damage to the vessel was not caused by any peril of the sea, but by the explosion of the boiler, which had become infirm from ordinary wear and tear.

The boiler burst, and it is contended that such an accident is not covered by the specific terms in, nor by the general clause at the end of the policy, for the general words can only refer to perils *ejusdem generis* with those particularly specified. The American cases only shew that possibly by American law such an accident as this might be covered by this policy. *The Citizen Insurance Company of Missouri* v. *Glasgow* (1); *Perrin* v. *The Protector Insurance Company* (2). But following the English decisions it would seem that even if an explosion such as this may be a peril of the sea, it is not so if it occur in the ordinary course of the navigation of the ship without any external cause resulting in, or contributing to, the explosion. The general principle is, that losses must, in order to come within the general clause, be *ejusdem generis* with those specially enumerated, and that they must be occasioned by the same causes (3). The immediate cause of the loss must be a peril insured against, and that was not the case here—*Jackson* v. *The Union Marine Insurance Company* (4). Meat on board a ship delayed by tempest became putrid and had to be thrown overboard, and it was held not to be lost by perils of the sea, and that is analogous to the present case—*Taylor* v. *Dunbar* (5). *Cullen* v. *Butler* (6) is to be distinguished, as there the ship was insured against loss by enemies.

Secondly, if the boiler burst from age and wear and tear, then, even though the policy would cover a loss by explosion, still the underwriters are not liable. There is no warranty of seaworthiness in a time policy, so that if the loss occur through perils insured against, the underwriters will be liable even though the vessel were unseaworthy; but the case is different if the loss occur through some inherent defect which causes her to perish without any external violence—*Thompson* v. *Hopper* (7); *Fawcus* v. *Sarsfield* (8) and *Dudgeon* v. *Pembroke* (9). Loss by wear and tear is not within the policy, nor is loss resulting from the negligence of the master and crew.

Sadler v. *Dixon* (10); *Paterson* v. *Harris* (11); *Anderson* v. *Morice* (12); *Boehm* v. *Combe* (13) and *Millaudon* v. *The New Orleans Insurance Company* (14), were also cited.

Cohen and *Mathew*, for the respondents.—The clause in the policy is in the ordinary form found in policies of insurance on steamers, so that it may well be supposed that a loss from explosion was contemplated as being a cause of loss for which the insurers might become liable to recoup the assured. There is no reason

(1) 9 Mod. 406.
(2) 11 Ohio, 147.
(3) Arnould on *Insurnce* (ed. 5), vol. ii. p. 776.
(4) 42 Law J. Rep. C.P. 284; Law Rep. 8 C.P. 572; (Appeal), 44 Law J. Rep. C.P. 27; Law Rep. 10 C.P. 125.
(5) 38 Law J. Rep. C.P. 178; Law Rep. 4 C.P. 206.
(6) 5 M. & S. 461.
(7) 6 E. & B. 172; 25 Law J. Rep. Q.B. 240; E. B. & E. 1038; 26 Law J. Rep. Q.B. 18.
(8) 6 E. & B. 192; 25 Law J. Rep. Q.B. 249.
(9) 43 Law J. Rep. Q.B. 220; Law Rep. 9 Q.B. 581; ibid. 1 Q.B. D. 96; 46 Law J. Rep. Q.B. 409; Law Rep. 2 App. Cas. 284.
(10) 8 Mee. & W. 895.
(11) 1 B. & S. 336.
(12) 44 Law J. Rep. C.P. 10, 341; Law Rep 10 C.P. 58, 609.
(13) 2 M. & S. 172.
(14) 4 Lousiana Annual Rep. 15.

why the meaning of the words used in the policy should be restricted, for this is a policy on a specific ship, and it is well-established law that on such a policy a shipowner may, as the phrase is, go to sleep.

The clause in this policy must be held to include and cover all perils relating to the navigation of the vessel; and, further, any peril which may be the result of improper navigation, so that in the case of a steamer it covers improper management of the machinery, the engines and the boilers; the clause in question is not confined to perils which are the result of external forces—the result of the violence of the sea or the elements—but it includes all dangers, without liability to which the navigation of the vessel, being such a vessel as it is, cannot be carried on.

"Perils of the sea," says Emerigon (15), "properly termed, are those which proceed from rocks and tempests. But in the matter of insurance, as will be seen presently, by perils of the sea is understood all losses and damages which happen at sea by a fortuitous event; and even sometimes under the same denomination are understood accidents which happen in the course of the voyage through the misconduct of the captain and mariners." A clause relating to perils of the sea has not to do only with perils the result of the violence of the elements, for damage by a collision is within such a clause—*Davidson* v. *Burnand* (16). *Sadler* v. *Dixon* (10) established that underwriters are liable for negligent and even wilful throwing overboard ballast so as to cause the ship to be lost. In *Busk* v. *The Royal Exchange Insurance Company* (17) the underwriters were held liable for damage caused by fire occasioned by the negligence of the crew; and to the same effect is the decision in *Carruthers* v. *Sydebotham* (18). *Good* v. *The London Steamship Association* (19) shews that mismanagement of machinery is included in the improper navigation of a steamer.

(15) *Emerigon*, Meredith's translation, c. xii. s. 1, p. 286.
(16) 38 Law J. Rep. C.P. 73; Law Rep. 4 C.P. 117.
(17) 2 B. & Ald. 73.
(18) 4 M. & S. 77.
(19) Law Rep. 6 C.P. 563.

The passage in *Phillips on Insurance* (20), on which reliance may be placed by the appellants, to the effect that insurers are not liable for accidents occasioned by defects in the thing insured, refers only to goods, as may be seen from the illustration given of hemp.

The general words in this policy will therefore, it is submitted, cover a loss by explosion; and that word may therefore, on the authority of *Phillips* v. *Barber* (21), *Perrin* v. *The Protector Insurance Company* (2) and *Devaux* v. *J'Anson* (22), be considered to be written into the policy. If this be so, then it is contended that there is nothing in the circumstances of this case to take this explosion out of the ordinary rule; if there was negligence, still the appellants are liable—*Sadler* v. *Dixon* (10). This argument is supported by *Dudgeon* v. *Pembroke* (9) and *Pickup* v. *The Thames and Mersey Marine Insurance Company* (23), the result of which cases is that there is nothing in the circumstances of this explosion to exonerate the underwriters.

Arbuthnot, in reply.

Cur. adv. vult.

SELBORNE, L.C. (on Nov. 15).—I will now read my judgment in this case. The Lord Chief Justice of England, who is unable to be present, concurs in the conclusion to which we have come, although he has not had an opportunity of seeing the reasons on which I base my judgment.

The question in this case is, whether a loss by the explosion of a steam boiler was or was not covered by a time policy on the steamship *Investigator*, dated the 6th of May, 1878. The insurance was for twelve months from that date, "in port and at sea, at all times and in all services, situations and circumstances." The risks to which the appellants, the insurers, were made liable were described in the ordinary form of "the seas, men-of-war, fire, enemies," &c., "and of all other perils, losses and misfortunes that have or shall

(20) C. xiii. s. 5, par. 1089.
(21) 5 B. & Ald. 161.
(22) 5 Bing. N.C. 519.
(23) 47 Law J. Rep. Q.B. 749; Law Rep. 3 Q.B. D. 594.

come to the hurt, detriment and damage of the aforesaid subject-matter of this insurance, or any part thereof."

The ship, when about to leave the port of St. Thomas, on the 8th of January, 1879, was reduced to a wreck, though not submerged or filled with water, by a sudden explosion of her boiler in ordinary weather. The underwriters disputed their liability on two grounds—first, that such an explosion was not a peril insured against within the true meaning of the policy; and, secondly, that, assuming it to be so, this particular explosion happened because the boiler was worn out, and that they were not liable for any loss due to that cause. Both these grounds of defence were overruled at the trial, without a jury, before Lord Justice Baggallay, and judgment was given for the plaintiffs, the assured. The present appeal is from that judgment. Assuming —and for the purpose of this decision I think it right to assume—that such an explosion is not, properly speaking, a peril of the seas, and that it cannot be brought within any of the other particular perils enumerated in the policy, the main question is, whether it is within the general words with which the specification of the risks insured against concludes —"and all other perils, losses and misfortunes." The principle of construction applicable to those general words in policies of this description was explained by Lord Ellenborough in the case of *Cullen* v. *Butler* (6), cited during the argument. "As they must," he said, "be considered as introduced into the policy in furtherance of the objects of marine insurance, and may have the effect of extending a reasonable indemnity to many cases not distinctly covered by the special words, they are entitled to be considered as material and operative words, and to have the due effect assigned to them in the construction of this instrument, and which will be done by allowing them to comprehend and cover other cases of marine damage of the like kind with those which are enumerated, and occasioned by similar causes." He proceeds to refer to an observation of Emerigon to the effect that phrases more or less similar had been introduced into various continental forms of policies to prevent doubts and disputes as to the extent of the application of what that writer describes as "the general rule that assurers answer for all loss and damages that happen on the sea." It is unnecessary to consider whether such a description of "the general rule" is not too large, because the canon of construction laid down by Lord Ellenborough, if reasonably understood, is sufficient for the solution of the present question. In *Devaux* v. *J'Anson* (22) similar general words were held by Chief Justice Tindal and the other Judges of the Court of Common Pleas to cover damages to a ship occasioned neither by wind nor water, but by the strain on her timbers of cables employed by workmen to remove her from her berth in a dry dock in which she had been placed for necessary repairs. I think it is at least as proper to hold that in the case of a steamship they cover damages occasioned by the explosion of the boiler, in which the motive power necessary to her navigation is generated. What the winds are to a sailing vessel, steam is to a steamer; and it is as reasonable that marine insurers should bear the risk incident to navigation by that kind of power, whether from excess of pressure on a boiler or from defects of safety valves, or from neglect or mismanagement making that dangerous which otherwise would not be so, as that they should bear loss occasioned by excessive pressure of winds and defects or mismanagement of a ship's sails or tackle. I agree, therefore, on this point with the judgment of Lord Justice Baggallay and with the decision of the Supreme Court of Ohio to which that learned Judge referred.

Upon the second point the only material facts appear to be that either through the access of bilge water without, or the accumulation of "scale" within the boiler, certain parts of the lower plate of the boiler had become worn in an unusual manner and to an extreme degree of thinness; that this was the cause of the inability of the boiler to resist a degree of steam pressure not otherwise extraordinary or improper; and that this unusual wearing away of the plate might have been prevented by proper care. It is cer-

tain that when the policy was effected this defective condition of the boiler, in whatever degree it may then have existed, was unknown to the assured. The defect was not, until several months after the date of the policy, sufficient to prevent the boiler from doing its usual work, though, being progressive, it eventually led to the explosion. These facts cannot, in my judgment, amount to more than what was assumed by the House of Lords in *Dudgeon* v. *Pembroke* (9), namely, that the ship was unseaworthy, and that such unseaworthiness, unknown at the date of the policy to the assured, was the *causa sine qua non* of the loss. That was a case on a time policy, like the present, and the House of Lords decided that the assured, on those assumptions, were entitled to recover. That decision binds us, so far as negligence on the part of those who ought to have examined and attended to the state of the boiler may be an element in the present case. The same authority, as well as *Sadler* v. *Dixon* (10), shews that it is immaterial. The appeal must be dismissed with costs.

BRETT, L.J.—This case has, as far as I am concerned, been argued substantially twice over; and I would add that it has been to me a case of considerable difficulty. In the result, however, I find myself able to agree with the conclusion to which the Lord Chancellor and the Lord Chief Justice of England have come.

The first question is whether, assuming that the loss of this steamer was caused by an explosion which was so nearly the proximate cause of the damage suffered and sued on as to bring it within the rules applicable to marine insurance, damage caused by an explosion by steam is within the mischief insured against in an ordinary policy of marine insurance. This is a question as to the construction of an English policy. It is said on the one hand that such a loss is not within the perils insured against, and for the reason that no peril is insured against except those perils which arise from external causes; it is said on the other side that an English policy covers every loss at sea, including those losses which occur from fortuitous accident and even by the negligence of the crew. It appears to me that the one contention is too narrow and the other too large. It has frequently been laid down that an English policy must be construed as every other mercantile document is construed; each phrase must receive its ordinary meaning, and where there are first a number of particular terms, and at the end a general phrase, that general phrase must be considered and construed with reference to the preceding particular terms, and not as though it stood alone.

The argument as to external perils being alone included is, as it seems to me, fallacious, and founded on a suggested incorrect interpretation of the first term in the list of perils—that is, "perils of the sea." It appears that some Judges have used phrases which would tend to the conclusion that these perils must be the result of external forces—that is, of the wind or the waves; but I would say, with deference, that the word "external" in this connection is surplusage and unnecessary. What the meaning of "perils of the seas" in that part of a policy is has been settled by judicial decisions, and these words can therefore be determined by reference to authority only. They have been held to include damage done by the sea and by the violence of the elements only, so that, with respect to the argument to which I have adverted, we are not free to say that this peril is within that term of the policy. But that is not the only term in the policy, for into the old common form of policy new terms have been from time to time introduced, and on every occasion on which a new term was introduced it may well be that the meaning of the general clause at the end has been thereby modified and altered; for it has been decided that the general phrase at the end must be held to include all perils not of the same kind as, but of a like kind to, those named in the particular clauses and by special terms. I agree that it is not possible to include under the general phrase at the end of the policy every loss caused by fortuitous accident, for I think that Lord Ellenborough decided that in *Cullen* v. *Butler* (6). In deciding cases

on principles of law, one must to a certain extent exercise the imagination, as it is often necessary to consider cases which may happen in the future, if they have not already occurred. It is possible to imagine a case of insurance on goods, as casks of spirits, which, by the negligence of the crew, or by an accident on board ship, are staved in and the spirits lost. There is nothing in an ordinary policy to cover such a loss. Or, again, suppose that a ship sails from the West Indies with a perishable cargo, that some violent disease lays low the captain and the whole of the crew, that the ship is delayed, that the articles all perish. There is nothing in an ordinary policy to cover such a loss, so that I cannot agree with the large definition contended for. It was during argument suggested by Lord Chief Justice Cockburn that the policy might cover those things, without exposure to which navigation cannot take place. I do not, after full consideration, feel able to agree with that. Lord Ellenborough, in *Cullen* v. *Butler* (6), limited the meaning of the large words which are used in a policy of insurance; and Lord Tenterden did the same, and limited the general phrase to perils not of the same, but of like kind to those enumerated. The passage cited from Emerigon is, I have no doubt, applicable to foreign policies, but it is not applicable to ordinary English policies; it is, however, valuable as shewing that a general phrase should have as large a construction as is reasonable. If, however, this policy only contained the phrase "perils of the seas," I do not think that the general phrase at the end of the policy would cover the loss, the subject of this suit for it would not have been a loss of the like kind; but the policy contains the term "fire." Now, I find it difficult to suppose that steam is so far like fire as to bring any accident caused by steam within the general phrase "fire," but I think it may be. It is true that an explosion by gas often ends in fire, and that fire under the deck of a ship often leads to an explosion, so that a loss which is the result of an explosion caused by steam may be said to be sufficiently like to a loss caused by fire to enable us to say that an explosion caused by steam is within the general phrase at the end of the policy, if the loss so caused is one which would otherwise be amenable to the laws of insurance.

It is, however, then argued that even if that be assumed, yet that this loss is not within the policy, inasmuch as the loss was caused by the infirmity of the boiler, and that that was an infirmity in part of the subject-matter insured. One must consider what is the loss for which the assured claim to recover. They do not claim for the loss of the boiler itself, for if they did so, they could only recover the difference between the value of the boiler immediately before the explosion and the value of the boiler immediately after, and that would amount to nothing. The claim made is a claim to recover for the damage caused to the ship by the explosion; now the loss was caused not only by the infirmity of the boiler, for that alone would not have caused the explosion, nor by the pressure of steam alone, for neither would this by itself have caused the explosion; but the damage was caused by the explosion itself, so that if explosion is a peril insured against by the terms of or the construction put on this policy, then the loss claimed for is a loss insured against, for the explosion was the *causa proxima* of the loss. It is then urged on behalf of the appellants that the loss claimed for was caused by the infirmity of the boiler, and that this infirmity was caused by the negligence of the crew. That argument contains the proposition that, although the proximate cause of the loss was by a peril insured against, yet if that proximate cause was the result of negligence or unseaworthiness, the underwriters have a good defence. Now the question as to negligence has long since been settled, and the question of unseaworthiness was expressly considered by Mr. Justice Blackburn, at the trial of *Dudgeon* v. *Pembroke* (9). He left certain questions to the jury which he thought would, if answered as he expected they would be, distinctly raise for decision this question of unseaworthiness. The questions were not so answered, but the case was argued as though they had been, and the House of Lords decided that the pro-

position that there is an implied warranty of seaworthiness in a time policy was untenable; so that, although the proximate cause of the loss may be the result of the unseaworthiness of the subject-matter insured, yet that fact cannot be, since *Dudgeon* v. *Pembroke* (9), set up as answer to a claim by the assured.

But it is further said that this loss was the result of mere wear and tear. I doubt whether we can consider this argument, for there is the authority of *Dudgeon* v. *Pembroke* (9) against this argument also; but the evidence before us shews that the damage was not the result of mere wear and tear. The question of the life of, and the age of, a boiler, must, in each case, be decided on the particular facts of the use of and the material of each particular boiler. The condition of this boiler was not the result of mere wear and tear, and the accident resulting from the infirmity was hastened by negligence or inadvertent want of attention. I do not think this question arises on the facts and evidence, and if it did, I doubt whether it could afford any defence to the action. For these reasons I agree that the appeal must be dismissed.

Judgment affirmed.

Solicitors—Freshfields & Williams, for appellants; Waltons, Bubb & Waltons, for respondents.

[IN THE HOUSE OF LORDS.]

1880. June 3, 4, 7, 8. } WALLINGFORD *v.* THE MUTUAL SOCIETY.

Practice—Judicature Acts—Order XIV. rule 1 *a, Order LIV. rule* 6, *Order LVII. rule* 6—*Mortgage—Lottery—Penalty.*

The time for appealing from an order of a Judge in chambers expired in the long vacation, during which no Divisional Court was sitting:—Held, *that the time ought to have been enlarged almost as of course, though execution had been levied under the order.*

The defendant applied to a Judge for an enlargement of time, which was refused. He then appealed against the order to a Divisional Court. By consent the appeal was treated as being also an appeal from the refusal to enlarge the time. The Divisional Court dismissed the appeal on the merits. An appeal to the Court of Appeal was dismissed, on the ground that there was no appeal from the order refusing to enlarge the time:—Held, *that the Court of Appeal were bound to treat the question of time as open, it having been treated as open in the Court below.*

In an action by a mortgagee in possession against a mortgagor for the mortgage debt, the writ was specially indorsed for a certain sum. Upon an affidavit that there was no defence, notwithstanding counter affidavits alleging questions of account, an order was made that unless the defendant paid 5,000*l. into Court by a given day, the plaintiff might sign judgment. Judgment was signed and execution levied under the order:*—Held, *that the defendant ought to have been allowed to defend, for the purpose of taking an account, without any payment into Court, and that judgment ought to have been signed as security only for what should be found due on the account, without power to issue execution except by leave of the Court, the defendant being required as a condition to consent to the immediate taking of such account.*

A provision in a mortgage, making the whole debt due on failure to pay one instalment, is not in the nature of a penalty, but may be enforced.

A society formed for making advances to its members, which selects by lot the members who are to receive advances, is not illegal under the Lottery Acts.

The defendants in this case appealed from a decision of the Court of Appeal affirming one of the Common Pleas Division.

The Mutual Society was an unlimited company registered under the Companies Acts, 1862 and 1867, the object of which was to receive subscriptions from its members and make advances to them on securities, and ultimately to divide the profits. "Certificates of appropriation" were allotted to members upon subscribing to the society. Each member might nominate a life on which a certificate was to be held, and if he did so would be entitled to receive bonuses on the tontine principle. "Appropriations" or advances were to be

made to members "according to the number of certificates held by the member successful in obtaining the appropriation. Some of the appropriations were allotted by drawing free of premium or interest, the rest to those members who tendered the highest premium. All appropriations were to be repaid by instalments in twenty years. The defendant became a member of the society, took up appropriation certificates and obtained advances upon securities.

In August, 1878, the society commenced an action for money alleged to be due from the defendant for accumulations of loans, interest and subscriptions. The writ was specially indorsed with the particulars of the amount claimed, 12,703*l.* 10*s.* After appearance by the defendant, the plaintiffs, under Order XIV. rule 1 *a*, took out a summons for leave to sign judgment upon an affidavit that there was no defence to the action. The defendant alleged generally fraud and misrepresentation by which he had been induced to enter the society, but stated no facts in support of this charge, which he subsequently withdrew. He also alleged that there were questions of account in dispute, and counter-claims, and that he had a good defence.

The case came before a Master, who ordered that the defendant should have leave to defend on paying into Court or giving security for 11,703*l.* 10*s.* within ten days. This order was varied by Manisty, J., sitting in chambers, who gave leave to defend on payment of 5,000*l.* into Court within one month. The money was not paid within the month, and the plaintiffs signed judgment, and on the 24th of October, 1878, levied execution for 7,091*l.* 14*s.* 5*d.*, the amount they claimed to be due after giving credit for the securities held by them.

On the 26th of October the defendant took out a summons under Order LVII. rule 6, for an enlargement of the time for appealing from the order of Manisty, J., the time limited by Order LIV. rule 6, namely, eight days, having long since expired. An affidavit filed in support of the summons stated that the appeal had not been made in time because there had been no Divisional Court sitting during the long vacation. Field, J., dismissed the summons with costs.

On the 2nd of November the defendant moved in the Common Pleas Division for a reversal of the order of Manisty, J., on the ground that there was a good defence on the merits. The motion was treated by consent as being also an appeal from the decision of Field, J., refusing an extension of time. The motion was refused on the merits.

An appeal to the Court of Appeal was dismissed, on the ground that there was no appeal from the decision of Field, J., and consequently that the appellant was not in time; though the Court expressed the opinion that the appellant had a good case on the merits.

This appeal was then brought.

Wills and *Hadley* (*Thrupp* and *Dyne* with them), for the appellant, contended that the Court of Appeal had, under the circumstances, the right to review the decision of Field, J., and ought to have enlarged the time. They also contended that the society was illegal under the Lottery Acts, and had no power to sue the appellant on his covenant; and that, the whole amount of the advances having been claimed upon default in payment of a part, the society was suing for a penalty which could not be enforced.

The following cases were cited: *Crom* v. *Samuel* (1); *Fox* v. *Wallis* (2); *Burke* v. *Rooney* (3); *Gibbons* v. *The London Financial Association* (4); *Bell* v. *The North Staffordshire Railway Company* (5); *Runtz* v. *Sheffield* (6); *Stirling* v. *Du Barry* (7); *Ex parte Alston; in re Holland* (8); *Fisher* v. *Bridges* (9); and *Henderson* v. *Lacon* (10).

(1) 46 Law J. Rep. C.P. 1; Law Rep. 2 C.P. D. 21.
(2) Law Rep. 2 C.P. D. 45.
(3) 48 Law J. Rep. C.P. 601; Law Rep. 4 C.P. D. 226.
(4) 48 Law J. Rep. C.P. 514; Law Rep. 4 C.P. D. 263.
(5) 48 Law J. Rep. Q.B. 513; Law Rep. 4 Q.B. D. 205.
(6) 48 Law J. Rep. Exch. 385; Law Rep. 4 Ex. D. 150.
(7) Law Rep. 5 Q.B. D. 65.
(8) Law Rep. 4 Chanc. 168.
(9) 3 E. & B. 642; 23 Law J. Rep. Q.B. 276.
(10) Law Rep. 5 Eq. 249.

J. Brown and *R. Brown*, for the respondents, contended that the provision making the whole debt due on failure to pay an instalment was not of the nature of a penalty—*Bonafous* v. *Rybot* (11); *Gowlett* v. *Hanforth* (12); *James* v. *Thomas* (13); *Thompson* v. *Hudson* (14). They also cited *Matterson* v. *Elderfield* (15); and *Smeeton* v. *Collier* (16).

THE LORD CHANCELLOR (LORD SELBORNE).—This is a very unfortunate case, the appeal to your Lordships being the fourth proceeding which has taken place by way of appeal or rehearing from an order made by Master Francis in chambers, on the 27th of August, 1878, without reckoning the application for time to Mr. Justice Field. The order of Mr. Justice Manisty, maintaining that of Master Francis, with the reduction only of the amount which the Master had ordered to be paid into Court, was affirmed by a Divisional Court, and also, although not on the merits, by the Court of Appeal. The question being in some sense one of discretion under the 14th General Order governing the practice of the High Court, your Lordships would be very unwilling to disturb those orders, unless for strong and substantial reasons. But the question which arises in this case, as to the principles on which the 14th General Order ought to be applied, seems to me to be one of great importance to the proper administration of justice, and the House is relieved from the difficulty of overruling two concurrent judgments of the Divisional Court and the Court of Appeal, on the merits of the case, by the fact that the Judges from whose decision the present appeal comes to this House were unanimously of opinion that the order of Mr. Justice Manisty ought not to have been made, although they thought themselves, for reasons with which I am unable to agree, precluded from giving effect to their own view of the original merits of the case.

(11) 3 Burr. 1370.
(12) 2 W. Black. 958.
(13) 5 B. & Ad. 40; 2 Law J. Rep. K.B. 207.
(14) 38 Law J. Rep Chanc. 431; Law Rep. 4 H.L. 1.
(15) Law Rep. 4 Chanc. 207.
(16) 1 Exch. Rep. 457; 17 Law J. Rep. Exch. 57.

Upon the question of time, on which the judgment of the Court of Appeal was really founded, I, for my own part, feel no difficulty. It stands thus: By the General Orders eight days are given to appeal from an order of the description of that which was made by Mr. Justice Manisty to a Divisional Court. That order was made in the long vacation, and it was not possible that there should be any appeal to a Divisional Court until the 2nd of November, long after the lapse of the eight days. To act, therefore, upon the General Order as to the limit of time for appealing was impossible. Under those circumstances it appears to me that it ought to have been considered very nearly, if not quite, of course, that the time for appealing, which had expired before a Divisional Court could possibly be assembled, should, upon a proper application, be enlarged.

I do not mean to say that a party might not have so conducted himself, in the interval, as to create a personal estoppel against him when applying for such an enlargement of time. But I am of opinion that the interval which actually elapsed between the date of Mr. Justice Manisty's order, made on the 6th of September, 1878, and the application made to Mr. Justice Field late in October, was not in itself a sufficient reason why the time should not have been enlarged. No Divisional Court had sat, or could possibly have sat, during that interval. It was the long vacation, and in the long vacation we all know that professional gentlemen, as well as others, are not expected to press forward all business in the manner which at other times may be necessary. It does not appear to me that any conduct is shewn or even suggested to have taken place on the appellant's part in the interval which, as between himself and the respondents, should be a reason for refusing, under these circumstances, to grant the enlargement of time. It is true that an execution had been issued; and in doing justice between these parties, the fact that nothing had been done (perhaps nothing could have been done) to stop that execution, must be taken into account in the order to be made; and we must deal with the execution as

well as we can. But I fail to see that, from the mere fact of that execution having been issued, any prejudice need, or will, arise to the respondents, if we treat the time, as I think your Lordships ought to treat it now, as having been enlarged.

Taking that view, the ground upon which the Court of Appeal declined to grant a remedy to the appellant is displaced, and I think that the question must now be treated by your Lordships, and ought to have been treated by the Court of Appeal, as completely open; because it is admitted, in the printed case of the respondents themselves, that what took place at the hearing before the Divisional Court was this: it was competent at that time for the appellant to have appealed, by motion in the regular form, from the order of Mr. Justice Field refusing to extend the time. The appellant had not, in point of form, done so; he had, in point of form, appealed from Mr. Justice Manisty's order only, and to that appeal it was an objection (which, if insisted upon, would only have caused expense and delay) that his time for appealing was past. In that state of things, upon the objection being taken before the Divisional Court, that Court suggested that, to prevent unnecessary delay and circuity, because the slip was not an irremediable one, the respondents should consent to treat the notice of motion then before the Divisional Court as being amended so as to be an appeal from the order of Mr. Justice Field.

Now, even assuming, as I think your Lordships are bound to assume, after what has been stated regarding the impression upon the mind of the respondents' junior counsel, that the effect of this was not understood by him at the time exactly as I think your Lordships ought to understand it, still, beyond all dispute, the question of time was open, and was brought before the Divisional Court by reason of that consent. Being open before the Divisional Court by reason of that consent, it was also, in my judgment, open before the Court of Appeal, when the appeal was brought from the order made under those circumstances; and it is also, for the same reason, now open before your Lordships. I cannot agree that it is consistent with any reasonable interpretation of such a consent to read it as if it meant that the appeal motion from Mr. Justice Manisty's order was abandoned, or was to be postponed until some later date after a new notice should have been given, and that the only question before the Divisional Court had come to be the question of time. In my view, the effect of it was, that both questions were, by means of that consent, before the Divisional Court, and the Divisional Court did deal with the question upon the merits; and, in my judgment, the Court of Appeal ought to have dealt both with the question of time and with the question upon the merits.

Well, that brings us to the question upon the merits of the case; and the first point upon which I wish to make a few observations is that which alone is of really great public importance, namely, the principle upon which Order XIV. ought to be applied. It is a very valuable and important part of the new procedure introduced under the Judicature Act, that the means should exist of coming by a short road to a final judgment, when there is no real *bona fide* defence to an action. But it is of at least equal importance that parties should not in any such way, by a summary proceeding in chambers, be shut out from their defence when they ought to be admitted to defend. And I cannot but think that the facts of this case shew (though I have not the least doubt that the respondents' advisers acted in perfect good faith) that they made an application for summary judgment under the 14th Order, in a case in which such an application was not proper, and ought not to have been made.

The writ which they issued was indorsed with particulars shewing a claim to a total balance of debt, as then due, of 12,703*l.* 10*s.* upon certain mortgage bonds; the affidavit made in chambers, in support of the application for liberty to sign judgment at once, gave credit, against this, for a sum therein mentioned; and the judgment which they obtained leave to sign was for 11,703*l.* 10*s.*, subject to a condition that, if that money was paid into Court or security given to the

satisfaction of the Master, the present appellant might be let in to defend.

It appears to me that, even upon the face of the mortgage bonds, there were strong reasons against summarily assuming, without going into an account between the parties, that any such sum was due. Affidavits were made by the appellant, contesting, upon grounds to which I will presently advert, the whole debt, and in addition denying, in general terms, that anything was due, and also mentioning certain particular sums or items for which the appellant claimed to have credit, if an account were taken—which account, he said in those affidavits, it was necessary to take; and he added, generally, that there were various questions of account between the parties. Looking at the mortgage deeds and at the affidavits, it appears to me, that the Judge before whom the application in chambers was made ought to have held that on those materials the case was not a proper one for summarily giving judgment for the amount claimed in the action. Nor do I think that, upon those materials, it was possible for him to say—A line is drawn between a certain part of the demand, as to which a defence ought to be allowed, and another part as to which a defence ought not to be allowed, so as to make it right to let judgment be signed for a certain sum, less than the whole demanded, but a defined part of it. When the case was so stated, even upon those first affidavits, the true conclusion (in my judgment) was, that there was an account to be taken as between a mortgagor debtor and creditors who were mortgagees in possession of certain securities, some of which were alleged to have been partly realised, and as to which nothing but an account could shew what the mortgagees ought to give credit for, and what they ought not to give credit for. Therefore, as far as the account was concerned, it would have been right and proper to let in the appellant to defend. I take so strong a view of the case in that light that I think it ought to have been considered very nearly a matter of course, under these circumstances, to let the appellant in to defend, for the purpose of taking that account.

The next question is, Upon what terms? The terms imposed were, either to pay into Court, or to give satisfactory security for, the whole amount in the opinion of the Master, but in the opinion of Mr. Justice Manisty, 5,000*l.*, being somewhat less than half the amount required by the order of the Master.

We are told at the bar that Mr. Justice Manisty reduced the amount upon some kind of estimate, not founded, so far as I can see, upon any affidavit that was before him, as to what might possibly be the value of the securities realised or unrealised. I think that was an unsatisfactory mode of dealing with a case of this nature. I cannot think that either to order payment into Court or to require further security was, *prima facie* at all events, a proper or a reasonable condition on which to allow a party the ordinary right of defending to the extent of ascertaining what was justly due from him, when you bear these two things in mind: in the first place, that if he should be unable to pay this considerable sum of money, or to give this further security to the satisfaction of the Master, he would be totally shut out, according to the order which was made, even from the opportunity of reducing that large total amount; and secondly, that the case was one of security from the beginning—a case in which the respondents had taken the security upon which they were originally satisfied to enter into the transaction, consisting partly of certain real estate and partly of certain Spanish bonds, and also of the interest of the appellant in their own and another company called the Trust Fund Company, represented by certain certificates and other rights, which in truth represented the whole value of the loan for which the security was given. Nothing in the shape of money found its way into the debtor's hand. The whole transaction had for its object the creation of those interests in the respondents' society and in the Trust Fund Company, all which, whatever their value might be, were included in the mortgage, together with further real and other securities.

In a case of that kind, between mortgagor and mortgagee, it does appear to me that very special reasons indeed were

necessary to justify an order imposing, as a condition upon what is *prima facie* every subject's right (the being let in to defend), the obligation either to pay a large sum of money into Court, or to give farther security.

For those reasons I think that the order of Mr. Justice Manisty was wrong, and that the true course would have been to do what was formerly done by the Court of Chancery in most cases, when an application was made to stay an action at law in order that an account should be taken in equity, namely, to allow judgment to be signed, for the sole purpose of standing as an additional security for any amount which might be found due on taking the account, without power to issue execution otherwise than by the leave of the Court, and that this should have been done on the terms of the plaintiffs consenting to an account being at once taken; and, in substance, that is the order which I should advise your Lordships now to make for the purpose of doing justice between the parties in this case.

It may be right, since that has been fully argued, to express an opinion upon the point, whether the appellant has shewn that in this case the mortgage bond ought to be regarded as making the total sum mentioned payable merely by way of penalty, to secure the regular payment of the instalments, so that the debt ought to be regarded as still payable by those instalments only, even after default had been made in the payment of a particular instalment. Your Lordships will not, I believe, think it necessary to make any declaration upon the face of the order on that point; but, for my own part, I feel bound to say that the appellant has not succeeded in satisfying my mind that it would be right for the House to declare that the account is to be taken on any such footing. The real matter seems to stand thus: These mortgage bonds were given to secure the 6,000*l.*, which sum was treated as advanced, although money did not pass, and also the premiums, which would become due by instalments, according to the rules of the society, and the payment of which under those rules was liable to be accelerated if any of the instalments were not punctually paid. I cannot think that such an acceleration of payments has anything in common with a penalty. It was a contract for certain payments which were *debita in præsenti*, although *solvenda in futuro;* and, being such, it is consistent both with principle and with authority to hold that if the party who ought to have paid them, or any of them, at the proper time failed to do so, the default was his own, and the time might lawfully be accelerated for the other payments, which were originally deferred. I think, therefore, that it would not be right for your Lordships in your order to give effect to that contention on the part of the appellant, but that the account must go at large upon the securities as they stand.

There were two other contentions, going to the whole demand: one, that this was a transaction within the Lottery Acts, and the other that it was a fraud.

With regard to the Lottery Acts, the learned junior counsel for the appellant referred your Lordships to the terms of the Act on which he principally relied. One of those Acts plainly, on the face of its recitals (the enacting part not departing from those recitals), had reference to gambling transactions only; and in my judgment this was not a gambling transaction within the meaning of that Act. The other had reference to persons who kept lottery offices, at which the public were invited to pay for lottery tickets; and that Act could have no application to this case. No case, therefore, in my judgment, was made worthy of a moment's consideration, in support of the contention that these were illegal transactions under the Lottery Acts.

With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice. And here I find nothing but perfectly general and vague allegations of fraud. No single material fact is condescended upon, in a manner which would enable any Court to understand what it was that was alleged to be fraudulent. These allegations, I

think, must be entirely disregarded; and the conclusion is, that it is only for the purpose of taking the account that any defence ought to be admitted in this case.

I am not sure that it is necessary to say anything more. The parties have been informed of the form and nature of the order which your Lordships think it would be right to make for the purpose of doing justice in this case; and, subject to the questions, which your Lordships will have decided, whether any relief at all should be given to the appellant, and whether an account should be directed or not, they have agreed to certain terms, which I think are perfectly reasonable, according to which, in the account to be directed, credit is to be given for a certain sum as the value of the real security not yet realised; and the respondents are to pay into Court the sum which they levied under the execution, namely, 1,300*l.*

With respect to the execution, a few words seem to be necessary. Upon the principle of your Lordships' judgment, if you should agree with what I have said, there ought to have been no execution issued at all, because there ought not to have been a judgment upon which execution could have been issued without the leave of the Court after an account taken. But the thing having been actually done, and having become one of the inextricable elements of the case with which your Lordships have to deal, it does not appear to me, and I think it will not appear to your Lordships, to be necessary for the purposes of justice that that execution should be treated as if it had never taken place. For some purposes it cannot be so treated, because the 1,300*l.* must be paid into Court; and I may also perhaps mention that I have myself been considerably impressed with the sum indorsed for the levy upon the writ of execution as evidence that the original order ought not to have been made, because, according to the general orders of the Court which regulate executions, the sum actually due ought to be indorsed for levy upon the writ; and in one of the affidavits in this case, language is used which seems to me to signify that the indorsement really represented not some voluntary retrocession of the respondents from the extent of their full right, but their own view of what was actually due to them at the time when the judgment was signed for a much larger amount.

In that state of circumstances the execution itself has been an element tending, at least in my view, to assist the appellant's case; and it appears to me that full justice will be done if the execution, now that it has been actually issued, as well as the judgment, should stand as security for what may be found due upon the footing of the account that is to be taken.

I apprehend that being thus, by the order of your Lordships' House, treated as a mere security between these parties, no other Court will act upon that execution for any purpose which might affect the interests of the parties. It will be regarded merely in the same light in which a judgment would formerly have been regarded, when entered up by order of a Court of equity by way of security, until it becomes (if it should ever become) an effective execution upon which a further levy may be made. It cannot in the meantime operate (as I apprehend) anywhere to the appellant's prejudice.

I think it is unnecessary to say more, except to move your Lordships, that the order under appeal be discharged and that an order be made in the terms which have been read to your Lordships, namely —[His Lordship read the proposed form of the order.]

LORD HATHERLEY.—I concur in the views which have just been expressed by my noble and learned friend on the woolsack, and I simply recapitulate the different heads under which those opinions upon the case have been pronounced, because I wish to shew that I have not omitted them from my consideration, but I do not go over them for the purpose of attempting to strengthen the reasons which have already been assigned. I think it of some importance that all of us who take part in this judgment should make it plain and clear that this was not a case to which the rule embodied in Order XIV. should have been applied. I remember much discussion taking place

in the Judicature Commission with reference to the course of procedure, now embodied in the rules which have been passed under the Judicature Acts. There was no doubt that the course which was taken with bills of exchange was that which it has been thought beneficial by the Legislature to carry into effect with regard to other proceedings. When an action has been brought upon a bill of exchange to which there is no real defence, the proceeding may be a short and summary one. But I am not now giving evidence as to what passed in the Judicature Commission. Anybody who looks at the directions which have been given and the rules which have been framed with regard to bills of exchange and promissory notes will see the analogy I refer to. I apprehend that from the first the object of these short methods of procedure has been to prevent unreasonable delay, a delay which was very prejudicial to the creditors, and never, I am afraid—or rather, I am pleased to say—could have been very beneficial to the debtor himself. Simply allowing legal proceedings to take place, in order that delay may be applied to the administration of justice as much as possible, is not an end for which we can conceive the Legislature to have framed the provisions which now exist under the several Judicature Acts. If a man really has no defence, it is better for him, as well as his creditors, and for all the parties concerned, that the matter should be brought to an issue as speedily as possible; and therefore there was a power given in cases in which plaintiffs might think they were entitled to use the power, by which, if it was a matter of account, an account might be immediately obtained upon the filing of a bill, or, if it was a matter in which the debt was clear and distinct, and in which nothing was needed to be said or done to satisfy a Judge that there was no real defence to the action, recourse might be had to an immediate judgment and to an immediate execution.

It is plain, as it appears to me, upon the face of this transaction, when you consider the contract on which the legal proceedings were founded, that this was not such a case as was meant to be provided for by the species of legislation to which I have referred. In the first place, it was an action for an account upon deeds—deeds which have been executed, it is true, and which were not disputed. But it was evident that it was distinctly a matter of account, because you had, upon the face of the proceedings before the Judge, these circumstances: In the first place, the party so applying for a speedy remedy had himself already something to account for, namely, as mortgagee in possession he had to account for what had been done with reference to any money he had received as being such mortgagee; therefore there was, on the face of the matter, an account to be entered into. And, further, the account was in itself of a very special character. It was not one so easily to be ascertained and settled by the short process which has been alluded to, it being an account under this contract or deed, which is very similar to the deeds executed usually with regard to building societies; it was evidently one requiring examination, but I do not say upon the ground of alleged fraud; upon that I shall have to say a very few words presently. There was nothing on that ground which should make a Judge pause; but, on the contrary, there was something, perhaps, that should make him rather more disposed to think that it might be a case in which exactly the very attempt was being made which was intended to be frustrated, namely, an attempt to prolong litigation by assertions made without any fact upon which to found them, and to bring, therefore, before the attention of the Judge matters which were not fit or likely to create any doubt in his mind, at all events, any doubt in favour of the defendant.

But, regard being had, as I said before, to this being a mortgage transaction, and there being a mortgagee in possession, it was clear that it was one of those cases which was never intended to be summarily disposed of, unless it was by granting an account without delay, the deeds themselves being admitted. In this case the party was shut out from entering into any of those questions by the judgment being signed and execution ordered to issue, and being placed also under the

condition of not having the benefit of that order without paying or giving security for a large sum of money in the first instance. I do not think that that was the intention of the Legislature; I speak now of the intent only as it is expressed in the words of the Legislature, and in the words which have been embodied in these rules.

So far, I think the case is sufficiently clear. Upon the other and subordinate points which have been argued before your Lordships, the case being open upon the account, I have nothing to add to what has been said by my noble and learned friend on the woolsack. I have very little to say except to express my acquiescence in that view.

There is the question of fraud upon which I said I should touch in one moment. Now I take it to be as settled as anything well can be, by repeated decisions, that the mere averment of fraud, in general terms, is not sufficient for any practical purpose in the defence of a suit. Fraud may be alleged in the largest and most sweeping terms imaginable. What you have to do is, if it be matter of account, to point out a specific error, and bring evidence of that error, and establish it by that evidence. Nobody can be expected to meet a case, and still less to dispose of a case, summarily upon mere allegations of fraud without any definite character being given to those charges by stating the facts upon which they rest.

Then we come to another point, and that is with reference to the question whether this is or is not a lottery. I will only observe upon that, that if this were held to be a lottery, nearly every one of the societies I have referred to, namely, building societies, and a great many other societies framed upon a similar footing, might be found to fall within the enactments against lotteries. But I apprehend that this is entirely wide and far apart from the statutes which have been referred to. I do not think it necessary to say a word more upon that, farther than to say that I entirely agree in the opinion which has been already pronounced.

The other question which was much argued before your Lordships was the question of penalty. I apprehend that there again the case is quite clear. The illustration of the form adopted in mortgages is a very good illustration, I think, of what the true principle is. The form adopted long since—I do not know whether it is still continued or not—in mortgages, was, when you wished to reserve in reality interest at four per cent., to reserve the interest by contract at five per cent., but to mitigate the severity of that contract in the event of the money being paid by a certain day. It is not a penalty on non-payment (though it seems a fine distinction) when you say that your contract shall be made for interest at five per cent. to be reduced, in the event of your punctual payment, to four per cent., but it is a relaxation of the terms of that original contract, not taking it by way of penalty at all, but a relaxation of your contract which you would merit and purchase by paying at a definite and fixed time. If that definite and fixed time were exceeded, then the original contract revived in all its force. Sometimes mortgage deeds being somewhat unskilfully drawn, interest at four per cent. was reserved by the contract to be raised to five per cent. if there was non-payment at a particular day; and although that brings the case to an extremely fine and nice distinction, it all the better illustrates the rule which has been applied at all times by the Courts, with reference to this question of penalty. If there had been indulgence at any time upon given terms, as long as those terms are observed the indulgence lasts. When those terms are departed from the indulgence at once fails, and the original contract is revived in full force. The basis of the whole transaction, of course, is contract, and in this particular case we have before us a sum of 6,000*l.* in money or money's worth advanced on a given day, and the contract is that at a distant day a much larger sum, exceeding, in fact, or nearly amounting to double the original sum, is to be paid by quarterly instalments, of which there are to be eighty. That contract is not only contained in the deed, but it is contained in the rules of the society under which that

mortgage deed is made as a security for the performance of those rules. There is nothing to prevent that contract being carried out to the full extent, especially now that the Usury Laws are at an end; and no question can possibly, as it seems to me, arise upon a deed framed as this is, as to whether or not it is a case of penalty or contract. The sum is plainly secured by a contract and that contract must be observed.

I do not think there is any other question which has been discussed before us which I need advert to. I will only say that the form of decree which has already been communicated in part, or, I think, almost wholly, to the parties, as being the form of judgment which your Lordships would be invited by my noble and learned friend, the Lord Chancellor, to pronounce, appears to me a correct form of decision to arrive at upon this case, which is somewhat complicated and rather tedious in its nature and character. I think that decree will render ample justice to all the parties concerned.

Lord Blackburn.—I also concur. I agree, without any alteration, to what has been said, that the leave to appeal against Mr. Justice Manisty's order to a Divisional Court ought to have been granted almost as a matter of course. I see no particular circumstances preventing it when it appeared that there was no Divisional Court which actually sat till after the eight days to which the power to appeal is limited. I think also that when it appeared that it was agreed between the parties, there being time enough to appeal to the Divisional Court against Mr. Justice Field's order (which I think was a mistaken one), that that appeal should be taken along with the appeal under Mr. Justice Manisty's order, it ought to have been understood by the Court that the appeals against those two orders were taken together. That does not seem to have been understood, as I think it ought to have been.

Now comes the question, taking that as being so, Was Mr. Justice Manisty's order the correct one? I think that it was wrong on one point, which is the one we shall now set right. On the other points I think it was perfectly right. The order allows that a plaintiff may swear positively that the money is due, and that there is no defence to his action; and when he so swears the defendant has "by affidavit or otherwise to satisfy the Court or a Judge that he has a good defence to the action upon the merits, or disclose such facts as may be deemed sufficient to entitle him to defend." Unless he does so, the Judge may make an order allowing the plaintiff to sign judgment.

Now I think what we have to see here is, what is it that the Judge is to be satisfied of, in order to induce him to refuse to make the order for the plaintiff to sign judgment? If he is satisfied upon the affidavits before him that there really is a defence upon the merits, it is a matter of right, unless there be something very extraordinary (which I can hardly conceive), that the defendant should be able to raise that defence upon the merits, either to the whole or to a part. He may fall far short of satisfying a Judge that there is a defence upon the merits; still he may do so if he discloses such facts as may be deemed sufficient to entitle him to defend.

And that raises another question altogether. There may very well be facts brought before the Judge which satisfy him that it is reasonable, sometimes without any terms and sometimes with terms, that the defendant should be able to raise this question, and fight it if he pleases, although the Judge is by no means satisfied that it does amount to a defence upon the merits. I think that when the affidavits are brought forward to raise that defence they must, if I may use the expression, condescend upon particulars. It is not enough to swear, "I say I owe the man nothing." Doubtless, if it was true that you owed the man nothing, as you swear, that would be a good defence. But that is not enough. You must satisfy the Judge that there is reasonable ground for saying so. So, again, if you swear that there was fraud, that will not do. It is difficult to define it, but you must give such an extent of definite facts pointing to the fraud as to satisfy the Judge that those are facts which

make it reasonable that you should be allowed to raise that defence. And in like manner as to illegality, and every other defence that might be mentioned.

So looking at the affidavits (they are very long and I will not go through them) which were used before Mr. Justice Manisty, I think that in none of those particulars did the appellant satisfy the burden that was cast upon him. He makes general statements of fraud, but nowhere does he condescend upon any particular of fraud, such as in my mind, if I had been in Mr. Justice Manisty's place, would have made me think that it was at all fit that he should be allowed to defend upon that ground. There are long statements resulting in saying that this society was illegal upon various grounds, which I cannot follow at all. One ground, among others, is, because there was a drawing of lots on one occasion, therefore it was illegal as coming under the Lottery Acts. I cannot think that that was a good ground of defence.

There was one point, and only one, which was argued a good deal here. I do not observe that it was argued in the Courts below, but it was argued by Mr. Wills here. He said, taking the form of deed, the 11,000*l.* and odd hundred pounds, should be considered as a penalty to secure the repayment of the different instalments, and not as a debt which upon the non-payment of the instalments should be recovered. I do not think that that is tenable for the reasons which have in fact been assigned before. The object and the nature of the society here and the whole terms of the bargain here, were these: If you choose to borrow the money, you shall name a sum which is to be added to the principal and to be repaid; and as it is the very essence of the society that we should have punctual payments, if you make default in paying the instalments, the whole sum shall become payable at once. Speaking not judicially, but as giving my own opinion, I do not think that a society framed upon a principle of this sort could have gone on anyhow, even if the instalments had been punctually paid, but it is self-evident that unless the instalments were punctually paid the society must have stopped in a very short time indeed. The agreement between the parties was, and it is obvious that what they meant to agree was, that the 6,000*l.* and the 5,000*l.* odd in addition, as the premium, shall be a *debitum in præsenti* payable by instalments if the instalments are punctually paid, but if there be a default in paying them, then all is to be paid at once. That being the contract between the parties, that is not the case of a penal sum. It is not necessary for the House probably to decide that question; but if it were necessary to decide it I should say that it was not a penalty, but an actual sum, like the case of a promissory note payable by instalments, the whole to become due if one of the instalments is not punctually paid.

Passing by this, we come to the ground upon which I think Mr. Justice Manisty was wrong. Having regard to the sum which is sued for, it appears from the nature of things that it was necessary that an account should be taken. There was a mortgage deed and there were securities. I am not quite sure that the mere fact that there were mortgage deeds would have made it necessary to take an account, unless there had been something more. But there is something more here. In the second affidavit of Mr. Wallingford he does—although it is smothered over with a vast quantity of irrelevant matter—make a distinct averment that a part of the security being these trust notes, 300*l.* of those trust notes became payable, and that they, against his will, without his authority, re-invested in three trust notes of 80*l.* each, making a sum of 240*l.* in all. That 300*l.*, at least according to his view, would be a sum which they had actually realised from the securities, although they had chosen to re-invest it without his authority. If that had stood alone, it would have appeared that there was a ground, a plausible ground, in respect of that 300*l.* When it came before the Court of Appeal, the matter was explained, and it became clear that the ground upon which it was put, in that 20th section of his affidavit, was an utterly mistaken one; for when his affidavit is produced before us, and examined, it appears pretty clearly

that it was with the full consent (if that account which was sent in is to be taken as genuine) of the appellant that the sum of 240*l.* was re-invested. But that same exhibit shews that the respondents gave the appellant credit for the first five instalments, 600*l.* odd, as having been fully paid; and, as far as that goes, there is not merely something to show *prima facie* that there was a ground for making that defence, but that the defence was made out as far as regards that sum. Consequently when the order was made that unless he brought into Court the sum of 5,000*l.*, or some sum which it was beyond his means to bring in, the plaintiffs would sign judgment for the whole money, it was allowing them to sign judgment for a sum greater than was really due. I do not think that that was right in any point of view.

It has been said, What was to be done then? That would be a difficult question to answer. The scheme which the Legislature (for these Orders are under the authority of the Legislature) has adopted for working out this mode of preventing vexatious litigation, by not allowing a party to defend when there is no defence, and yet not depriving a party of his rights, is to have it worked out in chambers. A Judge in chambers exercises an equity—not a capricious equity, but all the equities which might be exercised either at law or in equity in the days when the two were distinct. But he has much more machinery for exercising his discretion than either a Court of Chancery or a Court in Bankruptcy would have had; and consequently it has always—at least for some years past—been considered that a great many things could be worked out in chambers which probably no Court could have done, or which, if the Court of Chancery had done, it would have done at an enormous expense by affidavits and otherwise. Consequently if there was sufficient reason for saying that there should be an account as to some items, I am by no means clear that Mr. Justice Manisty would have been bound immediately to say that there should be the whole account. He would be bound to say, There must be an account at least as to this sum, and as to the terms of it I will hear you both, and see what is to be done. Possibly he might have worked it then so that the account should only have gone as to a part, and as to the remainder it should be considered as out of the account and as really due.

He might perhaps have done that in chambers; but what has been actually done is this—there has been execution to the amount of 1,300*l.* levied. That standing as it does, then comes the question, What should be done to raise the real question? It may be that on taking the account it will turn out that the appellant is not entitled to a deduction at all; it is more probable, I think, that he is entitled to a deduction, though only for some smaller sum. I do not say how that will be; but whatever it may be, he must have the benefit of that deduction. I do not see my way in saying, in the circumstances here, however it might have been worked out in the chambers, how the account can be taken upon one item without being taken upon the whole. Consequently I think that the form of order which has been read and proposed by my noble and learned friend on the woolsack comes as near as possible to doing complete justice in this case.

With regard to some parts of the proposed order, I think it might be a little doubtful whether the House had power to make the order without consent. I am not sure whether it had or had not, but that has been all obviated by its being agreed between the parties that as to the sale of the security it should be done.

I do not think there is anything farther upon which I need make any observation. I was not so much impressed by the indorsement on the back of the writ of a smaller sum to be levied as the noble and learned Lord on the woolsack is. No doubt the rule says that you shall indorse it with the proper sum to be levied, but that was not the old law. The old law was that you were to take care that you did not abuse the process of the Court by exercising it vexatiously. I see that the order was made by the Judges of their own authority as early as Hilary Term, 1853. I cannot find that the question was ever brought before the Court to say what would be the effect of it; but it is

enough to say that here sufficient facts are disclosed to shew that the appellant has a right to an account in respect of some sum. I do not see how that can be worked without taking an account of the whole.

The result is, that I agree that the matter should be set right by taking the account; and I think the form of decree which has been read to the House is the proper one to make.

LORD WATSON.—I agree with the result at which your Lordships have arrived upon the various matters which have been discussed in the present appeal.

I think that the order of Mr. Justice Manisty has been well brought under review in this house. I take it that when the appeal was taken to the Divisional Court from his Lordship's decree, it was incompetent for that Court to review the decree; but it was entirely within the competency of the appellant at that time, by presenting an appeal against the order in chambers of Mr. Justice Field, to have that order reversed and the time enlarged, to the effect of enabling the Divisional Court to review Mr. Justice Manisty's order upon the merits. That, I think, with the consent of the parties, was what the Divisional Court actually did. The Judges there held the necessity of the appeal from Mr. Justice Field's order and the enlargement of the time, as dispensed with by the consent of the parties; and accordingly they proceeded in their order (the note of their opinion shews, as I read it, that they were dealing with the case in that way) as if it were an appeal upon the merits from the order of Mr. Justice Manisty.

That being so, I further agree with your Lordships in holding that in this case the appellant did, at all events by the second affidavit which he filed, disclose a case sufficient to entitle him to defend to the extent of having an account taken. It appears to me that his averments upon the other parts of his case, upon which he has argued very strenuously at your Lordships' bar, are entirely irrelevant; that he stated no case shewing that this Mutual Society is a gaming or gambling society within the meaning of the statutes which he cited in support of his contention; and that he equally failed in stating any case of fraud.

It is a well-known and a very proper rule that a general allegation of fraud is not sufficient to infer liability on the part of those who are said to have committed it. And even if that were not the rule of common law, I think the terms of Order XIV. would require the parties to state a very explicit case of fraud, or rather of facts suggesting fraud, because I cannot think that a mere statement that fraud had been committed is any compliance with the words of that rule, which require the defendant to state facts entitling him to defend. The rule must require not only a general and vague allegation, but some actual fact or circumstance or circumstances which, taken together, imply, or at least very strongly suggest, that a fraud must have been committed, those facts being assumed to be true.

The only part of the case upon which I felt some difficulty during the discussion was that which related to the character of the mortgage bond—the contention, I mean, on the part of the appellant that the sum appearing to be due on the bond ought to be split into two, namely, a sum of 6,000*l.* as representing capital money advanced, and the sole debt due according to his contention, and a smaller sum of 5,221*l.* as representing interest or penalty, for it was put in both shapes.

Now, whatever the law might have been, if the appellant could have shewn that the substance of the transaction was as represented by him, it humbly appears to me that the contract to which he refers as supporting his contention does not support it. I think the substance of the transaction between the Mutual Society and the appellant was this, that in compliance with the rules of the society he undertook an obligation precisely such as those rules contemplated—an obligation to pay a sum of 11,221*l.* as the price of, or consideration for, the interest which he was to take in return in the society. I think it was the plain intention of these contracting parties that that sum should be paid and received, and no other sum is stipulated to be paid under the bond. No doubt there is a postponement of payment

in certain events; and the bond might be read either as a contract for payment by eighty instalments, payment being accelerated against the mortgagor in the event of his default, or it might be viewed as a contract for immediate payment, with a right and privilege to the mortgagor to postpone that payment by making regular quarterly payments of instalments, each equivalent to one-eightieth part of the capital sum to be paid. But, whichever of these views be taken, I do not think it possible to bring that within the cases of penalty, or to bring it within the rule that would entitle the appellant to relief in equity. It seems to me to be a plain case of contract to repay that capital sum, and there being no illegality in the contract, it does not appear to me that he is entitled to have it held to be penalty or to ask relief.

I fully agree that the order which your Lordships propose as that which should be made by this House will entirely meet the justice of the case. I think that it is very satisfactory that your Lordships have been able to indicate an opinion upon points which it is not necessary to decide in this case, because these, taken along with the admissions that have been made at the bar, will narrow to a very great extent the discussion upon the merits of the case; and that is exceedingly desirable, as otherwise the sole result of your Lordships' judgment would be to find that, after all the litigation which has taken place, the appellant is entitled now to begin litigation anew.

Order appealed from reversed; cause remitted to the High Court, with declarations and directions (17).

Solicitors—Purkis & Perry, for appellant; Linklater, Hackwood, Addison and Browne, for respondents.

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(17) These were, in effect, declarations that the time for appealing from the order of Manisty, J., was to be treated as enlarged till the 2nd of November, 1878, when the motion was made to the Divisional Court; that the order of Manisty, J., ought to have been discharged, and the appellant allowed to defend unconditionally for the purpose of taking an account; and that judgment, if signed, should have been only as security for the balance of account; and directions for taking the accounts by the Common Pleas Division, the judgment and execution to stand as security for the ultimate balance; the costs in all the Courts to be paid by the respondents if the balance at the time of the execution should be less than the sum named in the writ of execution, otherwise by the appellant.

[IN THE COURT OF APPEAL.]

1880. June 12, 14, 15, 17, 18. Nov. 19. } GLYN, MILLS, CURRIE AND COMPANY *v.* THE EAST AND WEST INDIA DOCK COMPANY.*

Bill of Lading—Pledge by Consignee before Arrival—Delivery Order to Third Party—Title of Indorsee—Liability of Warehouseman — Merchant Shipping Amendment Act, 1862 (25 & 26 *Vict. c.* 63), *ss.* 67, 68, 73, 75, 76.

Goods shipped to C., as owner, were before arrival pledged by him to the plaintiffs as security for an advance. The bill of lading was, as is customary, in three sets, "the one being accomplished the rest to stand void," and made the goods deliverable to "C. or assigns," freight payable in London. C. indorsed one copy of the bill of lading, marked "first," to the plaintiffs, and also gave them a letter of charge, making the bill of lading a collateral security for the advance, and empowering them to sell the goods represented by the bill of lading should default be made in the repayment of the advance. The vessel went on arrival into the dock of the defendants. C. duly entered the goods at the Custom House, and they were afterwards, at the request of C., landed and deposited with the defendants, the freight being unpaid. The manifest, a copy of which the captain lodged with the defendants, authorised the defendants to deliver the goods to the holders of the bill of lading. On the following day the captain lodged with the defendants a stop order for freight, pursuant to the Merchant Shipping Act, 1862. *C. then produced and gave to the defendants, unindorsed, the second part of the bill of lading; the defendants then entered C. as the proprietor of the goods. C. paid the freight, the stop was taken off, and*

* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Brett, L.J.

the defendants delivered the goods to W., on the production by him of a delivery order from C. C. shortly after went into liquidation, when the plaintiffs, producing the indorsed bill of lading, in vain demanded the goods of the defendants.

In an action for conversion,—

Held (*by the Court of Appeal*—BRAMWELL, L.J., *and* BAGGALLAY, L.J.; *dissentiente* BRETT, L.J.), *that the defendants were not liable.* (*By* BRAMWELL, L.J.), *that the property in the goods did not pass, but that there was a pledge of them with a right of redemption in C.; that the duty of the defendants was the same as that of the shipowner would have been had the goods remained on board; that the plaintiffs assented to C.'s retaining the other parts of the bill of lading, and to the receipt by the defendants of the goods to hold, after freight paid, to the order of C., so that there was no conversion.* (*By* BAGGALLAY, L.J.), *that the property in the goods passed by the delivery of the indorsed bill of lading; that the landing of the goods was the result of an arrangement between the shipowner, C. and the defendants; that the Merchant Shipping Act did not effect that the defendants thereafter held the goods for the plaintiffs, but that they received them to hold to an order of C., and that in the absence of any notice of title in anyone else, the defendants were bound to deal with them as directed by the ostensible owner.* (*By* BRETT, L.J.), *that the defendants were liable; that C. by indorsing the bill of lading to the plaintiffs passed the legal property to the plaintiffs, only reserving to himself an equity of redemption; that the shipowner was therefore bound to deliver to the plaintiffs, subject to the provisions of the Merchant Shipping Act as to warehousing the goods; that the defendants were, as such warehousemen, bound to hold the goods till freight was paid, and then to deliver to the plaintiffs as holders of the bill of lading.*

Appeal by the defendants from a judgment of Field, J., given on further consideration, after a trial without a jury.

The case is reported 49 Law J. Rep. Q.B. 303.

The facts are fully set out in the judgment of Field, J., and in that of Brett, L.J.

W. Williams and *Pollard*, for the appellants.

The Solicitor-General (*Sir F. Herschell*) (with him *Bompas* and *Mathew*), for the plaintiffs.

The following cases were cited:—*Barber* v. *Meyerstein* (1), *Caldwell* v. *Ball* (2), *Hollins* v. *Fowler* (3), *Pigott* v. *Cubley* (4), *Pickard* v. *Sears* (5), *The Tigress* (6), *Fearon* v. *Bowers* (7), *Lickbarrow* v. *Mason* (8), *Sheridan* v. *The New Quay Company* (9).

Cur. adv. vult.

The following judgments were read on Nov. 19:—

BRETT, L.J.—This case seems to me to be one of unusual difficulty. The solution of it depends so entirely upon a minute examination of the business and legal effect of each step in the transactions described in it between the various parties, that it seems to me to be necessary to state those successive steps with considerable particularity. The sugar which is the subject-matter of the litigation was shipped in Jamaica by one Elliot, and consigned to Messrs. Cottam, Morton & Co., merchants in London, as owners. The captain signed three copies of a bill of lading, in ordinary form, dated the 16th of April, 1878, in favour of Cottam, Morton & Co., or their assigns, deliverable on payment of freight. On the 15th of May, 1878, whilst the ship was at sea, Cottam, Morton & Co. obtained an advance from the plaintiffs, who are bankers in London, and in respect of such advance indorsed one copy of the set of the bills of lading, and handed it to the plaintiffs, with a letter of charge in the following form: "May 15, 1878. We beg to

(1) 36 Law J. Rep. C.P. 48, 249; 39 Law J. Rep. C.P. 187; Law Rep. 2 C.P. 50; Ibid. 4 E. & I. App. 317.
(2) 1 Term Rep. 205.
(3) 44 Law J. Rep. Q.B. 169; Law Rep. 7 E. & I. App. 757.
(4) 15 Com. B. Rep. N.S. 701; 33 Law J. Rep. C.P. 134.
(5) 6 Ad. & E. 469.
(6) Brown & Lush, 30; 32 Law J. Rep. Adm. 97.
(7) 1 Sm. L.C. ed. 9, at p. 705 *n.*; 1 H. Black. 364.
(8) 1 Sm. L.C. ed. 8, at p. 753.
(9) 28 Law J. Rep. C.P. 58.

apply for an advance of 13,000*l.*, to be repaid on or before the 15th of July, 1878, on bills of lading in schedule overleaf, to be lodged with you as collateral security. We may, with your consent, substitute other bills of lading for all or any of the bills of lading now lodged by us. We further agree that the total of our indebtedness to you in respect of this advance, and any other advances from you to us on bills of lading, or any other account, shall be regarded as collaterally secured by all bills of lading lodged by us with you, and in your possession from time to time. In event of default being made in payment of this or any other advance from you to us at due date, or in other case of need, you are at liberty to realise all the produce represented by the bills of lading in your possession." The ship arrived on the 27th of May, and went into the East and West India Docks, belonging to the defendants, the Dock Company. Cottam, Morton & Co. entered the goods at the Custom House, and afterwards perfected such entry. On the 28th of May the captain, with the knowledge and at the request of Cottam, Morton & Co., landed the sugar, and deposited it with the defendants, the freight not being paid. The captain landed at the same time the whole of his cargo, destined partly for other people. At the time of so doing the captain lodged with the defendants a copy of his manifest, the copy being made by entries on a form of manifest distributed by the defendants.

The names of Cottam, Morton & Co. and others were entered in the manifest as "consignees" of the goods severally consigned to them. At the bottom of the defendants' forms of manifest there was a printed statement as follows: "I declare the above to be a true copy of the manifest of the cargo of the above ship, and hereby authorise the East and West India Dock Company to deliver the same to the consignees as above or to the holders of the bills of lading." In the present case the words "to the consignees as above" were struck out, and the captain signed the order as an authority in terms to deliver the same to the holders of the bills of lading. On the back of the form of manifest was a memorandum for the guidance of captains and owners of all vessels entering the East and West India Docks to discharge their cargoes in respect to making their reports and completing their manifests: "The report of the ship and of the cargo must be made at the Custom House within twenty-four hours after her arrival; and two true copies of the manifest of the cargo must be delivered into the general office of the East and West India Dock Company at the dock house, &c. No ships can receive their rotation or be allowed to break bulk until their cargoes are duly entered, and such cargoes will be landed in due succession according to the strict order in which the manifests are delivered at the general office. Care must be taken that the names or firm of the consignees agree with the bills of lading." "Notice to detain the cargo for freight, and for subsequently removing the stop, should be given on the printed forms, which may be obtained at the general office." "By the Act 25 & 26 Vict. c. 63. s. 68, &c., goods landed in the docks and lodged in the custody of the company are subject to the same claim for freight as such goods were subject to and liable to while the same were on board the vessel, and upon due notice on that behalf being given will be detained accordingly." "No goods can be stopped for freight after the documents for delivery have been issued." Upon the landing of goods in their docks and delivery of them into their custody, the defendants were in the habit of having a copy of the bill of lading of the goods entered on a form of bill of lading of their own. On the back of this form was a memorandum: "When the consignee in the manifest is not the holder of the bill of lading or the goods are reported as consigned to order, the bill of lading must be produced, and a duplicate or true copy thereof deposited, except for East India produce, in such cases the originals only can be accepted." "Particular attention is necessary in the regularity of the indorsements, as the company's officers cannot pass any bill of lading on which the authority of the shipper to the holder is not deduced by a complete and accurate chain of indorsements." "In all cases of informality in bills of lading, from want

of indorsement, &c., or of their being lost, application must be made to the court by letter, stating the circumstances and enclosing any documents which will shew the title to the goods; in every such case the applicant must engage to indemnify the company by bond or otherwise as the court may direct."

On the 29th of May the captain lodged with the defendants a stop order for the freight pursuant to the Act 25 & 26 Vict. c. 63. s. 68: "I hereby give you notice to detain, &c., the goods, except samples, &c., until the freight, &c., shall be paid, &c." In the present case Cottam, Morton & Co., instead of filling up, at the time of the landing of the goods as above described, a bill of lading form of the defendants, so as to make it a copy of the bill of lading of the sugar, brought, on the 31st of May, and handed to the defendants one of the copies of the bill of lading of the sugar. Whereupon the defendants made an entry in a column of their books of the name Cottam, Morton & Co. under a heading—"Proprietor by bill of lading or transfer order." The copy bill of lading thus handed to the defendants was not indorsed. On the 7th of June, on payment of the freight by Cottam, Morton & Co., the stop for freight was taken off by authority of the captain's agents. On the 3rd of July Cottam, Morton & Co. gave a delivery order of the sugar to Williams & Co., which order was, on presentation to the defendants, accepted by them, and on it they afterwards delivered the sugar to Williams & Co. Cottam, Morton & Co. filed their petition for liquidation on the 15th of August. The plaintiffs demanded the sugar of the defendants, producing to them the indorsed bill of lading, but could not obtain delivery, the sugar having been already delivered to Williams & Co.

The first step to be considered is the advance by the plaintiffs to Cottam, Morton & Co., the indorsement in respect of it of the bill of lading by Cottam, Morton & Co., and the signing by them and the acceptance by the plaintiffs of the accompanying letter of charge. The business effect was, according to the manifest intention of the parties, as it appears to me, to give to the bank until the advance should be repaid the security of the goods; but in such a manner as that the borrowers of the advance might in the meantime deal with regard to the goods, to a certain extent, as owners of them. They were to have the power of making contracts as to their ultimate disposal; they might, on the arrival of the ship, so far as the plaintiffs were concerned, select the wharf or dock in which the goods were to be deposited until the freight should be paid; they might perfect the entry at the Custom House; they might do everything with regard to the goods which an unshackled owner might do, except take them into their own possession or deliver them actually into the possession of any other persons than the plaintiffs, to be held by such persons otherwise than subject to the plaintiffs' right of actual possession immediately the freight should be paid. As between the plaintiffs and Cottam, Morton & Co., the freight was not to be paid by the latter until they had redeemed the bill of lading from the plaintiffs. I think this is so, because, if the other copies of the bills of lading had been destroyed, as they ought to have been, the dock company would not have, as a matter of fact, delivered to Cottam, Morton & Co. without the production of a copy of the bill of lading, which must then have been the redeemed one re-indorsed by the bank. Cottam, Morton & Co. would not in regular course have deposited any copy of the bill of lading with the dock company, they would have made a copy of the bill of lading on a form of the defendants.

The power left to Cottam, Morton & Co. was, according to the intention of the parties, not a power to act as agents for the plaintiffs, but a power to act on their own behalf, in respect of the conditional equitable interest in the goods still left by the agreement in them. The legal effect of the transaction, in my opinion, was, that by the indorsement of the bill of lading the legal property in the sugar was transferred to the plaintiffs, and, as between them and Cottam, Morton & Co., a legal right to the immediate actual possession of the sugar by the plaintiffs on the arrival of the ship; but by the letter

of charge there was left to Cottam, Morton & Co. an equitable right to resume the legal and absolute ownership of the sugar on repayment of the advance, and an equitable right that the plaintiffs should not for a specified time exercise any rights of ownership over the sugar, but that Cottam, Morton & Co. might exercise any such rights which would not be inconsistent with the validity of the plaintiffs' security. The relation between two such parties was likened by Mr. Justice Willes, in *Barber* v. *Meyerstein* (1), to that between a pledgor and pledgee of goods, where the goods under pledge are left in or given into the actual custody of the pledgor to be used by him, but are held to be nevertheless in the constructive possession, for the purpose of the validity of the pledge, of the pledgee, inasmuch as without such possession there could be no valid pledge, which was nevertheless intended to be valid. I think, however, that he was speaking of the likeness of the business views in the two cases, and not of the legal view. To say that an indorsement of a bill of lading for an advance is only a pledge seems to me to be inconsistent with what has always been considered to be the result of *Lickbarrow* v. *Mason* (8), namely, that such an indorsement passes the legal property. It is suggested that the indorsement of a bill of lading, when accompanied by such a letter of charge, has not the same fulness of effect in passing the property as if there were no such letter of charge. But, upon consideration, I am of opinion that an indorsement of a bill of lading for an advance does, by the mercantile law of England, pass absolutely the legal property in the goods to the indorsee, and a consequent right in law of immediate actual possession against all the world except some one who may have an independent superior legal right of temporary possession. The right of the borrower of an advance on an indorsement of a bill of lading is, in my opinion, an equity which exists only between him and the lender. I think the indorsement of a bill of lading for an advance has by the law merchant the same effect as a bill of sale has by the common law to pass the legal property in goods; and in either case an equity may be reserved which was still an equity though recognised by the common law Courts. The plaintiffs, therefore, on the indorsement of the bill of lading to them, had, as against Cottam, Morton & Co. and all the world, the legal property in the sugar, and as against Cottam, Morton & Co. and all the world, except the shipowner, a legal right at common law to immediate actual possession of the sugar on the arrival of the ship. The shipowner, until the freight should be paid, had a superior legal right to temporary possession; but on payment of the freight the legal right to immediate possession would be in the plaintiffs and in them alone. Cottam, Morton & Co., as between themselves and the plaintiffs, had an equitable right to deal with the sugar, as if they were still the owners of it, in any way not inconsistent with the safety of it as a security to the plaintiffs; but any taking or giving of possession by them otherwise than as subordinate and subject to the plaintiffs' power to take immediate actual possession would be inconsistent with such safety. The equity existed solely as between the plaintiffs and Cottam, Morton & Co. There was nothing to raise an equity between the plaintiffs and anyone else. As regards all other people, the sugar was absolutely and unconditionally, in law and in equity, the sugar of the plaintiffs, to which, on payment of the freight—unless some other independent right should have accrued—they would have a right of immediate actual possession. No dealing between Cottam, Morton & Co. and other persons, unauthorised by the plaintiffs or by the law, could affect the plaintiffs' rights of property and possession. By the indorsement of the bill of lading the plaintiffs, as it seems to me, acquired also another legal statutable right and incurred a corresponding legal statutable liability. By the Bill of Lading Act, 18 & 19 Vict. c. 111. ss. 1 and 2, "every indorsee of a bill of lading, to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been

made with himself." "Nothing herein contained shall prejudice or affect any right of stoppage *in transitu* or any right to claim freight against the original shipper or owner," &c., &c. It was suggested for consideration that this statute might only apply where the indorsement and the attendant circumstances passed a complete, clean transfer, untrammelled by any limitation either at law or in equity. But this cannot be, without adding words to the enactment for which there appears no necessity. If in the case supposed it is assumed that the legal property in the goods has passed upon or by reason of the indorsement, the words of the statute, construed in their ordinary sense, are satisfied, and then the enactment in its ordinary sense must take effect. If it be true to say that the property does not pass, that there is no more than a pledge, wherein the property does not pass, then I think the Bill of Lading Act does not apply. But, as I have said, I am of opinion that the property does pass. As the statute is, in my opinion, applicable, the rights of suit under the contract against the shipowner—that is, the rights to performance of the contract by the shipowner—are transferred to the indorsee. If it were not for the subsequent part of the enactment—that is, section 2—the meaning of the word "transferred" would be, that all rights and liabilities under the contract would arise and exist between the shipowner and the indorsee, and would cease between the shipowner and the indorser if he was the original shipper or owner. All such rights and liabilities are so "transferred"—that is to say, so arise and so cease—except such as are reserved by the proviso in section 2. No right is reserved to the original owner or shipper except the right to stop *in transitu*. Therefore, by virtue of the statute, the original owner or shipper has lost all accruing claims and rights to performance under the contract against the shipowner, and all such claims and rights are transferred to the indorsee. By the indorsement, therefore, Cottam, Morton & Co. lost all rights to insist on any performance by the shipowner of the bill of lading contract; and such rights, as against the shipowner, were transferred to the plaintiffs, accompanied by liabilities. As between the plaintiffs and the shipowner, the latter retained his lien upon their goods for his freight, but was bound to them, on payment of his freight, to fulfil the bill of lading obligations as to the delivery of the goods—that is, as it seems to me, to delivery, unless something intervened to relieve them, to the plaintiffs or their assigns. The next step in the transactions which was discussed was the entry at the Custom House. That was conducted by Cottam, Morton & Co. They might properly do so, as far as the Customs statutes were concerned, as original consignees or importers, although they had subsequently to the shipment indorsed the bill of lading. Such being the law, no one could properly be misled from the fact of their so doing into a belief that they had not indorsed the bill of lading for an advance. It follows that the fact of their conducting the Customs entry had no legal effect on the plaintiffs' rights (if any) against either the shipowner or the defendants. The next step, therefore, to be examined is the deposit of the sugar for custody with the defendants, accompanied by a stop order for freight given by the captain. Assuming even that the deposit with the defendants was a deposit in fact, accepted by them at the request of Cottam, Morton & Co., and not by the sole order of the captain, the question is, What was the legal effect of the whole of that step of the transaction? If the delivery by the captain to the defendants was equivalent to a delivery to Cottam, Morton & Co., the captain thereby lost his lien for freight. Yet if the delivery to the defendants was a delivery to them as agents of Cottam, Morton & Co., it was equivalent to a delivery to Cottam, Morton & Co. If the defendants accepted the goods simply as agents for Cottam, Morton & Co., they could only have a right of action for rent against Cottam, Morton & Co., and could have no right to hold the plaintiffs' property as by virtue of a lien for rent available against the plaintiffs. It is obvious, as it seems to me, from these considerations, as also even more clearly from the references in terms to the Merchant

Shipping Amendment Act which are contained in all the documents as to the reception of the sugar by the defendants, and the stop for freight by the captain, that all the three parties—the merchants, the captain and the dock company—were dealing with the sugar, not under contracts expressed or to be implied, but solely under and subject to the enactments contained in the statute—the Merchant Shipping Acts Amendment Act, 1862 (25 & 26 Vict. c. 63.), ss. 66 to 77. It follows that the legal rights and liabilities of each were those enacted by the statute, and depend as to their effect upon the true legal construction of the statute. The statute does not deal with the case of a delivery of goods to a person ready to take delivery after paying freight. It deals with the case of no such person being ready to take delivery. If the goods are landed and deposited under the statute, they are assumed by it to be so landed and deposited by the captain. "Where," says section 67, "the owner of any goods imported in any ship" ("owner" being said by the interpretation clause to include every person who is for the time being entitled, either as owner or agent for the owner, to the possession of the goods), "where the owner fails to make entry thereof, or, having made entry thereof, to land the same, or take delivery thereof, . . . the shipowner may make entry of and land or unship the said goods at the times, in the manner and subject to the conditions following." A landing under this section is therefore a landing by the shipowner. The place in or into which, if he lands, he must deposit the goods is then stated: "The shipowner, in landing goods by virtue of this enactment, shall place them in or on some wharf or warehouse." Section 68 says, "If at the time when any goods are landed from any ship and placed in the custody of any person as a wharf or warehouse owner" (which is a landing under the statute, and therefore is a landing by the shipowner), "the shipowner gives to the wharf or warehouse owner notice in writing that the goods are to remain subject to a lien for freight, or other charges payable to the shipowner," &c., "the goods so landed shall, in the hands of the wharf or warehouse owner, continue liable to the same lien (if any) for such charges as they were subject to before the landing thereof." And then the section deals with the obligation or duty of the wharfinger: "And the wharf or warehouse owner receiving such goods" (that is, receiving under the statute) "shall retain them until the lien is discharged," &c. Section 73 says, "If the lien is not discharged, . . . the wharf or warehouse owner may, and if required," &c., "shall . . . . sell . . . . the said goods." Section 75 says, "In every case of any such sale as aforesaid, the wharf or warehouse owner shall apply the moneys received from the sale as follows, and in the following order," &c.: first, in payment of duties; second, of expenses of sale; third, of rents, rates and charges due to the wharf or warehouse owner in respect of the said goods; fourth, of the amount claimed as due for freight; and the surplus shall be paid to the owner of the goods. Section 76: "Whenever goods are placed in the custody of a wharf or warehouse owner under the authority of this Act, the said wharf or warehouse owner shall be entitled to rent in respect of the same, and shall also have power from time to time, at the expense of the owner of the goods, to do all such reasonable acts as in the judgment of the said wharf or warehouse owner are necessary for the proper custody and preservation of the said goods, and shall have a lien on the said goods for the said rent and expenses." Now the person who is assumed to deliver the goods to the wharfinger or warehouseman, when they are treated as delivered under this statute, is the shipowner. If there were any contract with the wharfinger or warehouseman outside the statute, it must then be between him and the shipowner. There is no express contract by the shipowner to be liable to an action for rent or charges. Can it be implied that the captain who intends to sail away intends to bind himself or his owners to a contract, or that the wharfinger who knows the rights given to himself by the statute, and that the captain intends to sail away, has a right to suppose, or does suppose, that

the captain intends to bind himself or his owners to a contract? The statute imposes in terms no contract; but it gives certain rights by way of remuneration to the wharfinger or warehouseman. These rights being so given, there seems nothing from which a contract giving any other rights can be inferred to be given by the statute. There is no contract, therefore, with the shipowner; none is given by the statute with the original consignee of the goods or with the real owner of the goods. There is nothing from which any contract giving a right to sue for rent or charges can be inferred with either of them. There is, therefore, no such contract; there is no contract with anyone. The remedies of the warehouseman or wharfinger are the power of sale and the lien given by the statute. Both of these take effect upon the goods; that is to say, both are effective only against him to whom the goods belong; that is to say, against the real owner of the goods at the time of the sale. There is no specific statement in the statute as to the person for whom the wharfinger or warehouseman is to hold the goods at the moment the stop for freight is taken off—no specific enactment as to the person to whom he is to deliver the goods. If he sells, the person for whom he is to hold the surplus is "the owner of the goods" (section 75). That must be the person whose property is sold—that is, the real owner at the time of the sale. It follows, as it seems to me, that, by the only reasonable intendment which can be made—and an intendment must be made—the wharfinger or warehouseman, by virtue of the statute, holds from the time the stop for freight is taken off for, and is then and afterwards bound to deliver to the real owner of the goods. If it is held that he may deliver to anyone else, he may have the captain's lien and his own paid off by the owner of the goods, against whose interest such lien is alone effective, and may, nevertheless, deliver the goods to the person who is no longer owner. If the wharfinger or warehouseman thus holds, as I think he does under the statute and according to its enactments, he is not in the same position as the shipowner was whilst the goods were on board. He has different rights and different liabilities; he is not the mere agent of the shipowner. There is nothing that I can see in the statute which would authorise him to give back the goods to the shipowner. There is nothing which would make the shipowner liable for any acts of the wharfinger or warehouseman. The shipowner has no longer charge or power or liabilities with regard to the goods; he has only his right of lien for freight. The relation of the wharfinger or warehouseman to the goods is a statutory relation, with statutory rights and liabilities attaching to him and to him alone. The statute does not give any rights to the shipowner except the right of lien after he has landed and delivered the goods. It imposes no liabilities on the shipowner; there is nothing affecting the plaintiffs' rights other than the effect produced on them by the statute. The only way in which they could have been affected by the statute would have been that their goods might have been detained or sold for the freight and charges. They were not detained or sold for either, but were sold and given up in a way not authorised by the statute. If I am right in saying that the wharfinger or warehouseman is not identified with the shipowner, the question raised as to the right of the shipowner to deliver to the person first presenting to him a copy of the bill of lading does not arise. The Bills of Lading Act does not transfer the rights and liabilities of the contract in the bill of lading from the original shipper to the indorsee so that they should arise between him and the wharfinger or warehouseman, but only so as they should arise between him and the shipowner. But if the defendants could rely upon the rights given to the shipowner as against the indorsee of the bill of lading, by the transfer of the bill of lading contract, I do not think that the shipowner would have been excused as against the plaintiffs for a delivery to the order of Cottam, Morton & Co., upon the production of the copy of the bill of lading held by them, after they had effectively and validly indorsed the whole bill of lading by indorsing a copy of it to the plaintiffs for value. It cannot be,

I think, fairly said that the plaintiffs were guilty of *laches* in not obtaining possession of all three copies of the bill of lading. All the Courts so stated in *Barber* v. *Meyerstein* (1), and everyone conversant with business knows that no such thing is ever done. But it is said that the captain has the right by virtue of the words in the bill of lading—"The one of which being accomplished, the others to stand void." Can it be maintained that the meaning of these words is to impose a duty or give a right to the captain, under all circumstances, to deliver to the person who first presents to him a copy of the bill of lading? If so, he may, or, as they are part of the contract, must, so do, although the real indorsee is present, and satisfies the shipowner that he is the real indorsee. Yet that was not contended, nor could it, in my opinion, be reasonably contended. If so, although the captain is informed by his owner and by the real indorsee, and by the indorser during the voyage, that the bill of lading has been indorsed for value, and that his contract liability to deliver to the assigns of the indorser has thereby, by virtue of the Bills of Lading Act, become a contract liability with the indorsee to deliver to him or to his assigns, he may fulfil that contract with the indorsee by delivering the goods to a person who is not the assignee of the indorsee, nor even the legal assignee of the indorser. The known practice of merchants to accept an indorsement of one copy of the bill of lading, without requiring delivery of the other copies, is inconsistent with this view.

If the indorsement of the first copy indorsed is made whilst the ship is at sea, and made for payment of a price or an advance, the copy remaining with the captain or purser cannot, in fact, be then delivered up, and the indorsement of the copy to hand, if the contention be valid, would be, as it seems to me, an idle security. The meaning of the words cited from the bill of lading must, I think, be, "The one of which bills being rightly accomplished, the others to stand void." A wrongful delivery to one, of the copies of the bill cannot be an accomplishment of it intended by the contract, and is not, therefore, an accomplishment within the contract. This is contrary to the *dictum* of Dr. Lushington in the case of *The Tigress* (6). I must respectfully differ from that *dictum*. It was not necessary for Dr. Lushington carefully to consider the words, neither was it for Lord Loughborough in *Lickbarrow* v. *Mason* (8). In both cases the observations are mere passing observations. I think the observation of Lord Westbury was merely by way of caution. The decision in H. Blackstone, if it means that the captain has a wayward choice, cannot, I think, be held to be even reasonable. I am therefore of opinion that the delivery of this sugar by the defendants to Williams & Co. was a wrongful delivery as against the plaintiffs who were the owners of the sugar, and who were entitled to immediate possession of it from the defendants. There was a misdelivery by the defendants of the plaintiffs' property with intent to deal with the property. I do not think that the difficulties arising in the case of *Hollins* v. *Fowler* (3) exist in this case. In this case the defendants delivered the goods to Williams & Co. as the property of Williams & Co., intending to pass the property to Williams & Co., when they were bound to hold them for and to deliver them to the plaintiffs alone. By the notices contained in their own habitual documents, which I have set out at the beginning of this judgment, it is shewn clearly, as it seems to me, that they undertook to consider and deal with the question of the right of property in the person who should demand delivery of goods placed in their custody under the statute. They assumed to deal with the delivery according to the right of property.

To sum up, then, the reasons on which my opinion is founded—they are, that Cottam, Morton & Co., by indorsing the bill of lading passed the legal property in the sugar to the plaintiffs, reserving to themselves nothing but an equity of redemption; that upon such an indorsement so passing the legal property, the Bills of Lading Act transferred the contract between the shipowner and Cottam, Morton & Co. into a contract between the shipowner and the plaintiffs; that

consequently the plaintiffs were in law the absolute owners of the sugar with a contract from the shipowner to deliver to them upon payment of freight. The shipowner was bound by contract to deliver to the plaintiffs, but with a right by statute to hand the sugar, according to the terms of the statute, to a dock company if the freight was not paid on arrival. The shipowner did hand the plaintiffs' sugar to the defendants. He handed it under and according to the statute. The defendants accepted the sugar—the plaintiffs' sugar—under and according to the statute. There was no contract between the defendants and the plaintiffs, or between the defendants and the shipowner, or between the defendants and Cottam, Morton & Co. The defendants were bound by a statutory duty to hold the sugar until the freight was paid, and when it was paid to hold it for and deliver it to the plaintiffs, the holders of the bill of lading. The defendants, contrary to such duty, and therefore wrongfully, delivered the plaintiffs' sugar to Williams & Co. That is a conversion. If the defendants could be said to be in the same position as the shipowner, a similar delivery by the shipowner would have been a conversion. I am of opinion for these reasons that the judgment of Mr. Justice Field should be affirmed.

BAGGALLAY, L.J.—The action in which this appeal is brought is founded upon an alleged conversion by the defendants of certain sugar and rum forming part of the cargoes of three vessels—the *Mary Jones*, the *Tropic* and the *Anglo-Indian*—and which in the spring of 1878 had been shipped by the said vessels from the West Indies, and consigned to Messrs. Cottam, Morton & Co., of London.

The circumstances affecting the goods shipped by each of the vessels were, so far as the present action is concerned, in all respects similar; and the arguments, both on the trial before Mr. Justice Field and on the present appeal, were confined to the case of some twenty hogsheads of sugar which had been shipped by the *Mary Jones*. I shall confine my observations to these goods, and in doing so I shall abstain from entering into any details of the facts, as they have been already fully stated by Lord Justice Brett.

It must, however, be borne in mind that on the 15th of May, whilst the vessel was still at sea, Messrs. Cottam, as consignees of the goods, delivered one part of the bill of lading, duly indorsed, to the plaintiffs as a collateral security for an advance of 13,000*l.* to be repaid on the 15th of July; that the vessel arrived in the port of London on the 18th of May, when the goods were landed and delivered into the custody of the defendants; and that eventually, though in ignorance of the plaintiffs' title, or of any claim on their part, the defendants delivered them to Messrs. Williams under an order signed by Messrs. Cottam, and dated the 2nd of July.

Several questions of great interest and of more or less difficulty have arisen in the course of the arguments; of such questions, the principal may be stated in the following terms:—

1. What are the duties and corresponding responsibilities of a shipowner acting through the master of his ship, when a demand is made for the delivery of goods, accompanied by a tender of the amount of freight due in respect of them by a party producing the ostensible *indicia* of ownership, but having in fact no right or title to them, by reason of his having previously delivered to another party, for value, an indorsed part of the bill of lading? and 2. What are the duties and corresponding responsibilities of a dock proprietor or warehouseman, into whose custody the goods have been delivered, under the provisions of the Merchant Shipping Act of 1862, who, whilst in ignorance of any previous or other dealing with the goods, is in like manner applied to for their delivery by a party who is apparently the true owner?

Are such duties and responsibilities similar to, or in what respects do they differ from, the duties and responsibilities of a shipowner under the circumstances just mentioned? Mr. Justice Field, who tried the action without a jury, gave judgment for the plaintiffs on the 23rd of January, 1880, and from his judgment the present appeal is brought. Now I take it to be clear, that upon an applica-

tion of well-recognised and established principles to the admitted facts of the present case, the following propositions are unquestionable :—

1. That the effect of the delivery by Messrs. Cottam to the plaintiffs, on the 15th of May, of the indorsed bill of lading, the other parts of the original lot of these not having been previously dealt with, was to pass to the plaintiffs the property represented by it and to confer upon them the right to the possession of such goods upon the arrival of the *Mary Jones* in the port of London, subject, nevertheless, to the payment of the freight due to the shipowner.

2. That it was immaterial that the bill of lading so indorsed was the first, or rather that numbered as "first," of the set, and that the plaintiffs would have acquired an equally good title to the goods if the bill of lading so indorsed had been that numbered "second" or "third" of the set, provided the others had not been previously dealt with.

3. That it was not necessary for the plaintiffs to give any notice to the master of the *Mary Jones* or to the defendants, as owners of the docks where the goods were warehoused after being landed from the vessel, or to do any other act, in order to perfect or assert their title to the goods, as against persons acquiring possession of or laying claim to the same, under any subsequent dealings with the other parts of the bill of lading or any delivery order obtained from the consignees or any persons claiming under them.

The principles involved in these three propositions were affirmed by the House of Lords in *Barber* v. *Meyerstein* (1), if any affirmation were necessary of what appear to have been previously well-recognised principles of mercantile law. It is a consequence of the principle involved in the third of these propositions that every person who makes an advance upon a bill of lading, without ascertaining in whose custody the other parts remain, does so at the risk of such other parts having been previously dealt with ; and in like manner every person who, after the bill of lading has been accomplished, makes an advance upon a delivery order without enquiring as to the bill of lading, does so at the risk of the property in the goods having been passed to some other person by virtue of the bill of lading. The party making the advance in either case runs this risk and must take the consequences if the result turns out to his detriment. That he can protect himself, if he thinks fit, against such risks is clear from the report of the case to which I have already alluded, of *Barber* v. *Meyerstein* (1). In that case the Chartered Mercantile Bank of India not only took the precaution of having all three parts of the bill of lading delivered to them at the time of their making the advance, but, as a further protection, lodged a stop order upon the goods in the warehouses ; and, by the adoption of these precautions, prevented any dealing with the goods until their stop was released. Moreover, Meyerstein, when making his advance, after the claims of the bank had been satisfied and the three parts of the bill of lading had been returned to the consignees, obtained two of the three parts of the bill of lading, and only did not press for the third because he was led to believe, or was under the belief, that it was still in the hands of the master. It would follow from these considerations, that in the absence of any modifying circumstances, which may, although I am not aware that they do, exist in the present case, the title of the plaintiffs to the goods and their right to recover their value as against Messrs. Williams, who have obtained possession of them under the delivery order of Messrs. Cottam, would be clear.

Both parties ran the risks to which I have adverted ; neither of them made or deemed it necessary to make any enquiry as the custody of the other parts of the bill of lading. In the case of the plaintiffs their confidence was well founded—their title has not been interfered with by reason of the other parts of the bill of lading having been previously dealt with ; but as regards Messrs. Williams, their claim to the goods could not prevail against that of the plaintiffs, to whom the property in the goods had passed under their indorsed part of the bill of lading.

Though, however, it was not necessary for the plaintiffs to give any notice or to

do any act to perfect their title as against Messrs. Williams, considerations of a very different character would arise if the plaintiffs had by any act or conduct on their part led or induced Messrs. Williams to believe that Messrs. Cottam had authority to deal with the goods as their own. At first sight it appears somewhat strange that no notice was given by the plaintiffs to the master of the vessel or to the defendants not to part with the goods otherwise than to themselves, and still more so that it was not until some time after Messrs. Cottam had gone into liquidation that the plaintiffs made any claim in respect of the goods or any enquiry about them; but it is not suggested that in so acting or abstaining from acting the course pursued by the plaintiffs was different from the usual practice of bankers who make advances on bills of lading. The practice has doubtless been adopted for the convenience of those engaged in like mercantile transactions, and it is based upon the confidence of the banker that the consignee will neither fraudulently nor negligently so deal with the goods as to occasion him loss in respect of his advance, and to some extent, perhaps, upon a confidence in the solvency of the consignee. In the present case, had Messrs. Cottam remained solvent no difficulties would have arisen; their liability to the plaintiffs would have been clear and they would doubtless have discharged themselves from it. That it was within the contemplation of the plaintiffs that Messrs. Cottam would, or might to some extent and without any previous communication with the plaintiffs, deal with the goods as their own, appears to me to be beyond doubt.

But assuming the rights of the plaintiffs against Messrs. Williams to be clear, the question remains whether it is equally clear as the respondents have contended that the plaintiffs are entitled to recover from the defendants the value of the goods delivered by the defendants to Messrs. Williams & Co. I think they are not so entitled, and I proceed to state the grounds upon which I have arrived at this conclusion.

In *Barber* v. *Meyerstein* (1), though it was held that the legal ownership of the goods acquired by Meyerstein, who, in consideration of an advance to the consignees, first got the bill of lading, must prevail as against Barber, who was the holder of a subsequently taken part of the same set, the question was left open, "whether a shipowner might not be excused who, having no notice of an earlier dealing with a bill of lading, delivered the goods to a person who produced to him another part which had been subsequently dealt with." In the course of his judgment, Lord Westbury said, "It might possibly happen that the shipowner having no notice of the first dealing with the bill of lading, may, on the second bill being presented by another party, be justified in delivering the goods to that party. But, although that might be a discharge to the shipowner, it will in no respect affect the legal ownership of the goods, for the legal ownership of the goods must still remain in the first holder for value of the bill of lading, because he had the legal right in the property."

It is quite true, as has been pressed upon us in argument, that the judgment in *Barber* v. *Meyerstein* (1) was in no respect based upon the distinction so suggested by Lord Westbury between the position relatively to the first holder for value of a bill of lading of a person who, by virtue of another part of the same bill subsequently dealt with, has acquired possession of the goods represented by it, and that of a shipowner who, in ignorance of the existence of a first holder, has delivered the goods to a person producing the ostensible *indicia* of title to them; but, in my opinion, such distinction is not only not inconsistent with general principles, but is based upon an equitable foundation.

Let us examine it a little closer: the party who, upon the hypothesis, obtains possession of the goods, obtains possession of that to which he has no legal title, though he, as well as the first holder, may have given valuable consideration for it. For convenience, or for some other reason satisfactory to himself, he abstained at the time when he made his advance from making those enquiries, which, if made, might have protected him. He must have known, or he must be presumed to

have known, that, as he had not all the parts of the bill of lading, it was at least possible that some other part had been previously dealt with, and that, if so, the claim under it would be entitled to preference over his own; and in the event the possibility becomes a reality. Has he any equity which should prevail against the legal title of the first holder? I think not.

But the position of the shipowner who, in ignorance of any previous dealing with the bill of lading, delivers the goods to the consignee or to a person producing an indorsed part of a bill of lading, is very different. He acts strictly in accordance with his contract; there is no question of title as between him and the first holder whose rights have been interfered with; if responsible to the first holder at all, he is responsible in respect of something which he has improperly done or omitted to do.

What course can be suggested as proper to be pursued by the shipowner, acting through his master, other than that of delivering the goods to the person who, either as consignee or as holder of an indorsed bill of lading, tenders the freight and demands such delivery? Upon the hypothesis, there is no rival claimant; there is nothing in the surrounding circumstances to suggest a title to the goods in any person other than the party claiming them. Is the master to enquire of the party before him whether there is an absent legal owner? Is he to insist upon a production of all the other parts of the bill of lading, even though a plausible reason be assigned for their not being produced? Is he, under such circumstances, to deliver the goods, at the peril of having to account for their value in the event of the alleged reason for the non-production of the several parts of the bill of lading proving to have been fraudulently, or otherwise falsely assigned, or is he to refuse to deliver them if he desires to keep himself free from loss? Furthermore, is he to pursue the same course with reference to every separate consignment of which his whole cargo may be made up?

It would be impossible for a shipowner to carry on his business if he was to adopt the only course which prudence would dictate in such a position of responsibility. And the question naturally suggests itself, Why should the shipowner be required to take all these precautions for the protection of a first holder who has not thought it necessary to take any precaution for his own protection?

In the view which I take of this case it is unnecessary to consider whether the decision in *Fearon* v. *Bowers* (7) is one which should be followed in the present day; in that case there were rival claimants for the goods, and the effect of the decision, as it has been commonly understood, was that the master had, under such circumstances, a right to deliver to whichever he thought proper, and would be fully discharged by a delivery to either. That decision was cited with approval by Lord Loughborough, in *Lickbarrow* v. *Mason* (8), and by Dr. Lushington in the case of *The Tigress* (6); and though the case of *The Tigress* (6) was cited during the argument in *Barber* v. *Meyerstein* (1) in the House of Lords, no dissent from the principle involved in it was expressed in any of the judgments.

But, notwithstanding the weight of authority to which I have just referred, I should, as at present advised, hesitate before adopting the rule that the master has, in all cases, an unlimited right of selection between rival claimants.

I, however, readily adopt the more guarded suggestion of Lord Westbury, that the shipowner, who is ignorant of any previous dealing with the bill of lading, may be justified in delivering the goods to the party presenting the ostensible *indicia* of ownership.

Adopting this view of the responsibilities of the shipowner, I should have had no hesitation in holding that, if the goods had remained on board the *Mary Jones*, instead of being landed, he would have been discharged by the delivery of them to Messrs. Williams, upon a delivery order of Messrs. Cottam, after payment of the freight.

In the present case, however, we have to deal, not with the acts or defaults of the shipowner, but with the acts of a dock company into whose custody the goods have been delivered.

On the part of the appellants, the defendants the dock company, it has been contended that, under the circumstances of the present case, their responsibilities

to the plaintiffs, as first holders of the bill of lading, were the same as were those of the shipowner whilst the goods remained on board his vessel, and that, inasmuch as the master or the shipowner would not have been responsible to the plaintiffs for the value of the goods if delivered from the vessel to Messrs. Williams upon the directions of Messrs. Cottam, the defendants are in like manner free from any responsibility to the plaintiffs in respect of their delivery to Messrs. Williams upon the order of Messrs. Cottam. In my opinion this contention is well founded. It appears to me that, in the absence of any special circumstances, of which I can find no trace in the present case, the considerations to which I have already adverted as applicable to the responsibilities of the shipowner, apply with at least equal force to the responsibilities of the dock proprietor in whose warehouse the goods are deposited after being landed from the vessel.

The respondents, however, contend that the responsibilities of the defendants in respect of the deposit of the goods in their warehouse were regulated by the provisions of the Merchant Shipping Act, 1862, and that under such provisions the defendants were bound to hold the goods (subject to duties, to their own claim for rent and to the shipowner's claim for freight) for the rightful holder of the bill of lading, and that, inasmuch as the plaintiffs alone filled that character, the delivery of the goods to Messrs. Williams was a wrongful dealing with the goods for which the defendants are responsible to the plaintiffs.

In support of this contention, it has been urged that the deposit of the goods was not made upon the instructions or at the instance of Messrs. Cottam, as ostensible owners of the goods, but by the master availing himself of the statute, and with the view of securing a continuance of his lien for freight after the goods were landed and warehoused, and that it was understood and intended by him, as also by Messrs. Cottam and the defendants, that the goods should be dealt with under the provisions of the statute.

Having regard to all the facts and circumstances of the case, I have arrived at the conclusion that the landing and warehousing of the goods was the result of an arrangement between the three parties—the master as representing the shipowner; Messrs. Cottam, the consignees and ostensible owners of the goods; and the dock company. It may, I think, be assumed that the master in entering into such arrangements intended to secure a continuance of his lien for freight upon the goods after they were deposited in the defendants' warehouses, and to obtain the benefit of all the provisions of the statute in that behalf. He was within the terms of the statute when he landed the goods, for though entry had been made, the owner had failed to land or to take delivery of them; his notice of stoppage for freight was expressed to be given under the provisions of the statute, as was also the subsequent notice of removal after the freight had been paid.

What, then, was the effect of the arrangement so entered into by the master, Messrs. Cottam, and the dock company, and of the landing and warehousing of the goods consequent thereon? It appears to me that the rights of all parties and their responsibilities also were thenceforth regulated by the provisions of the statute so far, but so far only, as such provisions were applicable to the circumstances of the case; but that in all other respects their rights and responsibilities were the same as they would have been had no such statute been in force. If this be so, to what extent were the provisions of the statute applicable? It would appear to have been the object of the Legislature to enable the shipowner, in a case in which the owner was not ready to take delivery, to land and warehouse the goods, and at the same time to preserve his lien for freight; but that it was not intended to interfere with the rights or responsibilities of persons interested or claiming to be interested in the goods further than was necessary to attain that object. Under its provisions the shipowner may, in certain events, land the goods and deposit them in a warehouse, and by giving notice to the warehouse owner that the freight in respect of such goods has not been paid, may secure a lien upon them for its amount whilst they remain in the ware-

house; and in the event of such lien not being discharged, a sale may, or at the instance of the shipowner, must, be made by the warehouse owner. Should such a sale be made, the warehouse owner is to hold the surplus of the proceeds, after discharge of duties, rent and freight, for the holder of the bill of lading. It may well be in the present case that if the lien for freight had not been discharged, the defendants would have exercised the power of sale given to them by the statute, and the several provisions of the statute applicable to such a state of circumstances would then have come into force; but there was no occasion for the exercise of any such power, inasmuch as the freight had been paid, and the purpose for which the captain had concurred in the landing and warehousing of the goods had been accomplished, and the defendants had doubtless acquired under the statute a lien for their rent and for any expenses incurred by them in respect of the goods; but such lien could only be enforced in the usual way, namely, by detaining the goods until the claim was satisfied. I can find nothing in the statute which in terms, or in my opinion impliedly, declares or directs that after satisfaction of the shipowner's lien and of their own the dock company shall hold any goods delivered to them under its provisions for the holder of the bill of lading. On the contrary, it appears to me that, after such satisfaction, it was incumbent upon the dock company, and especially so in the absence of any notice of right or title to the goods in any other person, to deal with them as directed by those who were the ostensible owners of them at the time of their deposit, and who as such ostensible owners had concurred in placing them in their custody; and that by so dealing with the goods the defendants have not come under any liability to the plaintiffs in the present action.

It has been further, or rather in the alternative, contended on the part of the respondents, that the defendants should be regarded as the bailees of Messrs. Cottam, and that so regarded they could have as against the plaintiffs no better title than their bailors, and could in no way justify the delivery of the goods upon their order; and this view of the case appears to have been regarded by Mr. Justice Field as its true result.

That the goods were landed and deposited in the defendants' warehouse at the instance of Messrs. Cottam, though with the concurrence of the captain, is, in my opinion, in accordance with the proved and admitted facts of the case. I assent also to the proposition that the defendants acquired no better title to the goods than that of Messrs. Cottam; but there is no question in the present case of any title to the goods in the defendants: it is clear that they never had any, nor has it been ever suggested that they had. The only question, as it appears to me, upon the hypothesis of the defendants being the bailees of Messrs. Cottam, is, whether the defendants, having in their possession goods delivered to them by and as the goods of Messrs. Cottam, and to be disposed of according to the order of Messrs. Cottam, though in fact being the goods of the plaintiffs, can be held liable to the plaintiffs for disposing of them upon the order of Messrs. Cottam. I am of opinion that they cannot. They dealt with the goods in the ordinary course of their business as dock proprietors and warehousemen, and in the manner and for the purpose for which they were deposited with them. It is doubtless true, as was pointed out by Mr. Justice Field in his judgment, that the facts of the present case are in many respects different from those in *Hollins* v. *Fowler* (3)—indeed in that case it was held that there had been a conversion—but, adopting the general view expressed by Lord, then Mr. Justice, Blackburn, in the course of the answer given by him to the question submitted to the Judges by the House of Lords, I can arrive at no other conclusion than that the defendants have not in the present case been guilty of conversion. I agree, therefore, with Lord Justice Bramwell, in holding that the appeal must be allowed.

BRAMWELL, L.J.—This case is, I think, one of very great difficulty—a difficulty arising from there being an unreality in the delivery of the goods in question to the plaintiffs, that delivery being symbolical—an unreality in the alleged cause

of action, namely, a conversion of those goods to the use of the defendants, which as a matter of actual fact is untrue; from the unusual facts of the case, and, as far as I am concerned, from a want of an intimate and familiar acquaintance with the practice of merchants and bankers, shipowners and warehousemen, the Customs and other matters which have to be considered. It is not necessary for me to state the facts: my brother Brett has favoured me with his judgment, where they are, as I think, correctly stated. Save that, with submission, I cannot quite appreciate them as he does. I do not think that the property in the sugar was passed to the plaintiffs with an equity of redemption or some other equity in Cottam & Co. I think that what took place was a pledge at common law with a right in the plaintiffs to sell in certain events, and with a common law right to redeem in Cottam & Co. I think if there had been, instead of a symbolical, an actual delivery of goods from Cottam & Co. to the plaintiffs on the same terms as, for instance, of a case of diamonds, that the general property would not have been transferred, but would have remained in Cottam & Co., the plaintiffs having only a special property and right of possession. I cannot think that any action could have been maintained against them under the Bills of Lading Act for the freight, or any action by the dock company for warehouse rent, or charges or otherwise, supposing such action would lie against some one. They did, however, by the handing over to them of the bill of lading indorsed under the agreement, acquire a special property and right of possession. And I cannot doubt that as against an actual wrongdoer, and against any person who had actually converted the sugars to his own use, as by its consumption or sale, or dealt with them under a claim of title, they might have maintained an action such as the present, as they would have been able to do if the supposed case of diamonds had been taken from them and delivered to a person who sold them or used them, and would not give them up. Why, then, is not this action maintainable? The plaintiffs have a special property, and the defendants have disposed of the goods in a way they had no right to do. My difficulty is to see that the plaintiffs have made out the latter part of the proposition. It must be remembered that this is an action for conversion. If the defendants have disposed of them according to the terms on which they received them, having no notice of any claim, title or right other than that of the person from whom they received them, it is clear that they have not converted them to their own use—that they are not guilty of a conversion—indeed have done nothing wrong. A man steals a chattel and takes it to a carrier to be carried to A., and there delivered to X.; the carrier takes, carries and delivers the chattel accordingly: it is clear and settled law that he would not be guilty of a conversion. The case more like the present would be where the chattel was taken by mistake and handed to the carrier, and then carried and delivered by him. In that case clearly the carrier would not be liable to the true owner. Have the defendants done anything more than the equivalent of this? This involves an examination as to who it was from whom they received the goods; and on what terms did they receive them? In my opinion, in such cases as these, as a rule, where there are no special circumstances, a warehouseman receives the goods from the ship, or ship's captain, on the terms of holding them for the ship till the freight is paid, and then and thenceforth of holding them to deliver to such person as the shipowner or captain would have been justified in delivering them to under the bill of lading. This is Mr. Justice Willes's opinion in *Barber* v. *Meyerstein* (1). This, however, is subject to further considerations arising out of the particular facts of this case, to which I shall afterwards call attention. I think these are the general terms on which such warehousemen as the defendants receive goods with a stop for freight; and, with submission, I think nothing turns on any statute, private or public. This also seems to me the opinion of Mr. Justice Willes. I think the question is the same as it would be if the goods had been warehoused in the private warehouse of the shipowners or of any other warehouseman where, consistently with Customs laws and

regulations, they could have been warehoused, or if they had been left on the quay where the ship discharged, but in the custody of some one who was not to give them up till the freight was paid. I cannot think that the duty and right of the shipowner were other and different because he discharged his cargo instead of keeping it on board; and I cannot think that the warehouseman undertakes a different duty to that of the shipowner. I set no value on the captain's having struck out from the manifest the word "consignee;" for "deliver to the consignee or holder of the bill of lading" is the same as "deliver to the holder of the bill of lading," for "deliver to the consignee" means "deliver to him if he is the holder of the bill of lading." Of course some light is thrown on the matter by the terms of the various statutes, as shewing what are the mercantile usage and practice; but I cannot think that the case is governed by them. Then would the captain of the ship have been justified in delivering these goods to Cottam & Co. on production of their bill of lading and tender of the freight? I cannot bring myself to say he would not. I think if that is to be said it should be by the ultimate Court of Appeal. Nearly a century and a-half ago it was held in a much stronger case, namely, when the captain had notice of the true title, that he was justified in preferring the holder of one bill of lading to the holder of another really entitled. That decision was approved in *Lickbarrow* v. *Mason* (8), and by Dr. Lushington in *The Tigress* (6). It was not disapproved in *Barber* v. *Meyerstein* (1), and it is the undoubted practice to deliver without enquiry to anyone who produces a bill of lading. Then there are the words of the bill of lading, "one of which being accomplished, the other two to stand void." It struck me in the argument of the case that the terms of the bill of lading were against this contention, because the bill of lading says the goods are to be delivered to it, or order or assignees, in this case to Cottam & Co. or assignees—and that ought to be read, to Cottam & Co., or, if they assign, to their assignees; and that the meaning of "one being accomplished, the other two to stand void," is, as my brother Brett puts it, one being rightly accomplished, the other two to stand void. I will not say that is not a possible meaning. The bill of lading could not mean, to be delivered to them though they have assigned, or to their assignees, whichever presents the bill of lading. Another argument occurred to me, namely, Suppose a bill of lading so indorsed and stolen, would a delivery to the thief, the bearer, be a good delivery? If not, why was this? If a carrier received goods to carry to A. and hold till called for by X., and Y. came and represented himself to be X., a delivery to Y. would be a misdelivery and a conversion, according to the authorities. If so, why was not this? An answer given is, that in the case supposed the thief would not be the lawful owner of the bill of lading, and Y. would be committing a fraud and a crime, namely, obtaining goods under false pretences; whereas here Messrs. Cottam have lawful possession of them. I may observe, however, that Y., in the case put, is not necessarily guilty of a crime; he may *bona fide* believe that the goods were for him, that he is entitled to represent X. Still he would be a tortious holder of the bill of lading, which Cottam was not. I confess to being very much embarrassed by these arguments *pro* and *con*. Looking, as I do, on a bill of lading as a mere receipt for the goods, I should construe it as my brother Brett does. But, whatever their weight, there are the authorities to which I have referred, and there is the undoubted practice I have mentioned of delivering the goods to him who presents a bill of lading, and there is the probability expressed in *Barber* v. *Meyerstein* (1) that the captain might not be liable in respect of a delivery under such circumstances. If liable on his contract to carry and to deliver to the consignee or his assignee, he would be liable as in a conversion. He is indeed endeavouring to perform his contract, but so is a carrier who delivers to Y. believing him to be X., to whom he was to deliver. I may notice that in the case before Chief Justice Lee (7) the action was *in detinue* against the captain, which would have been maintainable if trover would have been, and *e converso*. On these grounds I should hesitate long before deciding for the plaintiffs. But

are other considerations in this case
ı I think entitle the defendants to
nent. We are judges here of fact
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laintiffs, who had notice by the terms
› one deposited with them that there
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or ought to have known were, or
one would be, in Cottam & Co.'s
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laintiffs, were only pledgees. The
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he freight and take such steps at the
ı as owners of the goods would do.
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hen a delivery order given by them.
›laintiffs never supposed they were
liable for freight or warehouse rent,
ıt they were in any way to see to
the goods. They might if they had thought fit have watched the arrival of the ship and landed the goods, they might have required a transfer from Cottam & Co. or given notice to the defendants of their title. They did nothing. And they did nothing for a long time after Cottam & Co.'s insolvency, and then they enquired about the goods in a way shewing they had trusted to Cottam & Co., and did not know their own position and rights. It is said that to hold this is to say they had no security. That is not so. They had a perfectly good title against a vendee of Cottam, against an execution creditor, and against a trustee in bankruptcy, saving the question of reputed ownership, as to which I am by no means certain they would have any answer to a claim by such trustee. I am by no means satisfied that these goods were not in the reputed ownership of Cottam & Co., with the plaintiffs' consent within the bankruptcy law. I think Cottam & Co. had with their consent "taken upon themselves the sale and disposition as owners of these goods," and that which shews that shews also that state of facts which gives rise to this defence.

I have said that perhaps Cottam & Co. ought not without the plaintiffs' leave to have given the delivery order for these goods to Williams. Undoubtedly it could not have been intended that the goods pledged should be sold and transferred if of any considerable amount. But I cannot help thinking that as to a small parcel like the present no difficulty would have been made, and that it would not have been necessary for Cottam & Co. to run to the plaintiffs for leave to dispose of a hogshead of sugar. Certainly I have no doubt, and find as a fact, that according to the contemplation of both parties the sale might be first, and the leave asked for, if at all, afterwards. This being my view of the facts I come to the conclusion that, with the assent of the plaintiffs (though I think that not necessary), the defendants received the goods to hold for the ship till the freight was paid, then to hold at the order and disposition of Cottam & Co.; consequently that delivering them to Cottam & Co.'s order was no conversion of which the plaintiffs can complain, and that the

judgment must be reversed. I say the assent of the plaintiffs is not essential, because if Cottam warehoused the goods in their names without the plaintiffs' assent, it might be wrong in Cottam, but a delivery by the defendants to Cottam would not be a conversion. It is scarcely necessary to add that I find no fault with the eminent firm who are plaintiffs for bringing this action. A wrong has been done by Cottam & Co., and the question arises on whom is the loss to fall? The plaintiffs are advised not on them, but on the defendants, and have accordingly properly brought this action. I could not blame them for so doing, unless I blamed them for adopting an opinion which I have come to several times in the course of the argument in and consideration of this case. I am sorry that in the conclusion I differ from my brother Brett, but it is not a difference on any principle of law but one in our appreciation of the facts.

He considers that the defendants received the goods to hold after payment of freight for the person entitled to present possession as against all the world. I think on the particular fact of this case that the defendants received them with the consent of the plaintiffs to deliver them after payment of freight to Cottam & Co. or their order. I think it would be very hard if it were otherwise; and while I admit on the one hand that hard cases make bad law, I contend on the other hand that the fact that a case is hard is *prima facie* proof that it is not law. The plaintiffs are not without remedy—they have one against Cottam & Co. and another against Williams, unless indeed they are taken to have authorised the delivery to them. If they have authorised that it is clear they have none against the defendants. If it is said that the defendants might have protected themselves by requiring the second bill of lading, the answer is, that is not customary; further, the plaintiffs might have protected themselves that way and many others. I cannot agree with my brother Field's judgment, which I have most carefully studied. He does not view the facts as I do. Further, as to the law he says, and says most truly, that treating the defendants as bailees of Cottam & Co. they had no better title than Cottam. But with great respect I cannot agree to the consequence he puts. The same would be true of a carrier who carried for the thief a stolen chattel, but the carrying and delivering would not make a conversion nor any wrongful act. The defendants did not act as on a title. The same conclusion in favour of the defendants may, I think, be arrived at in a different way.

This is an action for conversion; the alleged conversion is a delivery to the order of Cottam & Co. If the defendants received the goods to deliver to the order of Cottam & Co., then the delivery to this order is no conversion, whether Cottam had authority so to deal with the goods or not. Now I think Cottam had such authority from the plaintiffs intentionally, though whether intentionally or not is unimportant. But suppose Cottam had not actually such authority, I still think they were permitted by the plaintiffs to have the appearance of it, and that the plaintiffs cannot be heard to say that Cottam had it not. Still further, if Cottam had no authority, actual or apparent, and if their assumption of it was wholly wrongful, yet even then, if all the defendants did was to receive from Cottam to deliver to their order and delivered accordingly, they are not guilty of a conversion. Supposing that not to be so, a more difficult question would arise. If all that appeared was that the ship landed the goods with a stop for freight, then no doubt it must be taken that the defendants received the goods on the terms on which the ship or captain delivered them to the defendants. What were they? It cannot be supposed that the captain delivered the goods to the defendants to deliver to anyone to whom he would not be justified in delivering them; and so the question would arise whether he would have been justified by a delivery to a *de facto* lawful holder of a bill of lading. This, for the reasons I have given, I think we need not determine, though it arises.

Appeal allowed.

Solicitors—Freshfields & Williams, for appellants; Murray, Hutchins & Stirling, for respondents.

[IN THE COURT OF APPEAL.]

1880. Dec. 7. } KINGSMAN *v.* KINGSMAN.*

Husband and Wife—Power of Married Woman to sue alone—Practice—Leave, when to be obtained—Agent—Right of to set up jus tertii—Rules of Court, Order XVI. rule 8.

Leave for a married woman to sue alone can be obtained under Order XVI. rule 8, *after action commenced, as well as before.*

The plaintiff, a widow, being entitled absolutely to certain leaseholds and being trustee of certain other leaseholds, married in a colony K., then and at the time of action brought an infant. He agreed with her the day before marriage to settle her property upon her, but no settlement was ever made. He deserted her shortly afterwards, and she returned to England. Before this marriage she had appointed the defendant to receive the rents arising out of both these properties, and he continued to do so after he was aware of her marriage. K. never claimed any of the rents so received, but the defendant having declined to pay them to the plaintiff, she, without obtaining leave, brought an action for them in her own name alone. The defendant took out a summons under Order XVI. rule 8 *to oblige her to give security or join a next friend. This summons was dismissed:—*

Held (*by the Court of Appeal*), *that the effect of the dismissal of the summons was to give the plaintiff leave to sue alone; that she could therefore recover in this action the rents received by the defendant from the trust property; but* (*dissentiente* BRETT, L.J.) *that, the agreement for a settlement being void, she could not recover the rents received since her marriage from the property to which she was, prior to her marriage, absolutely entitled.* (*By* BRETT, L.J.), *that she could recover these also, for that the defendant could not allege that he retained them by the right title and authority of her husband.*

Appeal by the plaintiff from the judgment of Lopes, J., at the trial without a jury.

* *Coram* Selborne, L.C.; Baggallay, L.J.; and Brett, L.J.

Claim by the plaintiff, a married woman, suing alone, whose husband was out of the jurisdiction, for moneys alleged to have been received by the defendant as her agent.

The plaintiff, then a widow bearing the name of Langlois, was entitled under her first husband's will, as executrix and trustee for her infant son, to three leasehold houses in Mann Street, Walworth. She was also absolutely entitled to one house in Alvey Street.

She was married in New Zealand on the 25th of December, 1875, to W. W. Kingsman, who was then and at the time of this action brought an infant. The day before the marriage he entered into an agreement with the plaintiff as follows:—

"December 24th, 1875.

"To Mrs. L. J. Langlois.

"In consideration of your consenting to marry and marrying me, I undertake, promise and agree, as soon as the marriage shall have been solemnised between us, to convey and assign to such trustees as you may name the whole of the property belonging to you, or which hereafter may belong to you, upon such trust as shall secure the same property for your sole and separate use, and free from my interference and control, and with an absolute power of disposal on your part.

"S. L. Langlois,
"W. W. Kingsman."

No settlement was ever made.

W. W. Kingsman deserted the plaintiff shortly after this marriage, and she returned to England.

On the 24th of August, 1878, the plaintiff duly obtained at Lambeth Police Court a protection order, under the statutes 20 & 21 Vict. c. 85, and 21 & 22 Vict. c. 108, which order was, on the 26th day of August, 1878, duly entered with the registrar of the Lambeth County Court, within whose jurisdiction the plaintiff then was resident. By this order it was ordered "that all earnings and property acquired by the plaintiff since the 25th of December, 1875, the time at which the said desertion commenced, or what she may here-

after acquire, and all money and property which she has become possessed of, or to which she has become entitled as executrix, administratrix or trustee since the commencement of the said desertion, or which she may hereafter become possessed of, or to which she may become entitled as executrix, administratrix or trustee, shall be protected, and such earnings, moneys and property are hereby protected against the husband and all creditors and persons claiming under him, and shall belong to the said wife."

The plaintiff, before her second marriage, had appointed the defendant by power of attorney to receive the rents of all her property, and he did so both before and since her marriage to W. W. Kingsman. The defendant was aware of that marriage, though W. W. Kingsman had not informed him of it, and had not made any claim to the rents received by the defendant.

The statement of defence pleaded the infancy of W. W. Kingsman, admitted that prior to the marriage of the plaintiff the defendant was appointed her agent, and that as such agent he received certain rents and moneys both before and after her second marriage, and alleged that after that marriage he received the money in part on behalf of W. W. Kingsman and in part on his behalf as co-trustee with the plaintiff. The defendant further denied the validity of the protection order, and denied that the money claimed in the action came within that order.

After the action was begun the defendant took out a summons under Order XVI. rule 8 (1) to stay the action, unless the plaintiff should give security for costs, or join some one as her next friend. This summons was dismissed at chambers, and on appeal by the Exchequer Division. The plaintiff took out a summons for leave to sign judgment under Order XIV. rule 1, and this also was dismissed.

At the trial the jury were discharged, and Lopes, J., gave judgment for the defendant.

The plaintiff appealed.

L. Webb and *W. Cooper*, for the plaintiff. —The question is, whether this plaintiff, who is a married woman, can sue as a *feme sole* in order to recover money received by her agent for her. She is entitled to do so under the protection order made at the Lambeth Police Court, which dates back to December 25, 1875.

[SELBORNE, L.C.—But the rents claimed are rents of property which was hers before her marriage. Does the statute under which this order is made give the magistrate any power over property which by marriage became the property of her husband?]

The contention is that the property was hers, that the agreement for a settlement bound the infant, so that her own property and the trust property remained vested in her, and thus the protection order would cover both.

The promise to settle was in the circumstances of the case binding on the infant husband; it has never been set aside, and although an action could not have been brought for specific performance, still if he had received the rents of the property a Court of equity would have interfered.

[BAGGALLAY, L.J.—Suppose that six months after marriage he had sued the agent for rents, would the agent have had any defence?]

Acts of an infant such as these are not void, but only voidable, and therefore such an agreement as this holds good till set aside—*Zouch* v. *Parsons* (2); and at all events there is an agreement as to which the plaintiff would have a right after her desertion by her husband to obtain a declaration that it gave her an equity to a settlement. *Slocombe* v. *Glubb* (3) was a case in which an infant joined in a settlement in contemplation of marriage, and as there was no fraud

(1) Rules of Court, Order XVI. rule 8: "Married women and infants may respectively sue as plaintiffs by their next friends. . . . Married women may also, by the leave of the Court or a Judge, sue or defend without their husbands and without a next friend, on giving such security (if any) for costs as the Court or a Judge may require."

(2) 3 Burr. 1794. *Simpson on Infants*, p. 25.

(3) 2 Bro. C.C. 545.

it was held good, and the decision was quoted and approved in *Strathmore* v. *Bowes* (4).

[SELBORNE, L.C.—The Court of Chancery was not wont to apply the doctrine of equity to a settlement as against a legal title.]

The Court would not consider that the husband had any title till he had taken some steps to assert one, such as reducing the property into possession.

[SELBORNE, L.C.—That doctrine only applies to *choses in action*.]

The defendant admits that he received the rents as agent of the plaintiff.

[BRETT, L.J.—Perhaps there is an estoppel. I understand that Mr. Justice Lopes considered that if the difficulty as to the parties could be removed, the plaintiff might be in a better position.]

The defendant tried to stay the action by taking out a summons under Order XVI. rule 8 (1), but that summons was dismissed at chambers, and on appeal by the Exchequer Division.

[SELBORNE, L.C.—Possibly that may be held to imply that leave was given to the plaintiff to sue alone. Can an estoppel, however, arise from the agreement by the defendant to act for the plaintiff before marriage as against the husband's rights after marriage?]

There was a continued agency after as well as before the marriage; and as to the right to sue alone, from earliest times a wife could, if her husband was banished, or had abjured the realm, sue as a *feme sole*—*Seton on Decrees* (5)—so that there was no need for leave; but if there were, the order on the defendant's summons gave that leave.

McIntyre and *Oppenheim* for the defendant.

[SELBORNE, L.C.—We wish first to hear argument on the question whether the plaintiff has had leave to sue alone.]

The order made on the summons does not give her leave, it only shews that the Court did not think it necessary to require her to give security for costs and did not shut her out from attempting to establish her claim. The order was made too early in the case for the Court to have any sufficient materials before it to enable it to decide this point; the question before the Court then was one of costs, there was no discussion on procedure or the right of the plaintiff to sue.

With regard to the rents arising from the property of which the plaintiff was trustee, it is submitted that the defendant is entitled to retain those rents, for the husband became liable for the wife in respect of this trust and would be answerable for her acts—*Lewin on Trusts* (6)—and the husband's receipt would be required to exonerate the defendant. It may be that when the defendant first received the rents the plaintiff was entitled; but there is no estoppel, for the defendant can shew that her title has expired.

[BRETT, L.J.—The husband has never claimed the money.]

He was, when the action was brought, an infant, so that the absence of claim cannot weigh against his rights; the plaintiff has incapacitated herself from giving a valid discharge, and there is no question here as to *jus tertii*.

[BRETT, L.J.—*Biddle* v. *Bond* (7) seems to lay down that a person cannot set up the *jus tertii* without the authority of that person.]

This is not the case of a specific chattel. These are rents received by the defendant in part for the husband to whom they belonged as and from the date of the marriage, and in part for him as liable for the wife's trusts. The wife's power of attorney was revoked by marriage; if the money arising from the trust property were misapplied the husband would be liable.

[SELBORNE, L.C.—We are agreed that the agreement for a settlement was waste paper, so that the only question is as to the rents of the trust property.]

The plaintiff could not give a valid discharge for those rents, and an order made under Order XVI. (1) would not enable her to do so: it confers no fresh rights on a married woman, it cannot alter her *status*, it cannot relieve her husband from his liability to see that the trust fund is properly applied; the defen-

(4) 1 Ves. jun. 22; 1 White & Tudor, 446.
(5) Vol. ii. p. 657.
(6) 7th ed. p. 429.
(7) 6 B. & S. 325; 34 Law J. Rep. Q.B. 137.

dant is not setting up any *jus tertii*, and only seeks to protect himself by holding the money for the legal owner thereof.

Webb, in reply.

SELBORNE, L.C. — The plaintiff endeavoured to establish a right to sue under two protection orders; but we are all of opinion that those orders do not, or rather the order made at the Lambeth Police Court—which is set out in the pleadings, and which is the only one we can consider—does not, entitle the plaintiff so to sue. That order directed "that all earnings and property acquired by the plaintiff since the 25th of December, 1875, the time at which the said desertion commenced, or what she may hereafter acquire, and all money and property which she has become possessed of, or to which she has become entitled as executrix, administratrix or trustee since the commencement of the said desertion, or which she may hereafter become possessed of, or to which she may become entitled as executrix, administratrix or trustee, shall be protected, and such earnings, moneys and property are hereby protected against the husband and all creditors and persons claiming under him, and shall belong to the said wife."

Now that order applies to all earnings and property acquired since the date of the marriage, whereas no such property is the subject of this suit.

It is then alleged that the plaintiff is entitled to sue under an agreement which her then intended husband made with her on the day before the solemnisation of the marriage. That agreement was in the following terms.

[His Lordship read it.]

This agreement was made by the husband of the plaintiff when he was an infant of the age of eighteen, and it is with some regret that I find myself unable to give effect to it. The law is, that generally speaking the promise of an infant is absolutely void as against himself; and in order to make this agreement effectual it would be necessary to shew that it could be enforced against an infant. To hold that this agreement constituted this property the separate estate of the plaintiff would be to make an agreement which would be to the infant's prejudice. He was still an infant when this action was brought, so that he could not have affirmed it; and the agreement being thus one made by an infant in derogation of his own rights, it cannot constitute the property therein mentioned the separate estate of the wife, so that on the marriage the husband became the purchaser of the plaintiff's legal estate in these leaseholds.

Two questions then arise in connection with the right of the plaintiff to recover anything in this action. The defendant admits that prior to the marriage of the plaintiff he was appointed her agent, and that as such agent he received the rents and moneys arising both out of the leaseholds which were absolutely her property as well as out of those which she held in trust for her infant son by her former marriage. The considerations differ as to each of these two properties, and I will deal first with those which apply to the trust property. The law is, that if a woman who is a trustee marries, her husband does not thereby become trustee instead of her, or co-trustee with her, but that he is subject to her liabilities —that if she sue as trustee he must be joined in the action, and must probably join in a receipt; but the law will dispense with these requirements in certain cases, as when the husband is an outlaw or has abjured the realm, as well as in certain cases specially provided for by legislation of modern date, and in cases for which provision is made by Order XVI. rule 8 (1). No doubt application for leave to sue alone under this rule is ordinarily and properly made by a married woman when or before she begins her action; but there is nothing in the rule to prevent the Court giving her that leave even if she have begun the action without applying for leave. In the present case the plaintiff did begin without asking leave. The defendant then applied for an order staying the action unless and till she should give security or join some one as her next friend, and I think that on that summons the Court had power to exercise the authority given by the order referred to. That summons was dismissed both at

chambers and by the Exchequer Division, so that we may take it that the Court was of opinion that this was a case in which it was proper that a married woman should be permitted to sue alone; and I may add that, so far as relates to the trust property, I am of the same opinion. The plaintiff has therefore a *locus standi*, and that which she can recover under a judgment so obtained she can, I do not doubt, give a valid discharge for. Why should she not recover in such an action the amount received by the defendant under the agency constituted by her before her marriage? He has received the money of her infant son, of whom she was the sole trustee. It is clear to me that the defendant ought not to retain the money so received, that that money ought to be recovered by her, and that in an action thus allowed to proceed judgment ought to pass for the plaintiff.

Then arises the question as to the property which was not trust property, but the absolute property of the plaintiff. These leaseholds were prior to her marriage hers absolutely. If there is any balance in the hands of the defendant of rents or moneys received by him before her marriage, that would be a debt or *chose in action* due to the plaintiff at the time of her second marriage, for which the husband would, if he were to sue, have to join the wife as party to the action, and for which she can under the order made in this case, pursuant to rule 8 of Order XVI. (1), sue alone; but, on a review of the figures, it appears that nothing is shewn to be thus due. Then how stands the case as to what has been received by the defendant since the marriage? I confess I am unable to see any analogy between the circumstances of this case and those of the case of *Biddle* v. *Bond* (7), to which reference has been made.

The effect of the marriage, apart from the agreement for a settlement, was to give the husband as good a legal title in these leaseholds as if he had been assignee of them both at law and in equity. The defendant, the agent of the plaintiff, had notice of the marriage, and I do not think that the fact that the infant husband did not make any claim on him makes any difference. The defendant, the stakeholder, had notice of the person to whom the money belonged. It resembles the case of an assignment; and if there had been an assignment by deed and notice of the assignment, he could not have paid the money to the assignor, to whom it had ceased to belong. The case of *Biddle* v. *Bond* (7) was different in its facts. There there was a dispute as to whether the person on whom the distress was made was really tenant or not, and this related to the antecedent title, before the auctioneer to whom the goods were delivered for sale became the bailee of those goods. That is not analogous to the case of an assignor and assignee; so that although I think the decision in *Biddle* v. *Bond* (7) was a right decision on those facts, I am unable to see that it is an authority in favour of the plaintiff on this part of the case.

I am of opinion that this appeal should be allowed, and that the whole costs from the beginning to the end of this action should be paid by the defendant.

BAGGALLAY, L.J.—I am of the same opinion. Two questions arise on this appeal—First, whether the plaintiff can sue alone; and secondly, whether the subject-matter of the action is one in respect of which she ought to recover.

With regard to rule 8 of Order XVI. (1), I agree that there is nothing in the rule which requires that leave to sue alone should be obtained by a married woman before action commenced, and that in this case the right of the plaintiff to sue is established by the dismissal of the summons taken out by the defendant. Then, as regards the subject-matter of the suit, the plaintiff bases her claim in the first place on the protection order, in the second place on the agreement for a settlement, and in the third place on the general circumstances which constitute the source of the fund in question and the relation of the defendant to that fund. I agree with the Lord Chancellor that the protection orders do not touch this property or any of it, and that, although the agreement is in terms a promise to execute a settlement, still, that as the promisor was an infant, he is not bound by it; and

that, as he was when this suit was brought still an infant, he could not do any act to ratify or affirm or shew acquiescence in his promise.

The last question is as to the source of the money. With regard to the trust property, which is part of the property whence these funds accrued, the plaintiff was of that property the sole trustee when she married, and it probably now would be necessary, in case of litigation, that her husband's name should be joined as party to the proceedings, and probably he ought to join in a receipt; but the order which was made on the defendant's summons for staying the action removes any difficulty on that point, and on any judgment recovered by her it is clear that her receipt would be an ample discharge for money paid to her. But the rest of the property in question stands on a different footing; it was hers absolutely, so that on her marriage it vested in her husband, and he alone could give a valid receipt for rents arising out of it. It is said that because he has made no claim, he must be taken to have agreed that his wife should receive the rents arising out of it; but there is no evidence of any such agreement, apart from the settlement, which we all agree cannot bind the infant husband, and it cannot be that failure by an infant to claim what is his can be sufficient to deprive him of his right to receive it.

The rents of this property the plaintiff, therefore, cannot recover. I agree with the proposal of the Lord Chancellor as to costs.

BRETT, L.J.—I am unable to agree with the Lord Chancellor and Lord Justice Baggallay as to this last point, as to the rents of the leaseholds, which were, prior to the marriage, absolutely the plaintiff's property. In the rest of their judgments I concur, and I should prefer, differing as I do with diffidence, to say no more; but as this decision may hereafter be cited, I ought to state why I am obliged to take a different view on this part of the case. No point as to the power of the plaintiff to sue under Order XVI. rule 8 (1) was taken before Mr. Justice Lopes, so that we have not the benefit of his judgment on the point.

I agree that, the promisor being an infant, the agreement for a settlement could have no effect, and by the marriage the leasehold properties, of which the plaintiff was absolute owner, vested in her husband. Before marriage the plaintiff gave the defendant an authority to collect rents as her agent, so that the relation of principal and agent was constituted between them, as the defendant accepted the agency. That agency was, in one sense, determined by the marriage of the plaintiff, as the defendant was not obliged to continue her agent after that marriage; but he did continue and collected rents as agent after the marriage—he acted under that previously given authority, for he had no other; the husband, being an infant, could not authorise him to act as agent, so that he thus acted under the authority of the wife, and he received the money in question under the contract between him and her, although, indeed, the money so received was not hers. The wife now sues him alone, and the order justified her in so doing; her case should, therefore, be treated, I think, as if she and her husband were independent parties. Now, the plaintiff sues the defendant under a contract by which the defendant collected money for her, and the defence is that the money is not the money of the plaintiff, and that the defendant had notice that it belonged to some one else—not notice from the owner, but notice *aliunde*. I do not think that this defence can be maintained. Suppose that these parties were independent parties. Suppose that the plaintiff had handed certain goods to the defendant on a contract to return them, could the defendant refuse to do so on the ground that he had notice, not from the real owner, but *aliunde*, that they did not belong to the plaintiff? I think not. I do not think that the mere fact of notice gives the *employé* a right to set up a *jus tertii* as against the person by whom he has been employed.

The Lord Chancellor has said that if the plaintiff empowered the defendant to collect the rent of the property, and then assigned the property, and if the defendant should continue to collect the rents under the authority of the plaintiff after

notice of assignment, he could set up the fact of assignment in answer to the claim by the plaintiff for the money. It is of course necessary to suggest an answer to this proposition, and it appears to me that the plaintiff would have a right to say, "What is that to you?—that is my affair, not yours." Some circumstances will, undoubtedly, give a person in the position of the defendant the right to set up a *jus tertii*, but one of those circumstances, and a material circumstance, is not notice, but claim; and if so, the case seems to be brought within the authority of *Biddle* v. *Bond* (7). Mr. Justice Blackburn based his judgment in that case on the claim made by the alleged tenant, who gave the auctioneer, the defendant, notice not to sell the goods, or if he did sell them, to retain the proceeds for him. The auctioneer did so, and set up the title of the alleged tenant against the plaintiff; and he was held to be justified in so doing, because he there defended upon the right and title, and by the authority of the person named.

That is not so here, as it seems to me. If the wife, the plaintiff, be treated as a distinct person, she must be held to be suing the defendant under his contract for money received by him for her, and the only answer that is set up is not a claim by the husband, but the statement that the defendant knew the money belonged to the husband. The defendant cannot say that he defends on the right, the title and the authority of the husband: I think, therefore, that the answer is insufficient. He cannot truly say he has the authority of the husband, and therefore, by rules of law, the plaintiff ought to recover all that she claims.

Judgment reversed, and entered for the plaintiff, for the balance of moneys admitted by the defendant to have been received from the property of which the plaintiff was trustee.

Solicitors—G. M. Cooke, for plaintiff; H. F. & E. Chester, for defendant.

[IN THE COURT OF APPEAL.]

(*Appeal from the Common Pleas Division.*)

1880. June 29. } MACDONALD *v.* CHESNEY.*

Debtor and Creditor—Bankruptcy—Composition—Debtor's Statement—Non-assenting Creditor—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 126.

Under section 126 *of the Bankruptcy Act*, 1869, *a debtor must, in order to bind a non-assenting creditor by a composition, shew in his statement the whole of every debt due to the creditor, so that if the debtor states one and omits another of the debts, the creditor is not bound in respect of the debt stated.*

Judgment of the Common Pleas Division affirmed.

Appeal from a judgment of the Common Pleas Division upon the report of an official referee.

The plaintiff in the action claimed a sum of 37*l.*, and the defendant counter-claimed for three sums of 8*l.*, 82*l.* and 119*l.* respectively. The official referee found that the 37*l.* was due from the defendant to the plaintiff, that the sum of 8*l.* was due from the plaintiff to the defendant in respect of services rendered by him, and the sums of 82*l.* and 119*l.* were due to him as trustee in the bankruptcy of one Porter.

Shortly after Porter became bankrupt the plaintiff filed his petition under the Bankruptcy Act, 1869. The defendant thereupon sent in a proof for the two sums of 82*l.* and 119*l.* only, but he afterwards withdrew this proof. The plaintiff in his statement produced at a general meeting of his creditors scheduled the two sums of 82*l.* and 119*l.* as being the whole of his indebtedness to the defendant, and the creditors eventually resolved to accept a composition, under section 126 of the Bankruptcy Act, 1869, of 2*s.* 9*d.* in the pound. The defendant did not in any way assent to the composition proceedings.

Upon these facts the Common Pleas Division (Grove, J. and Lindley, J.) gave

* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Brett, L.J.

judgment for the defendant upon his counter-claim, and the plaintiff appealed.

W. Graham, for the plaintiff.—First, the defendant was bound by the composition in respect of the debts due to him as trustee in Porter's bankruptcy. Those debts were properly scheduled in the plaintiff's statement; they were due to the estate of Porter, and not to the defendant personally, and the plaintiff representing that estate is bound by the composition resolutions — *Campbell* v. *Im Thurn* (1). Secondly, it is contended that under section 126 of the Bankruptcy Act, 1869 (2), the debtor may declare in his statement the amount of a particular debt due to his creditor without declaring the whole amount of the debts due, and the creditor is bound by the composition in respect of the debt declared. The language of the section will bear that construction. *Ex parte Lang; re Lang* (3) is distinguishable from this case because there the debt was improperly stated. Thirdly, in the present case the defendant has precluded himself from setting up that the composition resolutions were not binding upon him by conduct similar to that in *Ex parte King; re Harper* (4)—and see also *Ex parte Peacock; re Duffield* (5). By sending in his proof for the two sums due to him as trustee in Porter's bankruptcy, he misled the plaintiff into supposing that the amount of those sums was the whole amount of the plaintiff's indebtedness to him.

F. Clarke (*Dugdale* with him), for the defendant, referred to *Oppenheim* v. *Jackson* (6).

BRAMWELL, L.J.—I am of opinion that this appeal must be dismissed. Mr. Graham's first point was that this was a debt due to the defendant only as trustee in the bankruptcy of Porter; I think it is clear that it was a debt due to the defendant personally. He could maintain an action to recover it in his own name. He sold some property to the plaintiff under a contract binding upon both parties personally. If it was intended to say that the debt was one due to Porter's estate the fact should have been so stated in the schedule. The plaintiff is in this dilemma: either it was a debt due to the defendant as trustee of Porter's estate, and if so, the facts were not properly stated in the debtor's schedule; or it was a debt due to the defendant personally, and if so, the whole of the debt was not scheduled. As to the construction of section 126, it is difficult to see what was the intention of the framers of that section; but we ought to put the most natural and obvious meaning on it unless by doing so some striking anomaly or hardship is produced. I think the section should be read thus: the provisions of the composition resolution "shall be binding"—that means, shall be binding notwithstanding the objection or dissent of the creditor—on all the creditors whose respective names and addresses, and the respective debts respectively due to whom are put in the schedule. That interpretation comes to this, that those creditors whose names and addresses are inserted in the schedule, and the whole of whose debts are also in the schedule, shall be bound. The section goes on, "but shall not prejudice or affect the rights of any other creditors." I think the primary and natural meaning is that a debtor, whose creditor has more than one debt, must in order to bind the creditor state all the debts in the schedule. Thus if the creditor is owed a sum on a promissory note given

(1) 45 Law J. Rep. C.P. 482; Law Rep. 1 C.P. D. 267.

(2) Section 126 enacts that "the creditors of a debtor unable to pay his debts, may, without proceedings in bankruptcy, by an extraordinary resolution resolve that a composition shall be accepted in satisfaction of the debts due to them from the debtor." After providing the mode in which the extraordinary resolution is to be passed, and after making other provisions as to the conduct of the proceedings, the section further enacts that "the provisions of a composition accepted by an extraordinary resolution in pursuance of this section shall be binding on all the creditors whose names and addresses, and the amount of the debts due to whom, are shown in the statement of the debtor, produced to the meetings at which the resolution has passed, but shall not affect or prejudice the rights of any other creditors."

(3) Law Rep. 5 Ch. D. 267.

(4) 43 Law J. Rep. Bankr. 41.

(5) 42 Law J. Rep. Bankr. 78; Law Rep. 8 Ch. App. 682 (Judgment of Mellish, L.J.).

(6) 48 Law J. Rep. C.P. 441; 49 Law J. Rep. C.P. D. 216.

by the debtor, and another sum for butcher's meat supplied to the debtor, in order to bind the latter he must state both debts in the schedule. At first sight it appeared to me unreasonable to construe the section so that if a debtor stated a debt of 1,000*l.* owing to a creditor, and by inadvertence left out a debt of 5*l.* to the same creditor, the composition would not be good either in respect of the 1,000*l.* or the 5*l.* But I am inclined to alter that view. I cannot say that it is unreasonable to construe the section as I have done. The Legislature may have intended to prevent a debtor getting the advantage of a composition upon some and not upon others of his debts. There may be good reasons for it. The larger the amount scheduled of the creditor's debts the larger is his voting power. I do not therefore see anything so unreasonable in this construction of the section as to induce us to alter the natural meaning of the words. Mr. Graham wishes us to read into the section, after the words "shall be binding on all the creditors whose names and addresses and the amount of the debts due to whom are shown in the statement of the debtor," the words "as to such of the debts due to the creditors as shall be shown in such statement." I do not see any reason for doing so. If it is said that our construction creates a difficulty in the way of effecting compositions with creditors, the answer may be given that there are two other ways of becoming free given by the Act—bankruptcy and liquidation. I am of opinion that the appeal should be dismissed.

BAGGALLAY, L.J.—The question we have to determine is whether the defendant Chesney is bound as a creditor of the plaintiff by the composition resolutions passed by the plaintiff's creditors under section 126 of the Bankruptcy Act, 1869. Wisely or unwisely the Legislature has thought fit to enable the creditors of a debtor to accept a composition, and by their resolution to that effect to bind non-assenting creditors. This, no doubt, is an interference with the right of a creditor who does not assent to the composition to enforce payment of his debt, and the Legislature has thought fit in several ways to guard his rights.

The resolution must be passed at two meetings: at the first meeting the creditors may by an extraordinary resolution resolve to accept a composition. That resolution must be confirmed at the second meeting in the manner prescribed by the Act. And it is required of the debtor that at each of the meetings he shall produce a statement shewing the names and addresses of his creditors and the amount of the debts due to them.

Now it appears to me that if it was open to a debtor and creditor to arrange between themselves, where there were several debts, that some of them should go under the composition and others should not, the door would be opened to very great frauds. By the omission from the statement of one of several debts, or part of one debt, the creditor would be enabled to obtain an advantage over his fellow creditors. The Act says that the composition shall be binding "on all the creditors whose names and addresses, and the amount of the debts due to whom," are shewn in the statement; but it also states that the composition shall not be binding upon any other creditors. I am of opinion that the statement must shew the whole of the debts, if more than one, or the whole of any one debt due to the creditors, in order to bind him. *Ex parte Lang; re Lang* (3) appears to me exactly applicable to this case. There there was a non-compliance with the requirements of the first part of the section. Here the whole of the debts due to the defendant was not set forth in the plaintiff's statement to the meeting of creditors. The terms of the Act, therefore, have not been sufficiently complied with to authorise us to say that the creditor was bound by the composition.

BRETT, L.J.—I am of the same opinion. The answer to the contention that the two debts due to the defendant inserted in the schedule were really only debts due to Porter's estate is, that they were debts due to the defendant personally. As to the construction of section 126, *Ex parte Lang; re Lang* (3) decides that, inasmuch as creditors may be bound by composition

proceedings against their consent, the debtor must bring them strictly within the terms of the statute. If he fails to do so by mistake or otherwise, non-assenting creditors are not bound. The question then is whether the creditor in this case is brought within the terms of the statute. I am of opinion that the true rendering of section 126 is that the name and address and the whole of the debts due to a creditor, in order to bind him, must be put in the statement. It signifies not whether debts are due under different contracts, and in respect of different rights. It is not necessary to add them up in the statement, but the whole of the debts due to the creditor must be put down. In other words, if you are a debtor you are only one debtor. It signifies not in respect of how many contracts you are the debtor. You must put down the amount of your debt—the whole of it—and failing to do this you fail to bring yourself within the terms of the Act. Lord Justice James in *Ex parte Lang; re Lang* (3) held that with reference to the first part of the section the interpretation of it must be strict, and that mere omission to state correctly the debt is no excuse.

It is clear that in *Oppenheim* v. *Jackson* (6) we followed the reasons of the judgment in *Ex parte Lang; re Lang* (3). The debtor must take care to be strictly within the Act if he desires to bind a non-assenting creditor.

There is no conduct on the part of the creditor here which has misled the debtor so as to estop the creditor from setting up that the statute has not been complied with.

Judgment affirmed.

Solicitors—Wright & Law, agents for J. T. Wright, Leicester, for plaintiff; H. B. Clarke & Son, agents for Terry & Robinson, Bradford, for defendant.

[IN THE COURT OF APPEAL.]

(*Appeal from the Queen's Bench Division.*)

1880.
June 23, 26, 28.
Aug. 6.

WILSON *v.* LORD BURY AND OTHERS.*

Company—Directors—Trust—Contract.

The defendants were directors of a company, formed for the purpose of receiving and investing upon security moneys received from depositors. The plaintiff deposited 1,000*l. with the company, upon the terms that it should remain in their hands for five years; that the company should pay interest on the whole sum at the rate of six per cent. from the receipt of the money until the end of the five years, and should, at the end of the five years repay the* 1,000*l. out of their own funds, if it should not be otherwise realised for the plaintiff; that the company should, as soon as possible after the receipt of the* 1,000*l., place in the hands of the plaintiff, to secure that sum, a colonial mortgage, not to be effected in the plaintiff's name; and, in case the mortgage should become ineffective before the end of the five years, the company were to replace it by another. The company accordingly transferred to the plaintiff a mortgage debt for* 1,000*l., secured by a mortgage to the company of lands in Canada. The mortgagor paid off the debt to the company before the expiration of the five years, and the company dealt with the proceeds as part of their general funds, and did not procure another mortgage security for the plaintiff. The company subsequently went into liquidation, and the plaintiff sued the defendants to recover from them the* 1,000*l., on the ground that he had lost it through their gross negligence. At the trial the defendants were shewn to have been present at meetings of directors, when a letter from the company's agent in Canada enclosing a bank draft for the amount of the paid-off mortgage debt was entered as read, and the company's balance-sheet for the year in which the mortgage debt was paid off contained an item on the debit side, "directors' fees,* 1,000*l." Evidence was tendered that at the time the proceeds of the bank draft were paid into the company's bank the company was in-*

* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Brett, L.J.

solvent. The Judge at the trial rejected this evidence as immaterial, and directed a verdict and judgment for the defendants:— Held (*by* BRAMWELL, L.J., *and* BRETT, L.J., *dissentiente* BAGGALLAY, L.J.), *that the evidence was properly rejected; that there was no evidence upon which the defendants could be made liable, and therefore that the judgment was rightly entered.*

The plaintiff in this action obtained, by way of appeal from the Queen's Bench Division, a rule *nisi* for a new trial in the Court of Appeal, on the ground of misdirection and improper rejection of evidence at the trial.

Sir J. Holker (*Lumley Smith* with him), for the defendant Lord Bury, and

Sir H. James (*Attorney-General*) (*R. T. Reid* with him), for the defendant Montgomerie, now shewed cause.

Whitehorne (*C. Russell* and *Silvester* with him) supported the rule.

The facts are fully stated in the judgment of Brett, L.J., and the arguments sufficiently appear from the judgments of the Lords Justices (*post*).

The following cases were cited in argument in addition to those referred to in the judgment of Brett, L.J.: *In re The Wincham Shipbuilding, Boiler and Salt Company; Hallmark's Case* (1), *Pickering* v. *Stephenson* (2); *Rhodes* v. *Forwood* (3); *Betts* v. *De Vitre* (4); *Stewart* v. *Austin* (5); *The Land Credit Company of Ireland* v. *Lord Fermoy* (6); *Ashurst* v. *Mason* (7).

Cur. adv. vult.

The following judgments were delivered on August 6:—

BAGGALLAY, L.J.—As the other members of the Court agree in opinion that the judgment of the Queen's Bench Division should be affirmed, I cannot but entertain considerable doubt as to the correctness of the conclusion at which I have myself arrived. It is, however, right that I should state my views upon the subject, and I will do so as concisely as possible. Among the objects for which the company was established were—First, The investment of money entrusted to it as agent for other persons; and second, The guaranteeing the repayment of any money which might be invested on securities through its agency.

In carrying out these objects it appears to have been the practice of the company to combine the two, and in lieu of simply investing the money entrusted to them upon mortgage or other securities, charging a commission for so doing, they guaranteed the repayment of the moneys so entrusted to them for a consideration which, it must be presumed, covered not only the risk incurred by them in respect of the guarantee, but a remuneration for the trouble and expense incurred by them in respect of the whole transaction. It is unnecessary for me to refer in detail to the several documents executed by the company and the plaintiff for the purpose of carrying out the transaction which has given rise to the present action, nor to the mode in which the company, through its directors, dealt with the money entrusted to it by the plaintiff, as they are fully stated in the judgment of Lord Justice Brett, which I have had an opportunity of reading and considering; it is sufficient for me to say that, in my opinion, the relation of trustee and *cestui que trust* was established between the company and the plaintiff, nor can I regard the mode in which the money was dealt with by the company after Dill's mortgage had been paid off, and the omission to make any communication on the subject to the plaintiff, otherwise than as a breach of trust. It appears to me also that both the defendants were parties to and aided in the commission of that breach of trust. I fully recognise as a general rule that an agent employed by a trustee is accountable to his principal only, and cannot be made responsible as a constructive trustee to the *cestui que trust*, but I think that a distinction may and

(1) 47 Law J. Rep. Chanc. 868; Law Rep. 9 Ch. D. 329.
(2) 41 Law J. Rep. Chanc. 493; Law Rep. 14 Eq. 322.
(3) Law Rep. 1 App. Cas. 256.
(4) 37 Law J. Rep. Chanc. 325; Law Rep. 3 Chanc. App. 429.
(5) 36 Law J. Rep. Chanc. 162; Law Rep. 3 Eq. 299.
(6) Law Rep. 8 Eq. 7.
(7) 44 Law J. Rep. Chanc. 337; Law Rep. 20 Eq. 225.

ought to be drawn between the case of a company necessarily acting by its directors, and an individual trustee acting through an agent over whose actions he can exercise a control. Whether, however, I am right or wrong in thinking that such a distinction should be drawn, there can be no question that the general rule to which I have referred does not apply when the agent has derived a personal benefit from the breach of trust, and in my opinion, an important question in the present case is, whether the defendants have derived any such personal benefit.

Upon this question, the evidence which was excluded upon the trial may have an important bearing. The two defendants held between them nearly one-fourth of the whole capital of the company, and it is alleged that the excluded evidence would shew that, at the time when the proceeds of Dill's mortgage came under the control of the directors, they must have been aware of the insolvency of the company; that they nevertheless mixed the moneys of the plaintiff and of other depositors with their own, and that they from time to time retained or paid to themselves large sums by way of dividends on their shares, and also as fees for their services as directors; and that they must have been aware that the moneys so retained and paid were derived not from any funds properly belonging to the company, but from the moneys entrusted to them by the depositors. In my opinion the tendered evidence, which would probably shew whether these allegations were or were not well founded, ought to be admitted, and the rule for a new trial should be made absolute.

It may be that, having regard to the frame of the pleadings, it was proper to reject such evidence at the trial; but even if this were so, the case is one in which I think liberty should be given to amend.

BRAMWELL, L.J.—My brother Brett has favoured me with the perusal of his judgment in this case. I entirely agree that the ruling of the Lord Chief Justice at the trial was right, and right for the reasons given. There is no what may be termed common-law cause of action in this case. Treating the case as one of contract, the contract was between the plaintiff and the company, and not the directors. Treated as a case of tort, no wrong in the defendants, independent of duty, is shewn, and no breach of any duty to the plaintiffs is shewn in the defendants for the same reason, that no contract raising it is shewn to have existed between them. The case is not mended by the statement of claim saying that the negligence was "gross." That will not give a cause of action unless negligence not gross will, and that will not unless mere nonfeasance will, and that will not in this case unless it is a breach of contract in the defendants, and that it is not, for there is none with the plaintiff. I also agree that the evidence was properly rejected as irrelevant to the question in the cause.

But a case was made before us which was not made at the trial, nor, as I think, open on the pleadings. And for my own part, if I thought that case a good one, I would not allow a new trial unless upon payment of the costs of the former trial and subsequent proceedings. But I think it is not a good case. It is, that there was a relation of trustee and *cestui que trust* between the plaintiff and the company, and a breach of trust, and that the defendants were parties to and aided in bringing about that breach of trust, and consequently are liable for it. I approach the consideration of this question with great distrust from want of familiarity with it, and from the singularly confused character of the documents between the plaintiff and the company, the description of which by my brother Brett I also agree in. I feel it difficult to say there is not a trust. The money is received to invest. If the security is paid off it is to be re-invested. I do not think that there being a contract and an agency prevents there being a trust, nor the fact that the company were to pay interest from the time they received the money, nor from what seems to me a consequence from that, namely, that they might properly make some use of the money, without mixing it with their general funds, till they could find a proper investment according to their agreement. Still, there

are those things, and the considerations to which they give rise, and I strongly feel the danger of implying trusts, with all their complexities, from a business contract. It is not necessary to decide this. For, assuming there was a trust, and a breach of it, I can see no reason on which the directors can be held personally responsible for it to the plaintiff. On this matter, also, I entirely agree with the reasoning and authorities of my brother Brett, to which I can add nothing profitably. I also am of opinion that this judgment should be affirmed.

BRETT, L.J.—In this case the plaintiff sued Lord Bury, Mr. Montgomerie and Mr. Muckleburugh, as directors of a company called the "Colonial Trusts Corporation, Limited," to recover the sum of 1,000*l*. The statement of claim founded the plaintiff's alleged right of action on a charge of gross negligence by the defendants.

The defendant Muckleburugh did not appear to the action.

The case as against the other defendants was tried before the Lord Chief Justice of England and a jury. The Lord Chief Justice at the end of the plaintiff's case directed the jury to find for the defendants. The Queen's Bench Division refused to grant a rule for a new trial on the ground of misdirection or improper rejection of evidence. Upon appeal a rule *nisi* was granted by the Court of Appeal as for misdirection and an improper rejection of evidence, against which cause was afterwards shewn. The ultimate question is, whether upon the evidence which was given or upon that, and that which was rejected, if it was improperly rejected, a jury could have been properly allowed to give a verdict in favour of the plaintiff. The evidence given was that the company called the "Colonial Trusts Corporation, Limited," was a company incorporated in order to replace a company called the "Colonial Securities Company, Limited." The "memorandum of association" of the new company stated the objects for which it was established, and, among others, that it was so established for—Third, the lending and investing money, whether belonging to the company or entrusted to the company as agents for other companies or persons; fourth, the securing by guarantee or otherwise the repayment of moneys invested on securities, whether such investments be made through the agency of the company or not; fifth, the negotiating loans, managing properties, collecting and receiving rents and transacting all manner of agency and commission business; sixth, the acquiring and dealing with land in England or elsewhere. The capital of the company was to be 300,000*l*. in 60,000 shares. The "articles of association," after giving to the directors the management of all the affairs and business of the company, gave them power in terms—(*c*) to invest the moneys of the company, or moneys entrusted to the company for that purpose, in any securities, or in any manner which they may think fit, except by purchasing the shares of the company, and to realise and deal with the securities and investments at their discretion; (*d*) to borrow on behalf of the company such sums of money as they deem advisable for any of the objects or purposes of the company, at such rate of interest, and generally on such terms and conditions, as they may from time to time think fit, &c.; (*e*) to secure the repayment of any moneys so borrowed, and the payment of interest thereon, in such manner, &c.; (*f*) to guarantee the repayment of money lent, and the payment of interest on money lent, either together or separately, whether the loans are effected through the agency of the company or not. The directors were to cause true accounts to be kept—(*a*) of all sums of money lent or advanced by or through the company, and of the matters in respect of which, and the securities upon which, the same were respectively lent and advanced; (*b*) of all sums of money borrowed by or through the company, and of the matters in respect of which, and of the securities upon which, the same were respectively borrowed. Muckleburugh was appointed the managing director, Montgomerie a director, Lord Bury chairman and director. Assuming to act under the authority thus given to them, the directors issued a "prospectus,"

which stated that "the corporation acts as agent for the investment of money in large or small sums, for not less than five years, in joint mortgages on freehold lands of ample value, and with registered titles, in Canada and other colonies, guaranteeing the principal and also interest at the rate of six per cent. per annum, payable half-yearly, on the 1st of January and the 1st of July. "Applications for mortgages, &c., may be made in the annexed form." "First mortgages on freehold and real estate for fixed periods issued at par. To the directors, &c. I herewith remit to you *l.* to be invested for years in first mortgages on freehold real estate in Canada, interest at the rate of six per cent. per annum, to commence from the date when you receive the money." The plaintiff in answer to such a prospectus filled up such a form on the 3rd of March, 1874, with the sum of 1,000*l.*, and for five years. A memorandum was attached to such application by the plaintiff's brokers. "Application for 1,000*l.* six per cent. mortgages, for five years." On the same day a receipt was given by and accepted from the company: "Received of A. Wilson, Esq., the sum of 1,000*l.* for investment for five years at six per cent. on mortgage in the colonies, effected through the company." The following documents then passed: "Transfer of mortgage." "This indenture, made the 6th of March, 1874, between the Colonial Company, Limited, and A. Wilson, witnesseth that, in consideration of the sum of 1,000*l.* paid by the transferee to the company, the company doth hereby grant and assign to the said transferee, &c., all that mortgage debt amounting to 1,000*l.*, secured by the indenture of bargain and sale by way of mortgage, dated the 29th of August, 1873, and made between Catherine Dill, of Pietermaritzburgh, in Natal, and the company, and all interest henceforth to become due for the same according to the terms of the said mortgage. And in consideration of the said company being permitted to receive and retain for its own use all sums payable in respect of interest on the said indentures of mortgage over and beyond the rate of six per cent. per annum, the said company doth hereby guarantee the payment to the said transferee of the said mortgage debt, and of interest thereon in the meantime at the rate of six per cent. per annum, payable half-yearly, on the 1st of January and the 1st of July. And it is further agreed that the company, as the agent and on behalf of the transferee, shall collect and require payment of the said mortgage money, &c. And it is further agreed and declared that, until payment of the said mortgage money and interest, the company stands seised of the legal estate in the lands comprised in the said mortgage in trust for the transferee, &c." To this was added a receipt: "Received of A. Wilson the sum of 1,000*l.* for investment on mortgage in the colonies for five years."

"Mortgage bond dated the 29th of August, 1873. Know all men, &c., that N. R., an attorney for Catherine Dill, declared that the said C. Dill was indebted to P. Shepstone, as trustee for the Colonial Securities Company, in the sum of 1,000*l.* for money lent, to be repaid to the said company or assigns, with interest at nine per cent. payable half-yearly, on the 30th of June and the 31st of December until paid off, which payment the borrower shall be allowed and obliged to make at the expiry of two years. And for security a mortgage of land, &c. And the principal may give three months' notice previous to the expiring of the said bond to the mortgagees of her intention to pay off, &c. Otherwise to be subject to twelve months' notice on either side after the expiring of such bond, to wit, the 23rd of August, 1875."

"Guarantee of principal and interest to investor, A. Wilson. Principal 1,000*l.*, interest at six per cent. per annum." "In consideration of the deduction hereinafter mentioned from the amount of interest payable under the indenture of mortgage, the particulars of which are specified on the other side, the Colonial Trusts Corporation, Limited, do hereby guarantee to A. Wilson the payment at the registered office in England of the company of the principal sums for the time being secured by the said indentures respectively, and also of the interest upon the said principal sums, &c., until such mortgages shall

have expired, been foreclosed, or otherwise discharged in course of law, such principal to be paid within two months after the date when the same shall become due in Natal, &c. And in consideration of the aforesaid guarantee, the said A. Wilson hereby authorises the said company to collect the principal moneys and interest for the time being secured by and payable under the said indentures, and thereout to deduct and retain for the use of the said company all sums by way of interest under the said indenture of mortgage over and above six per cent. And in case of default to take all necessary proceedings, &c."

Mortgage	Maturity	Mortgagor	Investor	Amount of Principal Money secured
29th August, 1873	23rd August, 1875	Catherine Dill	Colonial Trusts Corporation	£1,000

N.B.—"The mortgage has been transferred by deed, dated the 6th of March, 1874, to A. Wilson."

N.B.—"The guarantee to be conditioned on the investor, whenever required, giving such powers of attorney, &c., as &c., for enabling the company to enforce the covenants of the above indenture, and to cease whenever such parties shall decline to give or shall revoke such powers, &c."

From the time of forwarding the 1,000*l.* until the company went into liquidation, the plaintiff was paid the stipulated interest at six per cent.

On the 16th of April, 1877, Shepstone, the agent of the company in Natal, wrote to the secretary of the company in London a letter, in which, after setting out a personal claim for remuneration, he stated, "I have in hand some of the securities (company's funds, not that by the company's principals), and I have applied a portion towards paying me a fair remuneration, &c. I enclose detailed account, by which you will see, &c. I also enclose statement of account shewing the receipt of the amount of Dill's bond, and bank draft for 678*l.* 4*s.* 5*d.*, transmitting to you the balance." The letter enclosed an account of Shepstone's personal claim, amounting to 815*l.*, and the following:—

"The Colonial Trusts Corporation, Limited, to Shepstone."

By principal sum of C. Dill's bond . .				£1,500
To amount of account herewith . . .	£815	0	0	
Draft herewith . . .	678	4	5	£1,500
Exchange on do. . .	6	15	7	

and a bank draft for 678*l.* 4*s.* 5*d.*

The proceeds of the draft were paid by the secretary into the company's general account at their banker's. The company kept no separate account at the bank of moneys paid to them by customers in respect of which the principals received mortgage securities.

The company's ledger had an entry of the transaction with the plaintiff stating that his security was Dill's mortgage in Natal. The defendants were, by entries in the minute book, shewn to have been present at meetings of the directors when the letter from Shepstone was entered as read, and when the company's books were accessible, and when the company's pass-book shewed the receipt of the proceeds of the bank draft for 678*l.* 4*s.* 5*d.* No other evidence was given or proposed of the knowledge of Lord Bury or Mr. Montgomerie of any part of the above transactions. A balance-sheet, dated the 31st of December, 1877, which had accompanied a report of the directors to a general meeting of the company, held on the 7th of June, 1878, was put in evidence. In the profit and loss account there was an item on the debit side, "Directors' fees, 1,000*l.*" No other evidence was given as to any payments of fees to the two directors, Lord Bury and Mr. Montgomerie. In 1878 the company went into liquidation. The plaintiff called as a witness Mr. Kemp, the official liquidator, and proposed to shew by his evidence, founded exclusively on an examination of the books and vouchers, that at the time of the payment into the bank of the proceeds of the bank draft from Shepstone, in 1877, the company

was in fact insolvent. The plaintiffs did not offer to shew that their insolvency was in fact at that time known to the two directors. No other evidence of any kind was offered which was rejected. The objection as to the rejection of evidence must be confined to the rejection of this evidence alone. The Lord Chief Justice rejected the proposed evidence on the ground that it was immaterial. No notice was given to the plaintiff that Dill's mortgage had been paid off. No substituted security was given or offered to the plaintiff. No further evidence was offered as to the personal knowledge or interference of the two directors in any part of the transaction. The Lord Chief Justice thereupon directed the jury that there was no sufficient evidence on which they could legally find a verdict for the plaintiff, directed them to find for the defendants, and entered judgment for the defendants. Upon this evidence it is clear that there was at least a contract between the company and the plaintiff that the company would, on payment of the mortgage debt due from Catherine Dill to the company, give the company another mortgage security equal to so much of Dill's mortgage as had been transferred to the plaintiff; that such contract had been broken by the company; that the plaintiff would at least have been entitled to sue the company, if it had remained solvent, for such breach, and that the plaintiff would have been entitled during the five years to insist on a specific performance of the undertaking to give him another mortgage, and at the end of five years to recover 1,000*l*. It is clear that there was no contract between the plaintiff and the defendants personally to the like effect. It is equally clear that there was no contract of principal and agent between the plaintiff and the defendants personally. These matters have been too often decided to require further discussion. It was strenuously urged on behalf of the plaintiff that the defendants were, as a necessary consequence of their position as directors of the company, personally trustees of the plaintiff, and had been guilty of a breach of trust.

Being clearly of opinion, as above stated, that there was no contract between the plaintiff and the defendants, and that there was not the relation of principal and agent between the plaintiff and the defendants, the question is, whether there was the relation between them of *cestui que trust* and trustee. I know of no principle or authority for saying that such a relation can be constituted by any agreement or intercourse between the parties less direct than the agreement or intercourse which forms the relation of principal and agent. As the agent of an agent is not thereby the agent of the original principal, so neither is the agent or trustee of a trustee thereby the trustee of the original *cestui que trust*.

This was evidently the view of Lord Cairns in *Ferguson* v. *Wilson* (8). In that case, which must presently be again cited for another point, a bill was preferred against directors personally for the specific performance of a resolution of the board to allot shares; and, if all available shares were allotted, for indemnity by the directors out of their own shares. Lord Justice Turner and Lord Justice Cairns held, first, that the undertaking was, as between the plaintiff and the company, a contract only, and not a trust.

"This," said Lord Justice Turner, "is a contract. This Court can only deal with a contract by way of specific performance, and as all the shares are already allotted, that cannot be decreed. This is not a case of trust, this is simply a case of contract. This Court cannot give damages. Therefore," &c. But Lord Justice Cairns dealt more fully with the position of directors. "It ought," he said, "very clearly to be understood upon what principles and to what extent directors, in cases of this kind—that is, when they are sued personally—are liable to the jurisdiction of thi Court. This is a bill filed upon a contract. With whom has the contract been made? The bill alleges that the contract is made with and binds the company. What is the position of directors of a public company? They are merely agents of the company. The company itself cannot act in its own person, for it has no person; it can only act through directors; and the case is, as regards those

(8) Law Rep. 2 Ch. App. 77.

directors, merely the ordinary case of principal and agent." (This means obviously as between the company and the directors.) "Whenever," he says, "an agent is liable" (that is, to those persons) "those directors would be liable. Where the liability would attach to the principal, and the principal only, the liability is the liability of the company. This being a contract alleged to be made by the principal, I own that I have not been able to see how it can be maintained that an agent can be brought into this Court, or into any other Court, upon a proceeding which simply alleges that the principal has violated a contract that he has entered into. In that state of things not the agent but the principal would be the person liable." This seems to me to shew that Lord Cairns, dealing with the procedure of a Court of equity, was of opinion that the same want of direct intercourse which prevents any remedy at common law by the dealer with a company against the directors personally of such company, on the mere ground of their being directors, equally prevents any remedy against them by the same party, in respect of the same relation, in a Court of equity. I think he intended to point out that whether the remedy sought in that case was specific performance or indemnity against a breach of trust, the suit could not, in either case, be maintained against directors merely on allegation and proof that they were directors of a company, between which and the plaintiff the direct relation, whatever it was, existed. The judgment decided that a breach of contract is not a breach of trust to be remedied by equity; that the particular undertaking in that case by the company was a contract, and not a trust; that directors of a company are not, as such, trustees, any more than they are agents of those who deal with the company. Directors of a company are the agents, and in some respects trustees, of the company and its shareholders, not of strangers dealing with the company by way of contract or otherwise. And yet the statement of claim in the present case vouches against the directors a liability which would have attached against them at the suit of the plaintiff if they had been his trustees. It seems to have been founded on the following statement of the liability of a trustee to his *cestuis que trust*: "A trustee is bound to perform all acts which are necessary for the proper execution of his trust. But, by the English rule, as he is not allowed compensation for his services, he would stand in the position of a gratuitous bailee, and be responsible only for losses or improper execution of his trust in cases of gross negligence"—*Story on Contracts*, p. 297. It may be perhaps noticed that in this passage, if the analogy be correct, gross negligence is the neglect of taking the same care which a person of ordinary prudence and skill would take of his own similar affairs. I am of opinion that the defendants were not from the mere fact of their being directors trustees of the plaintiff at all.

But it was then urged that the company were trustees of the plaintiff of the 1,000*l.*; that they were guilty of a breach of trust with regard to it; that the defendants aided the company, or acted for them in committing the breach of trust, and that the defendants were therefore liable. That the company was trustee of the plaintiff for any mortgage handed to him whilst such mortgage was in force is not in dispute—that is recited by the express terms of the documents. I would not decide this case upon points of pleading, though I feel bound to notice that no such case as this is even alluded to in pleading. This contention raises two questions: First, whether the company was in this case trustee for the plaintiff of the 1,000*l.*, in the sense of the proposition of equity law suggested; and, second, if yes, was there evidence which could make the defendants liable? As to the first, the question is, whether there was a trust as distinguished from a mere contract. In order to determine this question, it is necessary to extract from a mass of inconsistent phraseology in almost senseless documents what were the reciprocal rights and liabilities of the company and its clients. One really can give no business explanation of these papers, unless by supposing that they were invented and heaped up, one upon another, by some astute speculator, for the purpose of

equally puzzling shareholders, directors and customers, and so keeping the management of a proposed company in his own hands. It is useless to attempt to construe accurately language when used with such a design. It is not intended to be intelligible. We must gather the liabilities and rights, almost regardless of the language, out of all the documents, and elucidate the resulting legal relation of the parties. The obligation of the plaintiff, in my opinion, was, if he should place a sum of 1,000*l.* in the hands of the company, to leave it there for five years; the obligations of the company were to pay interest on the whole sum placed in their hands at the rate of six per cent. from the receipt of the money until the end of five years; to repay out of their own funds the 1,000*l.* at the end of the five years, if it should not be otherwise realised for the plaintiff; to place in the hands of the plaintiff, as soon as possible after the receipt of the 1,000*l.*, a colonial mortgage to secure 1,000*l.*, but which mortgage was not to be effected in the plaintiff's name; and in case such mortgage security should by any means become ineffective before the end of the five years, to replace it by another. It was argued—and there are terms in some of the documents to justify, though not to maintain as valid, an argument—that the company undertook to pay to the plaintiff the principal sum secured by the mortgage handed to him two months after it should become due in the colony. But that event might happen during the currency of the five years (as it did in this case), and yet the money was to remain invested with the company for five years. The result must be that such principal was, if it should become payable within the five years, not to be paid into the hands of the plaintiff, but to be treated by the company as if then placed in their hands by the plaintiff for the same purpose and under the same conditions as was the sum when it was first paid. In other words, the company must in such case replace the security by another. All these liabilities of the company, namely, to pay interest, to replace securities, to repay principal, were binding on them, whether the colonial mortgagors did or did not fulfil their liabilities. The company was not bound to obey any instructions of the plaintiff as to the amount, duration or sufficiency of any mortgage they might select to hand to the plaintiff. They were bound to give him a reasonable mortgage security, which they guaranteed. A stipulation that the plaintiff should give power and authority to the company to sue the mortgagors was much relied on, but seems in truth a futile stipulation. The company was to lend money to the mortgagor, and was to take a mortgage from him to itself; it is obvious that, as to him, the company was a principal, and could sue him without any authority from the plaintiff. No power was given to the plaintiff to settle with or release the mortgagor. There was no stipulation that the money lent to the mortgagor, or that the amount of the mortgage security handed to the plaintiff, should be the same amount as the 1,000*l.* placed by the plaintiff in the hands of the company. In this case the mortgage debt was 1,500*l.*, of which a part only, namely, 1,000*l.*, was transferred to the plaintiff. The rate of interest of the mortgage debt was entirely according to the will of the company, to be settled between them and the mortgagors, without reference to the plaintiff. The whole liability of the company, therefore, was, as above stated, to pay interest, to repay principal, to hand a security not necessarily purchased with that principal, to replace that security if necessary and to repay the principal if necessary. There is no express promise, and it seems to me to be contrary to the stipulated mode of carrying out the transaction, to imply a promise to keep the plaintiff's 1,000*l.* apart from other funds of the company. The question is, whether such liabilities of the company, undertaken by them by agreement for a consideration, constitute, in contemplation of law, a contract or a trust. "A contract is a deliberate engagement between competent parties, upon a legal consideration, to do or to abstain from doing some act"—*Story on Contracts*, s. 1.

There can be no doubt, in my opinion, that the stipulations in the present case

are within such a definition, and that there was a binding contract between the plaintiff and the company, with a complete remedy according to the common law for every breach of it. It would have been necessary to apply to equity to decree a specific performance of it, but for a breach of it the common law gave a complete remedy. Do such stipulations in a binding contract constitute a trust? "A trust, in the most enlarged sense in which that term is used in English jurisprudence, may be defined to be an equitable right, title or interest in property, real or personal, distinct from the legal ownership thereof" — *Story's Equity Jurisprudence*, s. 964. I fail to see any such distinction between a legal and an equitable interest in the 1,000*l.* The 1,000*l.* belonged by the agreement either to the plaintiff or to the company, not in law to the company with an equitable interest in it to the plaintiff. If it was by the agreement to be kept apart earmarked for the plaintiff, it belonged at law to him. If it was by the agreement not to be kept apart, it belonged to the company. "A trustee is a person holding the legal title to property under an express or implied agreement to apply it, and the income arising from it, to the use and for the benefit of another person, who is called *cestui que trust*. Trusts are, therefore, equitable interests in property based on confidence, over which Courts of equity alone have full jurisdiction"—*Story on Contracts*, s. 296, 4th ed. "A trust is where there is such a confidence between parties that no action at law will lie, but is merely a case for the consideration of this Court" —Lord Hardwicke, in *Sturt* v. *Mellish* (9). If I am right in saying that the arrangement to be collected from the documents which passed between the plaintiff and the company would give the plaintiff a complete remedy at common law for any breach by the company, then the arrangement is not a trust within these definitions. And upon this question, *Ferguson* v. *Wilson* (8), before cited, seems much in point. In that case directors had bound the company to allot shares to the plaintiff. "This," said Lord Justice Turner, "is contract. This is not a case of trust; this is simply a case of contract." In the present case the directors bound the company to pay interest, to supply a security, to replace an exhausted security, to repay the principal. These are all acts which the company are bound at law to do. This is contract and not trust. It is like the relation of banker and customer, which is contract and not trust.

But suppose there were a trust as between the plaintiff and the company, and that the company were trustees of the plaintiff; the subject-matter of the trust would be the 1,000*l.*; the trust would be to invest and re-invest it. Then the suggestion is, that the company committed a breach of trust in not re-investing it when Catherine Dill's mortgage was paid off, and that the two defendants aided the company to commit such a breach of trust, and are therefore liable. This suggestion assumes that the defendants were not trustees of the plaintiff by reason merely of their being directors. They are, for the purposes of this argument, unless made otherwise by their acts, strangers to the trust. The doctrine applicable to the suggestion is laid down by Lord Selborne in *Barnes* v. *Addy* (10). In that case two solicitors were employed by one of two trustees, the one solicitor to draw an appointment of one trustee, and the other to draw an indemnity. Both solicitors advised against the safety of the transaction, but both acted according to their instructions. It was held that the trustee was guilty of a breach of trust, but that neither solicitor was liable. "In this case," said Lord Selborne, "we have to deal with certain persons who are trustees, and with certain other persons who are not trustees. Those who create a trust clothe the trustee with a legal power and control over the trust property, imposing on him a corresponding responsibility. That responsibility may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees *de son tort*, or actually participating in any fraudulent conduct of the trustee to the injury

(9) 2 Atk. 612.

(10) 43 Law. J. Rep. Chanc. 513; Law Rep. 9 Chanc. App. 244.

of the *cestui que trust*. But, on the other hand, strangers are not to be made constructive trustees merely because they act as agents of trustees in transactions within their legal powers—transactions, perhaps, of which a Court of equity may disapprove—unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees. In this case there is not the slightest trace whatever of knowledge or suspicion of an improper or dishonest design in the transaction. There was nothing to lead them" (the solicitors) "to suppose that Mr. B., when he had been appointed sole trustee, &c., intended to sell out the funds and put the money into his own pocket." "The general rule of the Court is, that an agent employed by a trustee is answerable only to the trustee who employed him, and that he cannot be considered a constructive trustee, to be held liable as such, merely because he knew of the trusts. Such an agent is not bound to see to the application of the trust fund received by him and paid over to the trustee—at least, unless he is aware that the trustee is about to misapply the same fraudulently"—*Archer* v. *Lavender* (11). In the present case any charge of dishonesty was repeatedly repudiated. There is no pretence for saying that either defendant had any dishonest intention or any knowledge of any dishonest dealing with the plaintiff's rights. The charge of negligence negatives a charge of fraud. The question must, therefore, be reduced to this, namely, whether the defendants are sufficiently shewn to have received and become chargeable with some part of the trust property. That they ever had the post-bill sent from Natal in their personal possession or control for their own personal benefit is not pretended. They never directly received any part of the proceeds of it. It is argued that the balance-sheet shews that they received part of it in the shape of fees. But that balance-sheet does not in truth shew that these directors were ever in fact paid their fees; and if it did, it does not shew that the proceeds of the bank post-bill formed part of the fees paid to them. They were, if paid, paid out of the general fund of the company. There is nothing to shew that the fund in hand immediately after the payment into it of the proceeds of the bank post-bill was not wholly expended for other purposes before any fees were paid to the defendants. No evidence was given of any particular amount of fees paid to the defendants, and yet if they were to be made constructive trustees by reason of their having without fraud received trust money, they would only be such trustees of so much of the trust money as came to their hands. "The defendants are liable," said Vice-Chancellor Bacon, in *Lee* v. *Sankey* (12), "to make good so much of the trust funds which came to their hands as have not been applied according to the trusts, &c." There is no evidence, therefore, that the defendants ever received for their own benefit any part of the proceeds of the mortgage. There is no real evidence that either defendant, in fact, knew that Catherine Dill's mortgage had been paid off, and the proceeds had been sent to England and were paid in the general fund. Any clerk in the office paid his wages out of this money might be made liable if these defendants can. In truth, this mode of attempting to fix the defendants is an afterthought. No such ground of liability was suggested in the pleadings or at the trial. The case relied on evidently was that the defendants were, as directors, trustees of the plaintiff, and as such trustees had been guilty of negligence. In the cases cited on behalf of the plaintiff, in which agents of trustees were held to have made themselves constructive trustees of the principal, the trust property had been applied by the agents for their own benefit with knowledge of the trust. In *Bodenham* v. *Hoskyns* (13) money was transferred by bankers from a trust account to the private account of the trustee, in order to increase his deposit with the bank. So in *Myler* v. *Fitzpatrick* (14), the bill alleged that the trustee had abandoned the

(11) Ir. Rep. 2 Eq. 220, at p. 225.

(12) Law Rep. 15 Eq. 204, at p. 213.
(13) 2 De Gex, M. & G. 903.
(14) 6 Madd. 360.

execution of the trust to F., a solicitor, and that F. had possessed the trust moneys and employed them for his own use. Upon demurrer by F., the Vice-Chancellor said, "A mere agent is to account to his principal only; but according to the allegations of this bill, F. cannot be considered as a mere agent—he is a delegated trustee employing the trust moneys for his private profit." If it be suggested that directors are a different kind of agent from other agents, that is to attempt again to introduce the exploded doctrine, that directors are under other liabilities to dealers with the company of which they are directors than any other servants of the company would be under.

It seems to me that all the suggested grounds of liability fail, that the evidence proposed was immaterial and properly rejected, that the judgment was correct and must be affirmed.

Rule discharged.

Solicitors—Hewitt & Alexander, for plaintiff; White, Borrett & Co., for defendant Lord Bury; Linklaters & Co., for defendant Montgomerie.

[IN THE QUEEN'S BENCH DIVISION.]

1880. Nov. 6, 23. } THE QUEEN *v.* THE GUARDIANS OF THE ABERGAVENNY UNION.

Poor Law—Divided Parishes, &c., Act, 1876 (39 & 40 *Vict. c.* 61), *s.* 34—*Residence—Order of Removal made without Corroborative Evidence—Appeal to Sessions—Fresh Evidence on Appeal—Jurisdiction of Sessions.*

[For the report of the above case, see 50 Law J. Rep. M.C. 1.]

[IN THE COMMON PLEAS DIVISION.]

1880. Nov. 3. } BURCHELL *v.* HICKISSON.

Negligence — Householder — Defective Railings—Injury to Child in charge of his Sister—Trap.

The plaintiff, a boy of four years, accompanied his sister, who was going on business to the defendant's house. A flight of steps, protected on either side by railings, led up to the front door. One of these railings had been for some time displaced, leaving a gap of eighteen inches between the rails on either side of it. Across this gap rope had been interlaced, but had worn away and had not been renewed. The sister had frequently been to the house, and had shortly before noticed that the rail was missing. On the day in question the sister went up the steps, but the plaintiff in following fell through the gap and was injured:—Held, *that the plaintiff could maintain no action against the defendant for the injury he had sustained, as the only duty on the part of the defendant towards him was to take care that there was no concealed danger, and of this there was no evidence.*

Action for negligence.

The plaintiff, a boy of four years, accompanied his sister to a house of which the defendant was lessee. The defendant occupied the basement of the house, and sublet the remainder, together with the front door and railings, at a weekly rent to one Bloomfield, who in turn let out the rooms to lodgers. The sister, who was twelve years old, and carried a baby, was going to visit a lodger of Bloomfield's on business connected with the artificial flower trade. A few steps, protected on either side by railings, led up to the front door. One of the rails at the topmost step had been for some time broken away, leaving a gap of eighteen inches between the rails on each side of it. Rope had been interlaced across the gap, but had worn away and had not been renewed. The sister had frequently visited the house, and about a fortnight before had noticed the rail was missing. On the day in question she went up the steps, telling her brother, the plaintiff, to stop below. He, however, came up the

steps, and falling through the gap into the area below was injured. As between himself and the superior landlord the defendant was bound to repair, but as between the defendant and Bloomfield there was no covenant or agreement to repair.

The action was tried before Grove, J., and a common jury on the 22nd of April, 1880, and resulted in a verdict for the plaintiff for 15*l*. A rule *nisi* was subsequently obtained by the defendant to set aside the verdict and enter a nonsuit on the ground that there was no evidence of negligence to go to the jury, and no evidence that the spot where the accident happened was in the nature of a trap, and that the Judge had misdirected the jury on the question of negligence.

J. D. Fitzgerald shewed cause.—There was no contract on the part of Bloomfield to repair: the defendant was lessee and bound to repair; and at the time of subletting the premises these railings were ruinous, therefore the defendant is the only person who can be liable—*Nelson* v. *The Liverpool Brewery Company* (1). Had there been no railing there would have been no trap; but anyone seeing a row of railings would suppose them to be complete, and therefore there was a trap within the principle of *Corby* v. *Hill* (2) and *Indermaur* v. *Dames* (3).

The plaintiff was on lawful business, inasmuch as he was with his sister who had business at the house, and consequently he is in a different position to the plaintiff in *Bolch* v. *Smith* (4). It may be said the plaintiff himself was not on business, inasmuch as it was the sister's business, but regard must be had to the rank of life of the plaintiff and his sister, and to the fact that the children of poor people cannot be left at home.

Willoughby and *J. Gerard Laing*, for the defendant in support of the rule.—The place was visible, and there was no trap. The place was a private way, and *Corby* v. *Hill* (2) is therefore not in point.

If anyone were liable it would be the occupier, not the landlord—*Robbins* v. *Jones* (5). There was not a breach of any duty owed by the defendant to the plaintiff—*Gautret* v. *Egerton* (6); *Lax* v. *The Mayor of Darlington* (7).

The plaintiff is identified with his sister—*Waite* v. *The North Eastern Railway Company* (8); *Sullivan* v. *Waters* (9); and if it was no trap to her it could not be said that because of his tender age it was a trap to him.

LINDLEY, J.—I am of opinion that this rule should be made absolute on the ground that there was no evidence of negligence to go to the jury. The plaintiff accompanied his sister to the house, the sister went on business, but the plaintiff did not go on business. He was there not as a trespasser, but as a companion, and his position can be placed no higher than that he was there lawfully, and was not a trespasser. The question then for our determination is, What was the duty of the defendant towards the plaintiff, and what breach was there (if any) of such duty? There could be no duty on the part of the defendant towards the plaintiff further than that the defendant must take care no concealed danger exists. The plaintiff was, no doubt, too young to see or guard against any danger, but the logical way of considering the matter is to consider it alternatively in this way: the defendant never invited such a person as the plaintiff to come unless he was taken care of by being placed in charge of others, and if he was in charge of others then there was no concealed danger. In other words, there was no invitation to the plaintiff if he was not guarded, and if guarded, then there was no trap. There does not seem to be any authority against such a proposition. *Corby* v. *Hill* (2), and *Indermaur* v. *Dames*

(1) 46 Law J. Rep. C.P. 675; Law Rep 2 C.P. D. 311.

(2) 4 Com. B. Rep. N.S. 556; 27 Law J. Rep. C.P. 318.

(3) 36 Law J. Rep. C.P. 181; Law Rep. 2 C.P. 311.

(4) 7 Hurl. & N. 736; 31 Law J. Rep. Exch. 201.

(5) 15 Com. B. Rep. N.S. 221; 33 Law J. Rep. C.P. 1.

(6) 36 Law J. Rep. C.P. 191; Law Rep. 2 C.P. 371.

(7) 49 Law J. Rep. Q.B. 105; Law Rep. 5 Ex. D. 28.

(8) E. B. & E. 728; 28 Law J. Rep. Q.B. 258.

(9) 14 Ir. C. L. R. 460.

(3) appear consistent with it, as also the observations of Mr. Justice Willes, in *Bolch* v. *Smith* (4).

At one time I was somewhat embarrassed, because we seemed to be drifting into a discussion as to whether the verdict was against the weight of evidence, but that was disposed of by the rule that no new trial should be granted on the ground that the verdict was against the weight of evidence when that verdict is under 20*l*. The true view of the case, in my opinion, is to consider what was the duty of the defendant towards the plaintiff, and whether there was any breach of such duty.

LOPES, J.—It is material to consider the position of the plaintiff. He was entitled to use the defendant's property; then what was the duty of the defendant towards him. The defendant would, I think, be liable, as in *Corby* v. *Hill* (2), if he placed any obstruction or allowed any concealed danger to remain in the plaintiff's way, but I cannot see that if he allowed these railings to be out of repair there was any evidence of a concealed danger. Such a defect would be obvious to anyone using the steps in the ordinary way.

Rule absolute.

Solicitors—M. Webb & Son, for plaintiff; Wills & Watts, for defendant.

[IN THE COURT OF APPEAL.]

(*Appeal from the Divisional Court.*)

1880. Nov. 8. } THE QUEEN *v.* OASTLER AND MEWS, JUSTICES OF SURREY.

Maintenance of Insane Prisoners—By whom Expenses to be paid—3 & 4 *Vict. c.* 54. *s.* 2—27 & 28 *Vict. c.* 29—40 & 41 *Vict. c.* 21. *ss.* 4 *and* 57.

[For the report of the above case, see 50 Law J. Rep. M.C. 4.]

[IN THE COMMON PLEAS DIVISION.]

1880. Dec. 2. } HOOPER *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

Railway Company—Negligence—Passenger's Luggage—Liability apart from Contract.

The G.W.R. issue through tickets from Stourbridge on their line to Euston (via Birmingham) on the defendants' line. The journey from Stourbridge to Birmingham is by the G.W.R., and from Birmingham to Euston by the defendant railway. The plaintiff travelled with one of these tickets, and his portmanteau was labelled and carried in the van of the G.W.R. as far as Birmingham. At Birmingham he changed into the defendants' train, and his portmanteau was seen to be transferred into the van of the defendants' train, but at Euston it was not forthcoming, and was not recovered till three months afterwards, when its contents were injured by contact with some perishable articles he had packed inside it. The plaintiff having sued the defendant company for the delay and injury to his goods, it was,—Held, *that the action was maintainable in accordance with the principle of* Foulkes *v.* The Metropolitan Railway Company (49 Law J. Rep. C.P. 361; Law Rep. 5 C.P. D. 157), *for the defendants, having received the portmanteau to forward it, had committed a breach of duty in neglecting to do so, for which they were responsible, apart from any question of contract.*

Semble, Mytton *v.* The Midland Railway Company (4 Hurl. & N. 615; 28 Law J. Rep. Exch. 385) *is overruled by* Foulkes *v.* The Metropolitan Railway Company (49 Law J. Rep. C.P. 361; Law Rep. 5 C.P. D. 157).

Appeal by motion under 38 & 39 Vict. c. 50. s. 6 from the County Court.

On the 14th of January the plaintiff took a ticket at the office of the Great Western Railway at Stourbridge to Euston. The ticket was issued by the Great Western Railway and entitled the holder to travel on their line from Stourbridge to Birmingham, where he would have to change and proceed by the defendants' line to Euston. The plaintiff took with him a portmanteau, which was

labelled (1) and put into the Great Western Railway train at Stourbridge, and at Birmingham was transferred into the van of the defendants' train. The transfer at Birmingham was witnessed and sworn to by some one who was travelling with the plaintiff. The plaintiff duly arrived at Euston, but the portmanteau was not forthcoming. It was not recovered until three months afterwards, when the contents were injured by the corruption of a brace of pheasants which the plaintiff had packed inside. Upon these facts the County Court Judge nonsuited the plaintiff on the ground that there was no evidence of any contract entered into between the plaintiff and the defendants. A rule *nisi* was subsequently obtained to set aside this nonsuit and enter judgment instead for the plaintiff (2).

Ernest Page shewed cause.—The contract was with the Great Western Railway, and there is no cause of action against the defendants, and but for the fact of a witness seeing the portmanteau transferred to the defendants' van there would be a clear verdict for the defendants—*Mytton* v. *The Midland Railway Company* (3); *The Bristol and Exeter Railway Company* v. *Collins* (4). For an act of misfeasance probably the defendants might be held liable—*Martin* v. *The Great Indian Peninsular Company* (5); *Hayne & Co.* v. *Culliford* (6); or for injury to a passenger lawfully on their line—*Austin* v. *The Great Western Railway Company* (7); *Foulkes* v. *The Metropolitan Railway Company* (8);

(1) The evidence given in the County Court did not shew to what point the portmanteau was labelled, but it would seem it must have been labelled to Euston.

(2) It was agreed, in case the Court should be of opinion that the judgment of nonsuit was erroneous and should be set aside, that judgment should be entered for the plaintiff, without further trial, for 15*l.*

(3) 4 Hurl. & N. 615; 28 Law J. Rep. Exch. 385.

(4) 7 H.L. Cas. 194; 29 Law J. Rep. Exch. 41.

(5) 37 Law J. Rep. Exch. 27; Law Rep. 3 Exch. 9.

(6) 48 Law J. Rep. C.P. 372; Law Rep. 4 C.P. D. 182.

(7) 36 Law J. Rep. Q.B. 20; Law Rep. 2 Q.B. 442.

(8) 49 Law J. Rep. C.P. 361; Law Rep. 5 C.P. D. 157.

but for an act of nonfeasance without contract the defendants would not be liable.

Terrell, in support.—The Great Western Railway are agents for the defendants, and the latter are liable for a breach of contract. They are also liable for a breach of duty. The portmanteau was shewn to have been in their custody, and they are responsible for it in accordance with the principle of *Foulkes* v. *The Metropolitan Railway Company* (8), which covers the case, and by which it is submitted *Mytton* v. *The Midland Railway Company* (3) is virtually overruled. *The Bristol and Exeter Railway Company* v. *Collins* (4) is distinguishable, because there the goods were received by the railway as common carriers. In *Marshall* v. *The York, Newcastle and Berwick Railway Company* (9) Jervis, C.J., distinctly says that if the plaintiff could recover for his personal suffering by reason of a duty irrespective of contract, the same admission would apply to the loss of his property. But it must be observed this case was decided seven years before *Mytton* v. *The Midland Railway Company* (3). The neglect to forward the portmanteau was a misfeasance.

DENMAN, J.—Had *Mytton* v. *The Midland Railway Company* (3) been expressly overruled by *Foulkes* v. *The Metropolitan Railway Company* (8) I should have entertained no doubt but that our decision must be governed by the latter case; but *Mytton* v. *The Midland Railway Company* (3) does not appear to have been cited in the argument or referred to in the judgments, and it is left to us to decide whether it has been overruled. On consideration, however, I have come to the conclusion that the *ratio decidendi* of *Foulkes* v. *The Metropolitan Railway Company* (8) does in effect overrule *Mytton* v. *The Midland Railway Company* (3), and we must hold accordingly. In the carefully prepared judgment of Lord Justice Thesiger—a Judge whose recent loss we all deeply deplore—I find the following passage: "I think that the true principle in such a case as the present

(9) 11 Com. B. Rep. 655; 21 Law J. Rep. C.P. 34.

is, that the carrying company, so far as concerns its own line, in which term I include a line over which running powers are exercised, and its own acts or omissions, is under the same obligations in reference to the security of the passenger as it would have been if it had directly contracted with him. That principle is a reasonable one, for underlying it is the fact that, more or less directly or indirectly, the carrying company derives a benefit from its carriage of the passenger, and should therefore come under some corresponding obligation towards him; and what more appropriate obligation can there be than the ordinary one undertaken by railway companies towards their passengers, namely, that of taking due and reasonable care for their safety?"

In the present case the facts seem to shew that the portmanteau was put into the defendants' van at Birmingham, and was not forthcoming at Euston. It must therefore have remained in the possession of the defendants or gone astray; and under such circumstances it would be a strong thing to surmise that the miscarriage was not caused by some affirmative neglect on the part of the defendant company's servants. It was their duty to protect and forward passengers' luggage entrusted to their care; and one cannot imagine how it can be said this loss was not due to their negligence. This being the evidence, I am of opinion the defendants neglected a duty which they owed to the plaintiff. The County Court Judge decided against the plaintiff, because there was no contract between him and the defendants; but I think we need not consider any question of contract. The action was founded on negligence causing loss, and if we find there is evidence on which a jury could be asked to give an opinion, then the point of law cannot prevail. The judgment of Lord Justice Thesiger, in *Foulkes* v. *The Metropolitan Railway Company* (8) is to this effect; and the judgments of Lords Justices Bramwell and Baggallay are not inconsistent with his. The doctrine laid down in *Foulkes* v. *The Metropolitan Railway Company* (8), namely, that there is a duty owing by a railway company towards the passengers they are carrying, would apply to goods, consequently *Foulkes* v. *The Metropolitan Railway Company* (8) must be taken to have overruled *Mytton* v. *The Midland Railway Company* (3). The judgment, therefore, of the County Court Judge must be set aside, and a judgment entered instead for the plaintiff.

LINDLEY, J.—I am of the same opinion. There is difficulty in reconciling some of the earlier cases, such as *Mytton* v. *The Midland Railway Company* (3), *The Bristol and Exeter Railway Company* v. *Collins* (4), with *Foulkes* v. *The Metropolitan Railway Company* (8). Indeed, *Mytton* v. *The Midland Railway Company* (3) so much resembles the present, that had it not been for *Foulkes* v. *The Metropolitan Railway Company* (8) we should have affirmed the decision of the County Court Judge. The plaintiff, no doubt, entered into an express contract with the Great Western Railway Company to carry him and his luggage to Euston; at Birmingham it was transferred into the van of the defendant company. Whether there would be an implied contract with the defendant company may be a question of difficulty, but, as a matter of fact, the portmanteau was lawfully in their charge, and the fact of its not forthcoming at Euston involves the default of some one of the defendants' servants. The defendant company, having received the portmanteau, are responsible for its loss, in accordance with the principle of *Foulkes* v. *The Metropolitan Railway Company* (8). I am unable to distinguish that case from the present, and therefore I agree that the judgment of the County Court Judge was wrong, and that the action was maintainable.

Judgment for plaintiff.

Solicitors — J. B. Barrett, for plaintiff; R. F. Roberts, for defendants.

[IN THE COURT OF APPEAL.]

1880. Dec. 21. } THE CREDIT COMPANY *v.* POTT.*

Bill of Sale—Statement of Consideration—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 8.

A bill of sale recited that the plaintiffs had agreed to lend to the grantor a sum of money; that he was already indebted to them in certain other sums; and that it had been agreed that he should execute the bill of sale as a security for the first-named sum. The bill of sale then witnessed that in pursuance of the agreement, and in consideration of the sum then paid by the plaintiffs to the grantor, the receipt of which he admitted, he assigned the goods therein mentioned to the plaintiffs. The receipt indorsed on the bill of sale acknowledged that the grantor had received the sum therein mentioned.

The evidence shewed that this sum was the balance due on advances made by the plaintiffs to the grantor during several years, and that no money passed at the time of the giving of this bill of sale:—

Held (*by the Court of Appeal*), *that the bill of sale truly set forth the consideration for which it was given, and satisfied the requirements of the Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 8.

Appeal from the judgment of Pollock, B., given on further consideration, in favour of the plaintiffs.

Interpleader issue directed to try the right as between the plaintiffs and the defendant to certain goods taken in execution by the sheriff on behalf of the defendant while in the possession of Smith, the execution debtor.

The goods in question were comprised in a bill of sale, dated the 21st of January, 1879, and given to the plaintiffs by Smith. The plaintiffs had, since 1875, advanced to Smith various sums of money at different times on different securities, and bills of sale had been from time to time given by him to the plaintiffs, and renewed within twenty-one days, so as to avoid the necessity for registration. In January, 1879, the several sums so advanced, after giving credit for certain payments, amounted, so far as related to the present case, to 7,350*l.*, and on the 21st of January the bill of sale in question was given to the plaintiffs by Smith, and was duly registered.

This bill of sale was, as far as is material, as follows: "Whereas the said company hath agreed to lend to the mortgagor the sum of 7,350*l.*; and whereas the mortgagor is already indebted to the said company in the sum of 24,000*l.*, and the said company are also liable as guarantors for the mortgagor in the further sum of 20,000*l.*; and whereas it has been agreed between the mortgagor and the said company that the mortgagor shall execute these presents as a security for the repayment of the said sum of 7,350*l.*, with interest. . . . This indenture witnesseth that, in pursuance of the said agreement, and in consideration of 7,350*l.* now paid to the mortgagor by the said company, as the mortgagor doth hereby admit, he, the mortgagor, doth assign. . . ." The bill of sale further declared that any demand for the payment of principal and interest might be made by notice in writing, and gave the company power to seize if default should be made in the payment of the principal or interest; and the following receipt, signed by Smith, was indorsed on the bill of sale: "I hereby acknowledge to have received, the day and year first above written, of and from the above-named company, the sum of 7,350*l.*, the consideration money above expressed to be paid by them to me."

As a matter of fact, no money whatever passed from the Credit Company to Smith at the time of the giving of this bill of sale.

The jury having been discharged, Pollock, B., on further consideration, gave judgment for the plaintiffs.

The defendant appealed.

Howard (with him *E. Lloyd*), for the defendant.—The question is, whether in this bill of sale the consideration has been set forth as required by section 8

* *Coram* Selborne, L.C.; Baggallay, L.J.; and Brett, L.J.

Bills of Sale Act, 1878 (1). The
ation of the defendant is that the
leration is not truly set forth; there
ot really any agreement for a loan
as there any loan of money, so that
citals are untrue, for no money ever
l.

ILBORNE, L.C.—Does not the deed
conclusively, as between the parties
that there was an agreement to
']

merely amounts to a statement of
ount.

GALLAY, L.J., refers to *Hamlyn* v.
y (2).]

re the recital was true, but in the
t case there is a false statement of
nstances, which would mislead any-
specting this bill of sale, and would
false impression as to the position
h parties.

ILBORNE, L.C.—In *Spargo's Case* (3)
Justice Mellish says that it is a rule
that the form of handing money
ards and forwards need not be gone
gh; and can the debtor be heard to
has not contracted when his own
ays he has?]

n if it be not necessary that money
l actually pass, still there must be
tual fresh advance—a new and dis-
loan—as there was in *Ex parte The
nal Mercantile Bank* (4). There
was a distinct cash advance, and a
ntial compliance with the recital
bill of sale; and that would seem
the principle which has run through
e recent cases—*Ex parte Berwick
Ex parte Ord* (6).

ILBORNE, L.C.—Is not the antece-
debt extinguished by this deed?
. it be set up afterwards by either
to the deed?]

41 & 42 Vict. c. 31. s. 8: "Every bill of
which this Act applies shall be duly at-
and shall be registered under this Act
seven days after the making or giving
, and shall set forth the consideration for
such bill of sale was given. . . ."

(1) Law J. Rep. C.P. 465; Law Rep. 5
. 327.

(2) Law J. Rep. Chanc. 488; Law Rep. 8
p. 407.

(3) Law J. Rep. Bankr. 62; Law Rep. 15
42.

(4) Law J. Notes of Cases, vol. 15, p. 140.

(5) Weekly Notes, 1880, p. 195.

L. Smith, for the plaintiffs, was not heard.

LORD SELBORNE, L.C.—We need not hear any argument on behalf of the respondents.

This appeal must be dismissed. Looking at this deed apart from any Act of Parliament, it appears to me to be a *bona fide* transaction, and as between the parties to it at all events evidence of that which it states. It states that the mortgagor is indebted in a certain amount; that the plaintiffs have agreed to lend him a certain sum at interest; and that he assigns the goods therein comprised as a security for the loan. The mortgagor further admits that he has received the money so agreed to be lent, and there is no allegation of any fraud or bad faith between these parties to this deed, so that as between these parties I am of opinion that this deed is conclusive evidence of the extinction of the previous debt to as great an extent as if the moneys due had been actually paid; because in this deed the plaintiff company treat the money last advanced as a new advance, and treat the previous debt as having been settled, so that the company would be unable to allege that the debtor still owed the debt contracted before the date of the deed, and the debtor could not deny that the company had lent to him the money which is stated by the deed to have been advanced. In *Spargo's Case* (3), to which I referred during the argument, Lord Justice Mellish said, "It is a general rule of law that in every case where a transaction resolves itself into paying money by A to B, and then handing it back by B to A, if the parties meet together and agree to set one demand against the other, they need not go through the form and ceremony of handing the money backwards and forwards;" and on the same principle Lord Justice James said, in *Ex parte The National Mercantile Bank* (4), "In cases of payment for shares in a company we have frequently held that, where there is a debt due from the company to the shareholder, and a debt for calls on shares due from him to the company, it is not necessary to go through the form of handing over the money and then handing it back

again, but that the one debt may be set off against the other." His Lordship then proceeds: "In my view the real consideration, as between grantor and grantee—the consideration which would have been properly stated in the deed if the Act had not been passed—is the consideration which ought now to be stated;" and Lord Justice Bramwell, referring to what Lord Justice James had said, expressed his agreement therewith. The only difference between that case and the one now before us is the existence in the cited case of an antecedent debt which was satisfied out of the advance. How does that cause the two cases to differ? The form makes no difference—that is, no substantial difference—and that in the earlier case the second sum advanced was a larger sum makes no substantial difference. If the money had been handed over the counter and then handed back, it is admitted that the case of *Ex parte The National Mercantile Bank* (4) would be an exact authority. I think that the rule laid down there was right, and I think that it applies here. There is no allegation of fraud, and if this deed is registered, everyone who inspects it has notice of the state of the account between the debtor and the creditor. If the contention of the appellant were to succeed, I doubt whether bankers could continue to advance money to their customers as they do at present. There is, in such cases, first an overdrawn account and then a loan; no money passes in many cases, but there is a transfer of a certain sum to the customer's account, and interest is charged him on that amount whether he draws it out or not. If the banker has reason to mistrust the credit of the borrower he may require a bill of sale, and then the transaction would properly be called an advance of money. The Legislature looks at the substance of the transaction and not at the form, and in this case the recitals are true, the consideration is set forth and the judgment was right.

Baggallay, L.J.—I am of the same opinion.

Brett, L.J.—This bill of sale is under seal, and, as between the parties to it, the recitals cannot be contradicted. A third party may, however, shew what the real facts are, and if the recitals are not substantially true and accurate, he may dispute the validity of the deed. I think the facts were not quite accurately stated in this deed; but it is sufficient if the statement of facts is accurate, either as to their legal effect or their mercantile and business effect.

There was an agreement between these parties that a certain security should be held over till after a demand in writing, and that agreement was carried out by this bill of sale. The legal effect of that is, that the old debt is wiped out and a new debt is constituted—that is, that a debt is incurred and an agreement for sufficient and valid consideration is made that that debt shall not be payable till after demand in writing. There was, therefore, a new debt and a new lending on new terms. The legal effect of this is the same as though the money had been put into the hands of the creditor, and by him handed back to the debtor on the new terms agreed upon. This is the legal effect, and I think the mercantile and business effect is the same; so that the money said to be advanced under this bill of sale was as much advanced as though cash had passed, and it follows then that there is a true description of the consideration in the bill of sale. The appeal fails, and the judgment must be affirmed.

Judgment affirmed.

Solicitors—E. Andrew, for plaintiffs; T. W. Nelson, agent for Freeth, Rawson & Cartwright, Nottingham, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1880. Dec. 2. *Ex parte* Austin.

Certiorari—Defect in Conviction by Justices—Conviction drawn up and filed—Application for Rule—Return—Right of Justices to substitute Fresh Conviction.

[For the report of the above case, see 50 Law J. Rep. M.C. 8.]

[IN THE COURT OF APPEAL.]

5. } ASHDOWN *v.* INGAMELLS.*

asure of Damages—Debtor and Credi-Bankruptcy—Action by Trustee for h of Contract made with Debtor.

defendant contracted with a firm to ase their business, and, in considera-o pay certain trade debts of the firm. quently the firm went into liquidation, trustee was appointed. The defen-having failed to pay the debts, in an for damages by the trustee it was,— (reversing the judgment of HUDDLE-B.—BAGGALLAY, L.J., *dubitante*), *that easure of damages which the plaintiff ntitled to recover for the breach was hole amount of the unpaid debts.*

rter v. Vorley (9 Bing. 93; 1 Law ep. C.P. 170) *discussed and disap-d.*

peal from a judgment of Huddle-B., after trial with a jury.

e plaintiff was the trustee of G. F. and C. F. Smith, whose affairs were lated by arrangement under the ruptcy Act, 1869, s. 125. They had d on business in Southwark as fruit otato salesmen. In the autumn of , Allin & Smith, being in embarrassed mstances, applied to the defendant sistance, and the following agree-was entered into:—

Agreement between G. F. Allin and Smith, of the one part (hereinafter l the vendors), and Clark Ingamells, e other part (hereinafter called the ıaser), as follows:—

.. For the considerations hereinafter ioned, the vendors agree to assign ease of the premises in one of the ay arches, Stoney Street, Borough et, now held by them, and the good-of the business of potato and fruit men carried on by them therein, and ıe stock-in-trade, vans, horses, office ture and effects belonging to the said ors and employed in the said busi-and all the book debts now owing to endors, to the purchaser absolutely, and to deliver him possession of the same.

"2. The purchaser agrees to pay Mr. Harrison, a creditor of the vendors, 10*s.* in the pound in payment and satisfaction of his debt not exceeding 400*l.* The purchaser agrees to pay all the trade debts, or to arrange with the creditors, including the debt owing to the purchaser for money lent.

"3. The balance at the bank (if any) is to be received and taken by the purchaser; and the acceptances held by Harrison, or given to him, are to be delivered up on payment to him of the 10*s.* in the pound.

"4. The purchaser will not undertake the payment of any debts or acceptances not herein mentioned.

"5. All the household furniture and effects belonging to the vendors are not included in the aforesaid sale.

"6. The vendors will forthwith hand to the purchaser all the books, and afford every assistance and explanation to him in obtaining payment of the debts; and the purchaser is to be at liberty to use the names of the vendors in any proceedings for the recovery of the debts, he indemnifying the vendors against all costs."

Allin & Smith performed the agreement on their part, and the defendant entered into and took possession of the property, effects and premises comprised in the agreement, and carried on the business and received and collected moneys in respect of the same. The defendant paid or arranged the debts due to several of the creditors of Allin & Smith, including a debt of about 400*l.* due to one J. Harrison; but he had refused to pay, nor had he ever paid, the other trade debts which were then due and owing by Allin & Smith, nor did he ever arrange with the persons who were then their creditors, according to the tenor of the agreement. The defendant always had notice that the property assigned to him comprised substantially the whole of the estate and property of Allin & Smith, and that the result of his refusing to carry out the agreement on his part, or to pay and arrange the debts, would be to oblige them to institute proceedings for the liquida-

ıram Bramwell, L.J.; Baggallay, L.J.; and L.J.

tion of their affairs. By reason of the defendant's default Allin & Smith, in November, 1878, were obliged to present a petition for the liquidation of their affairs, and their creditors resolved that their affairs should be so liquidated. The amount of the trade debts and creditors' claims, exclusive of the debt due to the defendant, which the defendant should have paid or arranged, was 1,750*l.*, or thereabouts; and the trade and other creditors had proved for the same, or claimed or given notice of their claims under the liquidation. The trade and other creditors, whose debts and claims the defendant should have paid or arranged according to the tenor of the agreement, were mainly the only creditors of Allin & Smith. The action was brought to recover this sum of 1,750*l.*

The defence, after alleging that the defendant had been induced to enter into the agreement by the fraud of Allin & Smith, contained the following paragraph: "The defendant, as to the whole statement of claim, brings the sum of one shilling into Court, and says that beyond such sum the plaintiff has sustained no damage by reason of the facts stated in such statement of claim, and that such sum is sufficient to discharge the plaintiff's claim."

The action came on for trial before Huddleston, B., and the objection was then taken for the defendant that, if the plaintiff proved all the allegations in the statement of claim, he was only entitled to recover nominal damages, and as the defendant had paid one shilling into Court, the judgment ought to be for him. The jury were thereupon discharged, and Huddleston, B., on further consideration, gave judgment as follows:—

"The contract was that the defendant should pay, not Allin & Smith, but their creditors. No doubt the right to sue *prima facie* passed to the trustee, but he must shew damage of such a character as will enable him to recover a substantial amount. There is no authority to shew that the fact of driving Allin & Smith into liquidation is a ground for damages, and there is nothing to shew that their estate in liquidation is diminished. In substance the only creditors are those whom the defendant has not paid. I think that the plaintiff is only entitled to nominal damages, and that the one shilling paid into Court is sufficient. The judgment must be for the defendant."

The plaintiff appealed.

De Gex (*J. Holmes Poulter* with him), for the plaintiff.—The plaintiff is entitled to recover the damages from the defendant for his breach of contract, which Allin and Smith could have recovered if there had been no bankruptcy. It is like a contract to sell with a direction by vendor to purchaser to pay the purchase-money to a third person. If the money is not paid according to the direction, the vendor can himself recover it from the purchaser. *Carr* v. *Roberts* (1) is directly in favour of the contention for the plaintiff. *Porter* v. *Vorley* (2) is relied on in support of the opposite view, but the facts in that case differ from those in the present; and in *Hill* v. *Smith* (3) the judgment of Parke, B., shews that he disapproved of the decision in *Porter* v. *Vorley* (2).

[The Court here called upon counsel for the defendant to argue.]

Lush-Wilson, for the defendant.—The plaintiff is seeking to enforce a contract by which the whole of the debtors' property is to be applied in favour of the trade creditors only. It is not shewn that the debtors' estate was diminished through the defendant's breach of contract, but only that the trade creditors, by reason of the breach, were not paid so as to relieve the estate. The damages, therefore, should be only nominal. The cases of *Carr* v. *Roberts* (1) and *Hill* v. *Smith* (3) are distinguishable from this case, whilst *Porter* v. *Vorley* (2) is in point in the defendant's favour.

Bramwell, L.J.—I am of opinion that the judgment must be reversed. With all respect to my brother Huddleston, I cannot see the difficulty he appears to have felt in the case. The defendant undertook with the bankrupts to pay certain debts. It is alleged that he has

(1) 5 B. & Ad. 78.
(2) 9 Bing. 93; 1 Law J. Rep. C.P. 170.
(3) 12 Mee. & W. 618; 13 Law J. Rep. Exch. 243.

not done so. He has therefore broken his contract, and it is not one which he can now perform, because if not performed within a reasonable time it cannot be performed. The defendant can only now reduce the damages by making the payment which he agreed to make. If there had been no bankruptcy the debtors would clearly have been entitled to recover as damages the sum which the defendant undertook to pay. How can it be possible that the trustee in the bankruptcy is not entitled to recover? He must surely have the right to recover the same amount which the bankrupts would have been entitled to recover if there had been no bankruptcy. It is not necessary to discuss the authorities at length. I think that the case of *Carr* v. *Roberts* (1) is in point, and especially the observation of Baron Parke, that the covenant to pay the debts, apart from the covenant to indemnify the testator and his representatives, was sufficient to entitle the administrator in that case to recover the whole sum which the defendant had failed to pay. As to *Porter* v. *Vorley* (2) it is clear that Baron Parke and the other Judges who decided *Hill* v. *Smith* (3) did not approve of the decision. But *Porter* v. *Vorley* (2) was a different case from the present one. There the thing done to the phaeton might have been treated as a tort by the true owner. He might have called upon the defendant to make good the injuries caused by his negligence. Perhaps that consideration may have influenced the judgment. But I confess to feeling great distrust in the correctness of the decision, because if the person from whom the plaintiff had hired the phaeton had remained solvent he would have been entitled to recover full damages. I think our judgment must be for the appellant.

BAGGALLAY, L.J.—I am not entirely satisfied that the decision of Baron Huddleston was wrong, though I do feel some doubt as to what the final result of this litigation should be if the whole question at issue was raised in a more convenient form than has been adopted here. I, therefore, do not dissent from the view taken by my colleagues, and think it better that Baron Huddleston's judgment should not stand.

BRETT, L.J.—In this case the action is brought by the trustee for breach of a contract made with the liquidating debtors before the bankruptcy. The case has now to be considered as if the only plea to the statement of claim was a denial of the agreement and of the breach, and as if it had been found at the trial that the agreement was entered into, and the breach had been committed. The only question then is as to the amount of damages the plaintiff is entitled to recover —whether they are merely nominal or substantial. The contract is for the purchase of the debtors' business at a price certain. Suppose that part of the price which the defendant contracted to pay had been a sum of 1,750*l*. Then upon the bankruptcy happening, it is clear that the trustee suing for the breach of contract would have been entitled to recover that sum. The contract in the present case is not in that form, because the engagement is not to pay the sum direct to the bankrupts, but that the defendant will pay debts to that amount owing by them to their creditors. The only contract was between the defendant and the bankrupts. If there had been no bankruptcy, and if there had been a breach of that agreement, the damages which the bankrupts could have recovered would have been that very sum of 1,750*l*. They would have recovered it because the defendant had contracted to pay it to the creditors and had failed to do so. I cannot see any principle upon which the trustee in the bankruptcy of Allin & Smith cannot also recover it. It, in my opinion, is a general principle of law that where an action is brought by a trustee in bankruptcy for the breach of a contract entered into with the bankrupt, the trustee is entitled to recover the same damages as the bankrupt would have recovered if there had been no bankruptcy. I think that the decision in *Carr* v. *Roberts* (1) shews that proposition to be true. In *Hill* v. *Smith* (3) the test as to the measure of damages is distinctly stated to be what the bankrupt could himself have recovered for the breach of

contract had he continued solvent, and not the ultimate loss to his estate according to the result of the proofs upon it. It is said that *Porter* v. *Vorley* (2) is an authority to the contrary. But in *Hill* v. *Smith* (3) Baron Parke treated that case in the way Judges are obliged to treat a judgment of a Court of co-ordinate jurisdiction when they disapprove of it. They say, "When the facts are exactly the same we will follow the decision, but otherwise not." I think *Porter* v. *Vorley* (2) was wrongly decided.

Judgment reversed.

Solicitors—G. H. Finch, for plaintiff; Walter Justice, for defendant.

[IN THE COMMON PLEAS DIVISION.]

1880. Nov. 8. } PHILLIPS *v.* THE GENERAL OMNIBUS COMPANY.*

Possession of Sheriff—Failure to withdraw Sheriff from Possession after Composition—Malice.

In the absence of malice, no action will lie against a judgment creditor for not withdrawing the sheriff from possession after the judgment creditor has become bound by a composition of the debt.

According to the statement of claim, A, having recovered a judgment against B, issued a writ of fi. fa., under which the sheriff entered into possession of B's goods. B filed a petition of insolvency, and A proved for the amount of his judgment against B's estate. Resolutions for a composition were passed and registered. The sheriff refused to withdraw from possession without A's instructions, which were not given by A. No malice was alleged as against A:—

Held, *on demurrer, that in the absence of malice A's failure to instruct the sheriff to retire gave B no right of action against A.*

This was a claim for damages for not withdrawing the sheriff in possession, under a writ of *fi. fa.* issued in enforcement of a judgment obtained by the defendants against the plaintiff, from the plaintiff's premises on the satisfaction of the debt for which the judgment was given.

Subsequently to the issue of the said writ of *fi. fa.* the defendants proved as creditors against the plaintiff's estate in liquidation, and became bound by resolutions, duly proposed and confirmed, for a composition of one shilling in the pound in respect of their debt.

There was incidentally some slight evidence that the defendants, by their solicitor, had after the date of such composition instructed the sheriff's officer to remain in possession; and it was undisputed that the defendants gave no direction to him to withdraw.

The statement of claim set out that the defendants, on the 22nd of March, 1880, were judgment creditors of the plaintiff for the sum of 228*l.* 5*s.* 9*d.*; that the sheriff entered into possession under a writ of *fi. fa.*; that on the 23rd of March, 1880, the plaintiff filed his petition as a liquidating debtor; that, a receiver and manager having been appointed, the defendants were restrained from proceeding under their execution until four days after the first general meeting; that the said meeting took place on the 12th of April, 1880, when the defendants proved for the amount of their debt, voting, however, against the resolutions proposed to accept one shilling in the pound which were passed by a statutory majority of the creditors and duly confirmed at a second meeting held on the 21st of April, 1880, and registered on the 22nd of April, 1880; but that, notwithstanding such resolutions, "defendants continued in possession of the plaintiff's goods, and refused to withdraw the sheriff from possession, although repeatedly requested to do so."

The defendants demurred.

Cock, for the defendants, in support of the demurrer.—The sheriff is not the agent of the execution creditor; and if the plaintiff desired that the sheriff should withdraw from possession after the said composition, he should have taken steps to obtain such withdrawal, as it was not the duty of the defendant to take the

* *Coram* Lindley, J.

initiative. There is no malice alleged in the pleadings, and *Sheibel* v. *Fairbairn* (1) is an authority that, in the absence of express malice, an action will not lie. *Page* v. *Wiple* (2) is also in point.

Waddy (with him *Crispe*), for the plaintiff.—The sheriff became the agent of the defendants immediately on the satisfaction of the debt, his possession as the officer of the Court having been thereby determined. Therefore, after the 22nd of April the continuance of the possession of the sheriff, which could only be determined by the directions of the defendants, was a trespass, and the action will lie. It is more than a nonfeasance, as in the case of *Sheibel* v. *Fairbairn* (1), cited on the other side; it is a misfeasance—*Croyer* v. *Pilling and Another* (3).

LINDLEY, J.—The demurrer must be allowed in this case. The substance of the plaintiff's complaint is that the defendants, having obtained a writ of *fi. fa.* against him, afterwards proved for their debt, in respect of which the writ was obtained, in certain liquidation proceedings, and accepted—or rather were bound by duly confirmed resolutions for—a composition thereon; that they thus abandoned their security, and consequently had no longer any right to retain the sheriff in possession. But no action will lie for such detention: there must be an ingredient of malice. The most plausible way of putting the case for the plaintiff is that in which it has been put by his learned counsel—that, after the date of the composition, the possession of the sheriff became unlawful; that, in point of law, up to that time he had been in possession by authority of law, which authority ceased on the satisfaction of the debt, and that it then became incumbent on the defendants to terminate such unlawful possession.

But the authorities shew conclusively that in the absence of malice no action will lie. *Sheibel* v. *Fairbairn* (1) and *Page* v. *Wiple* (2) may perhaps be distinguished, for, in those cases, the man had already been arrested when the debt was paid, and therefore there was mere delay in telling the sheriff to discharge the debtor; but in this case it is suggested that the defendants actively interfered to continue the possession of the sheriff. The distinction, however, is not an important one, and the case of *Croyer* v. *Pilling* (3) is, I think, in point. There the ground of the action was malice. On these grounds I think the demurrer should be allowed.

The evidence of malice submitted to me, however, is not sufficient to justify giving leave to amend.

Demurrer allowed with costs; leave to amend refused.

Solicitors—Noon & Clarke, for plaintiff; Harries, Wilkinson & Raikes, for defendants.

(1) 1 Bos. & P. 388.
(2) 3 East, 314.
(3) 4 B. & C. 26; 3 Law J. Rep. K.B. 131.

[IN THE COMMON PLEAS DIVISION.]

(*Appeal from Revising Barrister's Court.*)

1880. Dec. 20. } *In re* SALE.

Parliament—County Vote—12l. Occupier omitted from List—Proof of Notice of Claim—6 Vict. c. 18. ss. 37 and 38.

The revising barrister is entitled under sections 37 & 38 of 6 Vict. c. 18 to require proof that a person, who claims in consequence of the omission of his name from the 12l. occupiers' list, gave due notice of his claim to be inserted in such list. The fact that the overseers have inserted his name in the list of claimants for that franchise is not sufficient proof that he has given due notice of claim.

Rule under 41 & 42 Vict. c. 26. s. 37 calling on the revising barrister for the northern division of the county of Warwick to shew cause why he should not state a case on appeal from his decision in disallowing the claim of John Sale to be inserted in the list of 12*l.* rated occupiers entitled to vote for the northern division of the county of Warwick.

A rule *nisi* was obtained at chambers

In re Sale, C.P.

upon the following affidavit of George Nuttall, described therein as a registration agent.

John Sale, now residing at No. 5 Berner Street, in the hamlet of Aston Manor, in the parish of Aston, in the northern division of the county of Warwick, has been until recently for many years qualified to be, and has, in fact, been, on the list of persons entitled to vote in the election of a knight or knights of the shire for the said division as a 12*l.* rated occupier, his qualification to vote being a house, No. 91, in Wills Street, in the said hamlet and parish; but in consequence, I believe, of his recent removal from the said house to No. 5 Berner Street, aforesaid, the overseers of the said parish of Aston, omitted his name from the list of 12*l.* rated occupiers published by them for the present year.

Notice of claim to have the name of the said John Sale inserted in the said list of 12*l.* rated occupiers was duly sent to the said overseers (1).

The name of the said John Sale was included in the 12*l.* list of claims published by the said overseers. No objection to the name of the said John Sale appearing on the said list was made by the said overseers or by any other person.

I was present at the Court held for the revision of the lists of voters for the parish of Aston Manor. At such Court the qualification of the said John Sale as expressed in his said notice of claim, was proved to the satisfaction of the said revising barrister, and thereupon it was contended on behalf of the said John Sale that his claim ought to be allowed and his name retained in the list and on the register of voters. The said John Sale was not present. The said revising barrister then objected that no evidence had been laid before him that the said John Sale had either signed a notice of claim himself, or had authorised any other person to sign one on his behalf, and thereupon he struck out the name of the said John Sale and disallowed his claim, holding that the claim could not be allowed on the ground that persons who claim in consequence of the omission of their names from the list of 12*l.* rated occupiers must, notwithstanding that their claims are published by the overseers, prove to the satisfaction of the revising barrister not only their qualification to vote, but also that they give "due notice of claim."

A notice in writing on behalf of the said John Sale that he was desirous to appeal against the said decision was duly given on his behalf to the said revising barrister, but the revising barrister refused to state a case for the opinion of the superior Court. A rule *nisi* having been obtained at chambers as above stated,

Lawrance and *Coltman* shewed cause.—By section 30 of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), the registration of the 12*l.* occupiers (section 6) is assimilated to the registration of borough voters, and the provisions of sections 38 and 39 of the Registration Act (6 Vict. c. 18), relating

(1) The notice of claim was as follows:—

Notice of claim by person omitted from the list of 12*l.* rated occupiers made out by the overseers.

To the Overseers of the parish (or township) of (North Warwickshire).

I hereby give you notice that I claim to have my name inserted in the list made by you of persons entitled to vote in the election of a knight (or knights) of the shire for the northern division of the county of Warwick in respect of the occupation of lands or tenements of the rateable value of 12*l.* or upwards, within the said parish and county, and that the particulars of my qualification are stated in the column below.

Dated the 18th day of August, 18 .

(Signed)

Christian name and surname of the claimant at full length	Place of abode	Nature of qualification	Street, lane or other place in the parish (or township) where the property is situate, and number (if any)
Sale, John . .	5 Berner Street, Aston	House in succession	91 Wills Street and 5 Berner Street

to the proof of claims of persons omitted from the list of voters, are expressly incorporated. The present claimant was omitted from the list, therefore, by section 38 (2), it had to be proved, to the satisfaction of the revising barrister, that he had given due notice of his claim, and no such proof was given.

In shewing cause against this rule, the revising barrister has drawn up a report, in accordance with the intimation of the Court in *In re Bane* (3). The list in which the claimant's name appeared was styled "a list of claimants," but it is not properly a list at all—at most it is a catalogue of claims, as described by Lord Coleridge, C.J., in *Pickard* v. *Baylis* (4).

The list of voters has to be made by the overseers, and published on the 1st of August (6 Vict. c. 18. s. 13); persons omitted send in their claims by the 25th of August, and these are included in the list of claimants published on the 1st of September (section 18). The borough revision may commence on the 15th of September (6 Vict. c. 18. s. 33), and the county revision on the 20th of September (28 & 29 Vict. c. 36. s. 12).

In *Davis* v. *Hopkins* (5) and *Leonard* v. *Alloways* (6) it was held that the revising barrister was not entitled to require proof that due notice of claim had been given; but those were cases of persons on the list of claimants for a county in respect of property under sections 4, 5, 6, of 6 Vict. c. 18, and therefore objected to under section 40. In such cases the name is treated as though inserted, and no proof of notice of claim is required (section 40) as in the case where the name has been omitted (section 38). The position of claimants for the 12*l.* occupiers' list is pointed out by Bovill, C.J., in *Bennett* v. *Boumfit* (7).

J. W. Mellor and *Charles Crompton*, in support.—The applicant was duly qualified, and no objection being raised his claim should have been allowed. Section 38 applies to persons omitted from the list, including the claimant list. Section 15 of 6 Vict. c. 18, which is specially extended to the 12*l.* occupiers by 31 & 32 Vict. c. 58. s. 17, deals with persons whose names are omitted from the list, and includes those who have given due notice of claim to the satisfaction of the overseers, and those who have not; the latter they can refuse to place on the claimant list. The overseers have, therefore, in the case of 12*l.* occupiers, three sets of people to consider: First, those whom, on the 1st of August, they insert in the list, which has to be made out annually anew (31 & 32 Vict. c. 58. s. 19); secondly, those who by accident or design omitted from such list have, by the 1st of September, given due notice of claim to the satisfaction of the overseers, and are inserted in the list of claimants; thirdly, those who either have not given notice of claim to the satisfaction of the overseers, or are considered by them to be not duly qualified, and who are consequently omitted altogether. If the claimant is inserted in the claimant list he is relieved from proving his notice of claim—that is a matter between the overseers and himself; but if he is omitted altogether, then he has to prove to the satisfaction of the revising barrister that due notice of claim was given within section 38.

The general principle, as laid down in *Davis* v. *Hopkins* (5) is that matters of this sort are between the overseers and the claimant. In that case the *onus* of proof was on the objector first, and he having proved, the *onus* was then on the claimant, but the Court held that the

(2) 6 Vict. c. 18. s. 38: "The revising barrister shall insert in every list of voters for any city or borough the name of every person omitted, who shall be proved, to the satisfaction of such barrister, to have given due notice of his claim to be inserted in such list, and to have been entitled on the last day [now the 15th section of 41 & 42 Vict. c. 26] of July then next preceding to have his name inserted therein in respect of the qualification described in such notice of claim."

(3) This report of the revising barrister was not read, and was not further alluded to. It transpired, however, that the report did not dispute the facts alleged in the affidavit, but dealt with the question of law involved in the case. Law J. Notes of Cases, 1879, p. 165; Law Rep. W. N. 1879, p. 200.

(4) 49 Law J. Rep. C.P. 182; Law Rep. 5 C.P. D. 235.

(5) 3 Com. B. Rep. N.S. 376; 27 Law J. Rep. C.P. 6.

(6) 48 Law J. Rep. C.P. 81.

(7) 38 Law J. Rep. C.P. 65; Law Rep. 4 C.P. 407.

In re Sale, C.P.

fact of his name being on the list was sufficient proof he had made his claim. It must be taken the overseers have done their duty, and it is part of their duty to see to the sufficiency of the notices of claim.

GROVE, J.—This seems to me a simple case. Either of the two sections 37 & 38 of 6 Vict. c. 18 (for they both have reference to the same state of things) makes it necessary for persons whose names have been omitted from the list prepared by the overseers to give due notice of claim, and then "it shall be lawful for the revising barrister to insert the name of the person so omitted, in case it shall be proved to the satisfaction of such barrister that such person gave due notice of his claim, &c." It appears to me that plainer words could not be used, and it is not contended that this part of the section (section 37) had been complied with.

The name of the applicant had been omitted, and therefore the case was within section 37 or 38. A notice of claim seems to have been given to the overseers, but there is no proof that it was given by the claimant. We have only the affidavit of a gentleman, calling himself a registration agent, who tells us that notice of claim was sent to the overseers, but there is no proof that the claimant had given notice of claim, only that some one had sent it. Not only was there no evidence, but none that I can see was tendered. Had the question been one of evidence, and it was shewn the revising barrister had acted on no evidence, then we might interfere; but putting the matter in the light most favourable to the applicant, it was a question of discretion. Notice of claim was not proved to his satisfaction, and in his discretion he has refused to act and insert the name in the list.

It has been contended that some theoretical evidence ought to satisfy the revising barrister, but were we to make this rule absolute on such grounds, we should always be granting appeals. Section 37 of 41 & 42 Vict. c. 26 leaves this power to the full discretion of the Court, and it is not because any person is discontented with the refusal of the revising barrister to state a case we should compel him to do so. In my opinion there is no ground on which to state a case. We are asked to assume that the insertion of the name in the claimant list by the overseers was sufficient proof, or, in other words, to substitute the satisfaction of the overseers for the satisfaction of the revising barrister; but this would not be a compliance with the Act, it would be negativing the provisions of sections 37 & 38 of 6 Vict. c. 18, which seem to me to be passed for good reasons. It seems that, as in the ordinary list, a regular notice of objection has to be served, then the *onus* is on the objector. But here there is no notice of objection; there is a list of claimants who have been omitted from the ordinary list, and the revising barrister is required, without objection, to be satisfied that due notice of claim was given. He was satisfied with the qualification, but not with the notice of claim, for the reason that no evidence that the claimant had given due notice of claim was tendered; and we should be repealing the Act if we held that the satisfaction of the overseers was sufficient for the satisfaction of the revising barrister. I am of opinion, therefore, this rule should be discharged.

LOPES, J.—We are asked to direct the revising barrister to state a case in order to raise a question on the 37th section of 6 Vict. c. 18. If we thought there was any real question which ought to be raised, without doubt we should make this rule absolute: the power of the Court in this respect is discretionary. I am of opinion the revising barrister was justified in refusing to grant a case. No evidence was brought before him that the claimant had given due notice of claim; all he had brought before him by way of evidence was a document, which may or may not have been sent in by the claimant to the overseers: there was no evidence of the signature to it, nor whence it emanated. How could, or why should, the revising barrister under such circumstances say that it was proved to his satisfaction that the claimant had given due notice of his claim to the overseers?

It is said that as this notice of claim was sent to the overseers and received by

In re Sale, C.P.

them, all that is required to be proved has been done, because they are the proper persons to judge of the sufficiency of the notice of claim, and they are satisfied. If that were so, we should have to insert in these sections (37 & 38) the words "to the satisfaction of the overseers." To do so would have the effect of repealing the Act. I think the rule ought to be discharged.

Rule discharged with costs.

Solicitors — Sharpe, Parkers & Co., agents for Ryland & Co., Birmingham, for applicant; S. D. Hamilton, for respondent.

[IN THE COMMON PLEAS DIVISION.]

(*Appeal from Revising Barrister's Court.*)

1880. Nov. 13. SAUNDERS (*appellant*) *v.* SEARSON (*respondent*). SAUNDERS (*appellant*) *v.* SMITH (*respondent*).

Parliament—County Vote—Land occupied together with House in a Borough—Reform Act (2 *&* 3 *Will.* 4. *c.* 45), *ss.* 24, 25, 27.

The object of sections 24 *and* 25 *of the Reform Act, by which a person entitled to vote for a borough in respect of a house, &c., shall not be entitled to vote for the county in respect of any land occupied by him together with such house, &c., is, that a borough voter shall not utilise any land occupied by him as part of the occupation of the house, in order to obtain a vote for the county.*

Where a tenant in occupation of land within a borough of sufficient value to confer a county vote, by a separate taking became tenant and occupier of a dwelling-house within the borough, which was totally distinct and separate from the land, he was held to be entitled to a county vote for the land, and was not restricted to his borough vote for the house, though both tenancies were under the same landlord.

Collins *v.* Thomas (12 Com. B. Rep. 639; 22 Law J. Rep. C.P. 38); Capell *v.* Aston (8 Com. B. Rep. 1; 19 Law J. Rep. C.P. 28).

Appeals from the decision of the revising barrister for the northern division of the county of Northampton, allowing the name of the appellant to be retained in the list of voters for the parish of Peterborough.

SAUNDERS *v.* SEARSON.

The appellant had occupied since 1869 a close of land in Flag fen, in the borough of Peterborough, as tenant to Mr. Fitzwilliam, at a rent which would confer upon him the right of voting as a 12*l.* occupier, under the Representation of the People Act, 1867.

Some years afterwards he took a house in Bridge Street, in the borough of Peterborough, under the same landlord, which he had since occupied, and in respect of which he enjoyed the right of voting in an election of members of Parliament for the borough of Peterborough.

Since taking the house he had become tenant and occupier of another piece of land in Flag fen, within the borough, which also was rated at upwards of 12*l.* per annum, and was also held under the same landlord.

The lands in Flag fen were apart from each other, and were both distant upwards of a mile from the appellant's borough qualifying residence in Bridge Street, Peterborough.

Each of the three occupations was held under a Lady-day tenancy, and at a separate rent, and a separate notice to quit would be required for each property.

The respondent duly objected to the name of the appellant being retained on the list of voters for the parish of Peterborough, in the said division of the county of Northampton, on the ground that each of the pieces of land in Flag fen was occupied together with the house in Bridge Street, within the meaning of section 25 of 2 & 3 Will. 4. c. 45 (1),

(1) By section 25, no person shall be entitled to vote in the election of a knight or knights of the shire to serve in any future Parliament, in respect of his estate . . . . as tenant and occupier in any house, warehouse, counting-house, shop or other

and that such occupation conferred upon him the right of voting for the borough of Peterborough.

In answer to the objection it was urged that the lands in Flag fen were not occupied together with the said house, within the meaning of the said section, but that the occupation of the lands was distinct from the occupation of the house.

The revising barrister decided that the voter had the right to have his name retained on the list of voters for the division of the said county, in respect of the occupation of the said lands, under the Representation of the People Act, 1867, and retained the name in the list.

SAUNDERS *v.* SMITH.

In this case the respondent was the owner in fee-simple of the land, which was of the yearly value of more than forty shillings, and also of the house; in other respects the facts were substantially the same. The revising barrister held that the land was not occupied together with the house within the meaning of 2 & 3 Will. 4. c. 45. s. 24 (2).

Merewether, for the appellant.—By section 27 of the Reform Act (2 & 3 Will. 4. c. 45) (3) the occupant of a house in a borough was entitled, in case the house did not attain the then required value of 10*l.*, to supplement the value of the house by the value of any land occupied by him "together with" such house; but by section 25 (1) he was precluded from claiming a vote for the county in respect of the land when occupied "together with" the house. This section, and section 24 (2), which is to the same purport, and applies to the case of freehold occupiers, is specially made part of the Representation of the People Act (30 & 31 Vict. c. 102) by section 59 of that Act. The 10*l.* value required by section 27 of the Reform Act is as to dwelling-houses now done away with by 30 & 31 Vict. c. 102. s. 3, and all that the voter now requires is occupation of a rateable dwelling-house, or part of a dwelling-house occupied separately (41 & 42 Vict. c. 26. s. 5), and the land is no longer required to supplement the value. The result, therefore, of the respondent's contention would be, that anyone who occupies a house in a borough, with a garden which is of the rateable value of 12*l.*, would have a vote for the county as well as the borough.

[*Hensman*, for the respondent, intimated he did not intend to contend so far.]

The words "land occupied therewith" in sections 24, 25, 27 of the Reform Act mean, occupied at the same time, and have no reference to locality. It is so laid down in the text-books—*Rogers on Elections*, 13th ed. p. 71; *Davis on Registration*, 2nd ed. p. 29; and in *Collins* v. *Thomas* (4) it was held that the value of a garden occupied with a house might be

building, or in any land occupied together with a house, warehouse, counting-house, shop or other building, such house, warehouse, counting-house, shop or other building being either separately or jointly with the land so occupied therewith of such value as would, according to the provisions hereinafter contained, confer on him or on any other person the right of voting for any city or borough, whether he or any other person shall or shall not have actually acquired the right to vote for such city or borough in respect thereof.

(2) By 2 & 3 Will. 4. c. 45. s. 24, no person shall be entitled to vote in the election of a knight or knights of the shire to serve in Parliament in respect of his estate or interest as a freeholder in any house, warehouse, counting-house, shop or other building occupied by himself, or in any land occupied by himself, together with any house, warehouse, counting-house, shop or other building, such house, warehouse, counting-house, shop or other building being either separately or jointly with the land so occupied therewith of such value as would, according to the provisions hereinafter contained, confer on him the right of voting for any city or borough, whether he shall or shall not have actually acquired the right to vote for such city or borough in respect thereof.

(3) By 2 & 3 Will. 4. c. 45. s. 27, it is enacted that in every city or borough which shall return a member to serve in Parliament, every male person of full age, and not subject to any legal incapacity, who shall occupy within such city or borough, as owner or tenant, any house, warehouse, counting-house, shop or other building, being either separately or jointly with any land within such city, borough or place occupied therewith by him as owner, or occupied therewith by him as tenant under the same landlord, of the clear yearly value of not less than ten pounds, shall, if duly registered according to the provisions hereinafter contained, be entitled to vote in the election of a member to serve in any future Parliament for such city or borough.

(4) 12 Com. B. Rep. 639; 22 Law J. Rep. C.P. 38.

added to the value of the house though the garden was separated from the house by some waste land and a row of buildings. In *Capell* v. *The Overseers of Aston* (5) and the following case of *Burton* v. *The Overseers of Aston* (6), it was held that the land could not be joined to the house when the voter was freeholder of the one and tenant of the other, because section 27 required that they should be occupied in the same capacity. In the present case they are held in the same capacity, therefore they can be joined, and therefore the appellant can have but one vote.

Hensman, for the respondent.—The words "occupied therewith" in sections 24, 25, 27, mean more than that they must be occupied at the same time or under the same landlord: both must necessarily be occupied at the same time, inasmuch as they have to be occupied for the twelve months preceding the revision, and occupation under the same landlord is required by section 27. That section enables the occupant of the house to make up the requisite value by the value of land occupied with the house, but it was never intended that a voter entitled to a county vote in respect of land in a borough should lose the county vote if he subsequently occupied a house in the borough. *Collins* v. *Thomas* (4) decides that in order to be joined the land and house need not be contiguous: the land was there "occupied therewith" because it was part of the occupation, and it was held under the same landlord at one rent; while in the present case the land was held at a separate rent and was distinct from the occupation of the house. *Capell* v. *The Overseers of Aston* (5) seems to decide that in order to be joined there must be similarity of tenure, but in the present case the takings were distinct. Section 25 only applies when the land is wanted to make up the vote, not when the occupation is distinct and separate. The question of whether the land is "occupied therewith" is one of fact for the revising barrister to decide, and he has decided that the land is not occupied together with the house.

Merewether, in reply.

(5) 8 Com. B. Rep. 1; 19 Law J. Rep. C.P. 28.
(6) 8 Com. B. Rep. 7; 19 Law J. Rep. C.P. 28.

GROVE, J. (after stating the facts) proceeded as follows: The question before us is whether a vote for a borough in respect of a house excludes a right to vote for the county in respect of land held under the same landlord, although the land is quite distinct from the house. I think such a construction of the statute is not maintainable, and I ground my decision on what appears to me to be intended by the words "together with" and "therewith" in sections 25 and 27. Are those words intended to convey the idea of contiguity, or time, or is it intended they shall be used in a more general and popular sense, and mean that the land is to be part of the same occupation? In my opinion the last is the correct view. I do not pretend to give an exhaustive definition of the words, but I do not think that "time" or "contiguity" would be a sufficient interpretation; there must be something more intended. It is plain the holdings must be contemporaneous in the sense that they must be held for the twelve months preceding the revision, and that the holdings must be under the same landlord, because it is so stated in section 27; therefore, it seems to follow that some meaning must be given which carries more than occupation for the same time and under the same landlord.

The object of section 27 is that a person in occupation of a house of the annual value of 10*l.* is to be entitled to a borough vote, or if the house be of less value he may make up the requisite value with land occupied therewith by him under the same landlord. The land does not confer the vote *per se*, but it may be used as ancillary to the house in order to make up the requisite annual value. This is the first impression one receives on reading the section. There seems nothing in the Act to support the contention that a vote for the borough in respect of the house ousts the vote for the county in respect of any land which may be occupied by the voter under the same landlord within the same borough, and it becomes important to see whether such a view is borne out by the cases which have been cited. Had there been no authority, the construction I have given would seem to

be clear, but we have been pressed with *Collins* v. *Thomas* (4) and *Capell* v. *Aston* (5). It is evident in *Collins* v. *Thomas* (4) that the question to be decided was whether the land must be contiguous to the house. Both were taken of the same landlord and at one entire rent, so that the ground was allotted as part of the tenancy, and the only question was, whether the separation of the land from the house by an interval of forty yards and a row of buildings precluded the land being used to supplement the value of the house, and the Court say that it may be so used. The only point which presses against the present decision is the remark of Mr. Justice Maule, at the end of the case (7), where he says, "A man may have a qualification consisting of a counting-house five stories high and a garden in another part of the borough, if both are held under the same landlord." But that remark is not the decision in the case, it is nothing more than an observation to counsel, and it would seem to shew that these questions are questions of fact to be decided by the revising barrister. If he finds the house to be a counting-house, and that a piece of land in the same occupation is situate a mile off and has nothing to do with the counting-house, then the land cannot be said to be "occupied therewith" within the meaning of these sections. The other case (*Capell* v. *Aston*) (5) decides a point on which I should have thought there would not have been much doubt. The question was whether, where a person has a freehold within the borough, which by itself would give him a vote for the county, and is also tenant of a house in the borough which would give him a vote for the borough, the freehold must be joined to the house and thus disqualify the county vote. The Court says No; the qualification is totally distinct, and he is entitled to a county vote in respect of the land, and a borough vote in respect of the house. Neither of those cases support the construction contended for by the appellant. In my opinion, therefore, the words "occupied together with" import something more than unity of time or occupation under the same landlord; and the reason and object of these sections is that if the land is required to supplement the value of the house, then it is occupied therewith; but if the land is totally separated from the house and not required for the beneficial occupation of the house, then it is not "occupied therewith," although held under the same landlord. I am therefore of opinion that the decision of the revising barrister was right.

This decision applies to and covers the other case.

LINDLEY, J.—I am of the same opinion. The question before us turns upon the construction of section 25 in connection with section 27, and the only difficulty is to arrive at the meaning of the words "occupied together with" and "therewith." In the first instance, one likes to find out the object of the sections, and it seems to me that the key to their interpretation is value. The dominant idea of sections 24 and 25 is that a person who buys land to enhance the value of his house shall not have a vote for the county in respect of the land; and one must therefore see if the house when joined with the land is for purposes of enjoyment worth more than the value of the house plus the value of the land. If the land is not required at all for the enjoyment of the house, it would not seem to be "occupied therewith" within the meaning of the section.

It is said that this decision would be inconsistent with the authorities, and that it has been held that the words have reference only to time, but I do not find that to be the case. In *Collins* v. *Thomas* (4) both house and land were occupied together, and the decision does not seem to have been grounded on the question of time. Neither does *Capell* v. *Aston* (5) go that length. If in the present case the land could have been joined to the house so as to make up the value required by section 27, then there could be no vote for the county by reason of section 25, and that is the effect of *Capell* v. *Aston* (5). In my opinion the revising barrister was right.

LOPES, J.—I also agree that the decision of the revising barrister should be

(7) 12 Com. B. Rep. at p. 641.

affirmed. The appellant contends that if A rents of B a house and also land in another part of the borough, each sufficient to confer a vote, the one for the borough, the other for the county, then that A cannot be registered as a voter for the county, but for the borough only. In support of this contention the appellant relies on sections 25 and 27 of 2 & 3 Will. 4. c. 45. I think the true meaning of those sections is that a voter is to be prohibited from utilising any part of his borough qualification in order to give himself a county vote, but that it is not intended that where he holds two separate tenements he is to be restricted to a vote for the borough, and is not to have a vote for the county.

Decision affirmed in both cases.

Solicitors—Clarke, Rawlins & Clarke, agents for Percival & Son, Peterborough, for appellant; Hensman & Nicholson, agents for James Heygate, Wellingborough, for defendant.

[IN THE COURT OF APPEAL.]

1880. May 27. } THE CHESHIRE LINES COMMITTEE *v.* LEWIS AND COMPANY.*

Landlord and Tenant—Lease—Collateral Stipulation—Weekly Tenancy—Inconsistent Stipulation enlarging Term on happening of Event—Construction.

The plaintiffs, a railway company, let premises, through an agent, to the defendants on the terms, which were reduced to writing and signed by both parties, of a weekly tenancy to be determined by a week's notice on either side. At the same time the agent wrote, signed and handed to the defendants the following memorandum: "Messrs. Lewis & Co. You may have the premises as per agreement until the railway company require to pull them down." The defendants took possession of the premises, and the plaintiffs, who subsequently required them for their own occupation, but had no intention of pulling them down, gave the defendants a week's notice to quit, and after the notice had expired brought ejectment. The defendants pleaded that the plaintiffs did not require the premises in order to pull them down, and, by counter-claim, asked for a declaration that the representation by the agent was binding upon the plaintiffs, and for an injunction restraining them from acting upon the notice, or determining the tenancy, until they required the premises for the purpose of pulling them down:—Held (*affirming the judgment of* LUSH, J.), *that the plaintiffs were entitled to maintain the action, and that the defendants were not entitled to any of the equitable relief claimed.*

Appeal from a judgment of Lush, J., after trial.

Action of ejectment tried before Lush, J., without a jury.

The facts and proceedings at the trial are fully stated in the judgment of Lush, J., delivered on the 7th of August, 1879, as follows:—

LUSH, J.—This is an ejectment brought to recover possession of a dwelling-house, shop and premises in Ranelagh Street, Liverpool. The adjoining premises on each side belong to the defendants, and the property in question was taken by them with a view to its being used as part of their business premises.

The property was purchased by the plaintiff company, the Cheshire Lines Committee, in 1872. Their then purpose was to use it eventually as part of the site of their station. The purchase was made by a gentleman of the name of Radcliffe, in his own name, although it was known to be destined sooner or later for railway purposes.

The defendants seemed to be under the impression that Radcliffe was buying it in order to sell to the company, instead of buying it, as the fact was, as agent for the company. They were anxious, however, to secure its possession in the meantime in order to prevent its being occupied by a rival in trade.

The negotiation, so far as it is in writing, commenced with a letter from the defendants to Radcliffe, without a date, but probably written at the end of June or the beginning of July, 1872.

* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Brett, L.J.

Cheshire Lines Committee v. *Lewis & Co.* (*App.*), *C.P.*

It is in these terms: "We should be willing to take the place on any terms you suggest, provided the place was not let over our heads to anyone else carrying on business to our injury, as we should spend some money to improve the place. We would be willing to take for twelve months certain, or for a term to be terminated if the railway should require to pull down the place. As we said before, we are willing to take the place on any terms mutually fair, and would pay rent up to 200*l.* a year. This would depend on how we got it. We rely on your keeping our confidence, and not hawking the place about, as we don't want to make the running for anyone else."

On the 4th of July they wrote again: "Respecting the premises, we shall be willing to become tenants at as short notice as you like, even weekly tenants, so that we can't possibly interfere with any claim you have against the railway company. It would be an advantage to us to know if we are likely to have the place, because we could arrange to enter same time as we enter our new premises."

On the 15th of August the defendants wrote again: "In reply to your letter of the 14th of August, for which we are obliged, we should be much obliged if you would see our Mr. Cohen personally about the matter, as there are one or two things we should like to see you about. We are willing to take the place on your terms, and the rent we think—in fact are sure—we can arrange. The place is worth more to us than to anyone else, and we are willing to pay. The only difficulty we see is this: we should like to alter the place to suit us, and to do this as we would wish would cost us a lot of money. Now how could we do this if we were likely to receive notice, the time the alterations were completed which could only be in accordance with our lease, but yet would be very hard on us, especially if we made these alterations for some one in our own trade. Would it not be possible for us to take the place, make our alterations, subject to your wishes—a week's notice, with the proviso that the shop would not be relet, but that, should the railway require it, our interest at once ceased."

On the 17th of August the defendants wrote: "We will pay you 200 guineas a year for your premises in Ranelagh Street." And on the 19th again: "In further reference to your premises we should not object to pay you an increased rental each year we held your premises, to start as before named."

The result of the negotiations was an agreement, dated the 26th of August, 1872, between Radcliffe of the one part, and the defendants of the other part, by which Radcliffe agreed to let to the defendants, and the defendants agreed to take from Radcliffe, as weekly tenants, the premises in question upon a weekly tenancy, commencing from that day, at the weekly rental of 5*l.* 15*s.* 5*d.*, payable in advance at the beginning of each week, "the said tenancy to be determined by either of the parties hereto on giving a week's notice to the other of them of his or their intention so to do." It was further agreed that the defendants "should not assign or underlet any part of the premises to any person or for any purpose whatsoever without the approbation and consent of Radcliffe first obtained, and should not carry on, or permit to be carried on, by themselves or others, on any part of the premises, any description of trade, business or occupation which might be a nuisance or offensive to the neighbours, or objectionable to Radcliffe, and that defendants should bear, pay and discharge all rates, taxes and assessments, parliamentary, parochial or otherwise, except property tax and the landlord's proportion of the sewage and water rates."

When the parties met to sign the agreement the defendant Cohen pointed out that it would be very hard to be turned out if a rival tradesman should offer 400*l.* a-year, as the defendants were to pay at the rate of 300*l.* a-year; "and," said Mr. Radcliffe in his evidence, "as I understood the company's intentions were to buy other property in the neighbourhood, and they were acquiring this in order to pull it down, I thought there would be nothing wrong in giving them an undertaking. They wished to have our undertaking that they were not to be disturbed till the company required the premises to pull them down. I thought they would not require them till they

pulled the whole down for extensions." Radcliffe thereupon wrote in defendant's presence a letter to them in these terms: "Messrs. Lewis & Co.—Gentlemen, You may have the premises as per agreement signed by you until the railway company require to pull them down." He had added, "or to require them from me," but at the defendant's instance these words were struck through, and the letter was then and there signed by Radcliffe, stamped with an agreement stamp, and witnessed.

The defendants thereupon signed the agreement before set out which had been previously signed by Radcliffe, and entered immediately into possession.

On the 14th of May, 1874, the defendants wrote to the company's agent: "We at present occupy premises, No. 34 Ranelagh Street, belonging to your company. We have the place from Mr. Radcliffe, Lime Street, and hold a letter of his worded thus: 'You may have the premises as per agreement signed by you until the railway company require to pull them down.'

"Now we want your permission to cover in the yard at the back of the premises at our own expense, but before going to this expense we should like to have a similar letter from your company to the above."

Other alterations were subsequently suggested, and on the 14th of July, 1874, Mr. English, the company's manager, wrote: "You are at liberty to cover over the back yard of the premises, but you must clearly understand that the work must be done in a workmanlike manner, and no damage must be done to the premises. And, further, that you have no lease, and are on a weekly tenancy, and the committee will not compensate you at all for anything you may do if you are required to give up possession of the property. If you accept these conditions, kindly say so, and you can proceed with the work."

To which the defendants replied on the 25th of July: "We are in receipt of your favour of the 14th of July, for which we thank you. We quite understand we have no lease, but hold the premises subject to the arrangement made with Mr. Radcliffe originally; we shall proceed with the work forthwith."

Then on the 28th of July Mr. English wrote, as if in reply to the letter of the 14th of May: "I shall be much obliged if you will let me know what you consider the nature of the agreement made with Mr. Radcliffe; and if it is in writing, will you allow me to read it and take a copy? I wish to avoid misunderstanding."

A copy seems to have been sent, for on the 11th of August, 1874, Mr. English wrote: "I have consulted our solicitors, and by their advice I have to decline to allow the yard to be covered in unless a proper agreement for the tenancy of the property is first entered into. Their opinion is that the document you call an agreement is neither one thing nor another, and if you are willing to become parties to a proper agreement for holding the property as weekly tenants, or even as quarterly tenants subject to notice from the end of any quarter, we shall be prepared to have one drawn up."

To this the defendants replied on the 17th of August, in a letter to Radcliffe: "As far as we are concerned we are quite satisfied with the arrangements made with you on the 26th of August, 1872, in reference to our occupation of the Cheshire Lines property. But for all that, without prejudice to our agreement originally made on the 26th of August, 1872, if Mr. English will kindly send us a rough draft of what he suggests, we will do all in our power to meet his views, and from the conversation had with him, we do not think this will be difficult."

A copy of this letter was, on the 15th of September, sent by the defendants to English.

No further correspondence appears to have taken place upon the subject of the agreement. Offers were afterwards made by the defendants to purchase the property, which offers were rejected, and on the 2nd of May last a notice was given on behalf of the plaintiffs to quit the premises on the 12th of May.

The defendants in their statement of defence insist on the fact that the company do not require the premises in order

to pull them down, and, by way of counterclaim, ask that the promise and representation made by Radcliffe be declared binding, and that the plaintiffs be restrained from determining the tenancy or acting upon the notice until they require the buildings for the purpose of pulling them down.

The plaintiffs have long since abandoned their purpose of building a station on this site, and they have erected a station on another spot, but they require the premises for their own occupation for purposes connected with their railway.

The question is, whether the letter of the 26th of August, 1872, upon the faith of which the agreement of that date was signed by the defendants, and which I must regard as incorporated into the agreement, has the effect of enlarging the term either at law or in equity beyond a weekly tenancy, and, if so, to what extent.

The operation of such a restrictive clause was the subject of argument and decision in the Court of King's Bench so long ago as 1807. The agreement in that case was in these words: "Memorandum of agreement made, &c., between W. Warner and J. Browne. W. Warner, in consideration of 40*l.*, doth agree to let and J. Browne doth agree to take a messuage at 40*l.* per annum clear rent, to be paid quarterly; and it is further agreed that W. Warner shall not raise the rent, nor turn out J. Browne so long as the rent is duly paid quarterly, and he does not expose to sale or sell any article that may be injurious to W. Warner in his business. And it is further agreed that in case of removal J. Browne shall be at liberty to receive the aforesaid sum of 40*l.* from the next tenant W. Warner shall accept." The defendant not having broken either of the stipulated conditions, the question was, whether the plaintiff could determine the tenancy on a half-year's notice to quit, considering the defendant as tenant only from year to year. Lord Ellenborough asked what estate the defendant was contended to have, and whether he was not in this dilemma, that either the estate might enure for life at his option, and then, according to Lord Coke (Co. Lit. 42) such an estate would in legal contemplation be an estate for life, which could not be created by parol, or, if not for life, being for no assignable period, it must operate as a tenancy from year to year, in which case it would be inconsistent with, and repugnant to the nature of such an estate that it should not be determinable at the pleasure of either party giving the regular notice. The judgment was ultimately given on the ground that a tenancy from year to year was created, and that it was entirely repugnant to the nature of such a tenancy that the option of determining it should rest solely with the tenant. And Justice Lawrence said, "If this interest is not determinable so long as the tenant complies with the terms of the agreement, it would operate as an estate for life which can only be created by deed, as a feoffment, or a conveyance to uses. The notion of a tenancy from year to year, the lessor binding himself not to give notice to quit, which was once thrown out by Lord Mansfield, has been long exploded" —*Doe* v. *Browne* (1). This reasoning applies with at least equal force to the present case. This is not a mere constructive tenancy as that was. It is as explicit as words can make it that the defendants are to hold "upon a weekly tenancy at a weekly rental, and that the tenancy is to be determined by either of the parties on giving a week's notice to the other." There is this difference between the two cases, that in *Doe* v. *Browne* (1) the lessor engaged not to turn out the tenant so long as he observed the conditions, and in this case Radcliffe engages that the tenant shall hold until the company require to pull down the buildings. But, as that is an event which may never happen, the distinction is merely between the contingency of the tenant breaking the conditions and the contingency of the company wanting the premises in order to pull them down. The restriction is as repugnant to the nature of the tenancy in the one case as in the other. It is therefore no legal answer to the ejectment to say that the contingency provided for has not happened.

(1) 8 East, 165.

The next question is, Have the defendants any equity to enlarge the estate beyond what it professes to be, namely, a weekly tenancy subject to a week's notice to quit on either side? The same case which I have quoted from East's Reports, which is the only one that I am aware of at law on the point, was taken into equity, and the views expressed by Lord Eldon in the interlocutory stages of the suit, and which are reported in 14 Vesey, pp. 158 and 409, greatly assist in disposing of this point.

Warner, the tenant, filed a bill for a specific performance, treating the agreement not as an actual demise, as it was treated at law, but as an agreement to grant a lease, and prayed the execution of such a deed as would carry out the intention of the parties. The defendants in the suit demurred. Lord Eldon overruled the demurrer. "If this paper," said he, "is an actual lease, the question is decided at law, and the decision is clearly right as importing a letting and a taking; it could not be valid as an estate for life not being by deed. As to the equitable construction, if it is not a lease, but an agreement of which a memorandum is made in writing, the question will be whether it is so clear that this Court cannot execute that agreement, that a demurrer ought to be allowed in effect, declaring at this stage of the cause that such an agreement cannot be performed. The question, therefore, is, Is this a lease, or an agreement which this Court will specifically execute, and, upon the latter construction, whether there is enough in the body of it to shew what are the terms?" He then proceeds: "The phrase 'Warner doth agree to let and Browne doth agree to take' will not exclude the idea of an actual demise in some cases; but if the whole imports an intention to do a future act rather than a thing that is done, those words may be construed as not amounting to actual letting and taking. If the opinion of the Court of King's Bench was that the subsequent words meant that the tenant was to have the option of remaining for life (and the former words may mean either actual letting and taking, or a contract for actually letting and taking), it is fair to consider it as an agreement rather than an actual lease, as the latter construction would defeat the intention of the parties, which upon the former construction may be carried into effect by a future instrument." The conclusion to which Lord Eldon was at that stage disposed to come was that the intention was to grant an interest "not quite so thin and unsubstantial as a tenancy from year to year; that there was an imperfection in the instrument, and that the parties looked to some future instrument that should more clearly state how the enjoyment and benefit designed for each of them was to be secured. Whether," he added, "this will finally be made out at the hearing of the cause is another consideration, but the case is not so clear that the demurrer ought to be allowed."

The case came on again upon a motion, after answer, to dissolve the injunction which had been granted. This was refused upon the same ground, and the injunction was continued till the hearing. As no further mention of the case is to be found, the probability is that it never came to a hearing, but was settled between the parties.

Applying the doctrine as laid down by Lord Eldon to the present case, it is clear that no suit for a specific performance could be maintained. The defendants do not indeed suggest, by their defence or counter-claim, that it ever was intended that any other document should be signed, nor could it be contended that the defendants were to have any more substantial interest than a weekly tenancy. The agreement is most explicit on this point. They were to be throughout, however long they might be allowed to hold possession, tenants from week to week and nothing more. What was intended by the letter was to protect them in their holding as weekly tenants until the company wanted the premises by engaging that notice to quit should not be given by the landlord until that event.

Whether an injunction could be granted to enforce observance of that stipulation is a question which, in the view I take of the case, I am not called on to decide. I would only remark that it is a strong

proposition that the Court can by injunction enforce a stipulation which it holds to be void for repugnancy. But, supposing such a claim could be entertained, the Court would and must enquire what was the real intention of the parties, or whether the event really contemplated had or had not happened. The substance and not the letter of the stipulation must be regarded. Now all that the defendants wanted was to be secured in the possession until the company required to use the premises, so that they should not be let to a rival in business.

It was immaterial to the purpose what use the company meant to make of the premises, if only they intended to take them into their own hands. The words on which the defendants rely, namely, "to pull them down," cannot reasonably be construed as a condition; they merely express the purpose to which the company then intended to apply them, and it was not within the contemplation of either party that they should not be able to change their minds and use the premises as they stand without pulling them down, if they thought fit to do so.

My attention was called to a case upon this subject recently decided by Vice-Chancellor Malins—*In re King's Leasehold Estates* (2). One Warren being entitled to a dwelling-house, shop and yard for a residue of a term of twenty-one years, verbally agreed with King to let them to him at a given rent for such term of years, not exceeding his interest, as King might desire, and in order to effectuate the agreement Warren signed a paper whereby he agreed to let the premises at the stipulated rent, &c.; and, further, that he would not raise the rent or give notice to quit as long as King continued to pay the rent when due. The premises were taken by a railway company, and the question was, whether King was to be dealt with as a yearly tenant, or as one having a larger interest. King had described his interest as that of "any term at tenant's option, but not beyond the term and interest of Warren in the premises, which would expire on the 25th of December, 1881, at 36*l.* per annum."

(2) Law Rep. 16 Eq. 521.

The company had entered into an agreement with King to pay him 470*l.* for the "purchase of the estate and effects set forth in the schedule and claimed by him," but on receiving the written agreement they paid that amount into Court, and this was an application to the Court by King to have the money paid over to him.

The Vice-Chancellor held—first, that the company must be presumed to have known the nature of King's interest when they entered into the contract, and that they could not now question it; and, secondly, if they could, he held that King had an interest beyond that of a yearly tenant, one commensurate with the interest of his landlord, but doubted what that interest would have been if the landlord had held the fee. It is sufficient to say of this case that the learned Vice-Chancellor did not intend to overrule anything held by Lord Eldon in *Browne* v. *Warner* (3). On the contrary, he based his judgment on what Lord Eldon is reported to have ruled in that case. This case must be treated as an additional authority on the point on which Lord Eldon expressed his opinion.

For these reasons I am of opinion that no effect can be given to the letter of the 26th of August, and that judgment must be entered for the plaintiffs both on the claim and counter-claim.

On appeal—

C. Russell and *R. Henn Collins*, for the defendants, referred to *Doe* v. *Browne* (1), *Browne* v. *Warner* (3), *Kusel* v. *Watson* (4), *In re King's Leasehold Estates* (2), and *Norton* v. *Wood* (5).

Herschell and *Hugh Shield*, for the plaintiffs, were not heard.

Bramwell, L.J.—To my mind it cannot be supposed that the plaintiffs have in some way or other bound themselves to let the defendants keep in possession of the premises until the plaintiffs want to pull them down. It is not to be supposed that they ever will want them for the

(3) 14 Ves. 156 and 409.

(4) 48 Law J. Rep. Chanc. 413; Law Rep 11 Ch. D. 129.

(5) 1 Russ. & M. 178.

purpose of pulling them down merely. They would want to pull them down in order to use the ground for the purpose of building something else up. I think the true meaning of the two documents is, that the first document, which was an agreement for a weekly tenancy signed by both parties, constituted the only agreement between them; the other was a mere honourable statement of the company's intention upon which the defendants might have a reasonable expectation of being allowed to continue in occupation until the company wanted the premises to pull them down. I think that was the true effect of the second document, because of the inconsistency between the stipulation in the first for a weekly tenancy, and the provision in the second giving the defendants much more than a weekly tenancy. That provision would have been incorporated in the formal agreement if it was intended to be more than the sort of honourable understanding I have mentioned.

I doubt whether the company would have authorised Radcliffe to make a binding agreement that the defendants might keep possession of the premises till the company wanted to pull them down, though they might have authorised him to hold out a reasonable expectation that the defendants would be allowed to remain in possession until the company wanted the premises for their own purposes. I doubt if the company could have given him authority to bind them in the way suggested here, unless they gave it by some resolution or act under their common seal.

If the second document contains a binding engagement of any sort or kind, it is, "We will not turn you out until we require the premises," not "If we do require them we will pull them down." They cannot have meant that; the ludicrous consequence would follow that the company would be compelled to pull down the premises—at a cost perhaps of 500*l.*—in order to obtain possession. Another difficulty in the defendants' way is, that if the second document forms part of the lease of the premises, then it is a lease for the lives of the lessees determinable upon certain events happening, and therefore void because not made by deed. I do not see that there would be any legal repugnancy in the terms of such a lease, but nobody can suppose the parties here ever contemplated making it. It is said that the second document is not part of the lease (if the first is a lease), but a collateral agreement. If so, where is the consideration for it? There is none on the face of it. Then it is further said the two documents together form one agreement for a lease—the first agrees for a tenancy, and the second adds a collateral stipulation. According to the argument, if this is a lease, unless the company wanted to pull down the premises, the lessees might continue in possession for 100 years with no power of re-entry. It would be an unjust consequence that the lessees might hold the premises for their lives because the company did not want to pull them down, and yet that the company are not entitled to the customary covenants and stipulations for the benefit of the landlord in leases for lives. I am of opinion that if the two documents form one agreement, and if the second one is not a mere honourable engagement giving the defendants a reasonable expectation of not being disturbed in their occupation, the true meaning is, "You may continue to occupy the premises until we shall want them." I think the appeal must be dismissed.

BAGGALLAY, L.J.—I am of the same opinion. If our decision depended entirely upon the construction of the second memorandum, I should not be disposed to give the words a more extended meaning than that the defendants might keep the premises until the company wanted possession of them. But there are other grounds sufficient to justify us in rejecting this appeal. Assuming that Mr. Radcliffe was authorised by the company to make the second agreement, and that the two documents must be treated as one agreement, then I am of opinion that the letting was for the lives of the lessees, determinable on their part by a weekly notice, but not determinable by the lessors except upon the happening of an event which has not happened—that is, a lease for lives, and void by reason of not being

under seal. The judgment of Lord Eldon in *Browne* v. *Warner* (3) is clear to that effect. I am of opinion that this was an actual letting and not an agreement for a lease; there is nothing on the face of the documents, and nothing to be collected from the conduct of the parties indicating any intention to have a further deed executed. This ground is sufficient to justify us in disposing of this appeal against the defendants.

BRETT, L.J.—I am of opinion that this appeal must be dismissed. The action is ejectment, and the cause of action is founded on an alleged relation of landlord and tenant between the plaintiffs and the defendants. The action is brought on the ground that the defendants were tenants to the plaintiffs, under a lease subject to a weekly notice to quit; that the notice to quit was given, and the defendants remained in the premises after the notice had been given and had expired.

The defence set up is manifold: First, it is said that, although a tenancy was created between the parties, it was not a weekly tenancy pure and simple, but a tenancy, so far as the defendants were concerned, greater than from week to week, and therefore the notice to quit at the end of a week was wrong.

Another defence is that, assuming the tenancy to be a weekly one, which *prima facie* might be put an end to by a weekly notice, yet there was a covenant by the plaintiffs that that power should not be exercised except upon the happening of events which have not happened, and that the defendants are entitled to an injunction against the exercise of that power by the plaintiffs.

It was further argued alternatively, that the agreement between the parties was an agreement for a lease for a longer term than from week to week; that the defendants were entitled to specific performance of that agreement; that the Court ought to relieve against the notice, and ought to grant the defendants a decree for the execution of such a lease, and to enjoin the plaintiffs not to determine the tenancy until they require the buildings for the purpose of pulling them down. It was further put that if a weekly tenancy existed there was also a collateral independent agreement, which the plaintiffs were breaking, and an injunction is sought against future breaches.

I am clearly of opinion, as was Mr. Justice Lush, that there is but one contract here, although written on two pieces of paper. When possession was taken under it, it became and is the lease. As to the construction of that lease, this case is stronger than *Doe* v. *Browne* (1) and *Browne* v. *Warner* (3), which came before Lord Ellenborough and Lord Eldon, because here the lease was in the clearest terms a lease from week to week, to be put an end to by a weekly notice from either party to the other. It is said that the term enabling the tenancy to be determined by a week's notice from either party is rendered inoperative, so far as concerns a notice by the plaintiffs, by reason of another stipulation in the lease, that they cannot give notice unless the premises are wanted for a particular purpose.

I think the case of *Browne* v. *Warner* (3) is directly in point to shew that the stipulation, if interpreted so as to diminish the right to give a week's notice, is repugnant and inconsistent with that right, and therefore void. It is said that there is created a weekly tenancy not pure and simple, but of some other kind, by virtue of the stipulation. I know of no such thing as a tenancy from week to week not pure and simple, but only from week to week, until something happens which enlarges the term.

A tenancy from week to week implies that a week's notice may be given by either party, and, moreover, in the first document here there is an express provision to that effect. I think the subsequent stipulation is inconsistent with that provision, and if not inconsistent the lease is void, because not made by deed. This case is the same as *Browne* v. *Warner* (3); and when that case came before Lord Eldon in Chancery, he said that, if the document came before him as an existing lease, Lord Ellenborough's interpretation in the common law Court was right; that he would have construed it in the same way, and that he could have given no relief. Therefore, both upon

principle and authority, if both documents are to be taken as constituting a lease, the defence fails. It is said that, assuming the two documents are a lease, and assuming the stipulation not to have any effect in enlarging the term, it is still good as a covenant not to exercise the right to give a week's notice, unless the plaintiffs wanted the premises in order to pull them down. That argument is an attempt to put indirectly a construction upon the contract which, by the hypothesis, cannot be put directly. It is next said that this is not a lease, but an agreement for a lease, and that Lord Eldon held the document in *Browne* v. *Warner* (3) was an agreement for a lease. I do not think Lord Eldon did so hold. He seems to have said that at that time he could not say whether it was an agreement for a lease or a lease, and he reserved until the hearing the question whether, even if it was an agreement for a lease, any relief could be given. If the present is an agreement for a lease, I can see great difficulty in the way of granting specific performance to the defendants, because the same difficulties of inconsistency and repugnancy would be met with as in treating it as a lease. But it is sufficient to say that it is impossible for any Court to hold that there was an agreement for a lease in the present case. It was a lease and nothing else, and, at all events, it was made a lease *in præsenti* by the possession taken under it. It is clear that neither party contemplated that any future deed should be executed. The defendants themselves in their counter-claim asked for a declaration on the footing of there being an existing lease. It is said that, assuming the first document was a lease entitling the plaintiffs to give a week's notice, the second document was an independent collateral contract that they would not do so except in certain events.

If so, there was no evidence to shew that Radcliffe had any authority from the company to make that contract. *Kusel* v. *Watson* (4) is not in point here, because there, beyond all doubt, there was an express agreement for a lease of which specific performance could be granted. I do not express an opinion whether the decision in *Re King's Leasehold Estates* (2) was right or wrong, but I must say that in my view Vice-Chancellor Malins did not truly interpret what was said by Lord Eldon in *Browne* v. *Warner* (3).

I may add, if this were an agreement for a lease of which specific performance could be granted, and it was necessary to construe the stipulation in the second document, that the stipulation must mean that the company would not give notice to the defendants unless they wanted the premises for their own purposes.

Judgment affirmed.

Solicitors—Cunliffe & Beaumont, agents for Lingards & Newby, Manchester, for plaintiffs; Pritchard, Englefield & Co., agents for Grundy, Kershaw & Co., Manchester, for defendants.

[IN THE EXCHEQUER DIVISION.]

1880. Dec. 20. BAINES *v.* BROMLEY AND ANOTHER.

Practice—Costs following the Event—Claim overtopped by Counter-claim—Costs of the Cause—Rules of the Supreme Court, Order LV. rule 1.

In an action for a liquidated money claim, after a trial with a jury, judgment was entered for the plaintiff on his claim, but for the defendants on a similar counter-claim (for goods sold) overtopping the claim. A Master taxed to the defendants the costs of the cause, and to the plaintiff only the costs of witnesses to establish his claim:—Held, *upon application by the plaintiff to review the taxation, and objection that the plaintiff was entitled to all costs of the cause incurred in respect of the claim, and the defendants only to such costs of the cause as were incurred in respect of the counter-claim, that the taxation was right.*

Application by the plaintiff to review the Master's taxation of costs. The facts and arguments are stated in the judgment,

delivered after consideration, by Pollock, B.

Pollard, for the plaintiff.
Forbes, for the defendants.

POLLOCK, B. (on December 20).—This was a summons to review the Master's taxation of the plaintiff's and defendants' respective bills of costs, which came on before my brother Lopes, and was referred by him to the Court. The case having been part heard before my brother Hawkins and myself, it was agreed by counsel that the arguments should be concluded before myself, and that my judgment should be accepted as that of the Court.

The plaintiff, by his statement of claim, sought to recover from the defendants commission which he alleged to be due to him from the defendants upon an agreement made between the plaintiff and the defendants, whereby the defendants agreed that they would execute orders to be given by the plaintiff on behalf of Messrs. Dahl & Co., of Copenhagen, for goods in the way of the defendants' business, and that they would supply the goods to Messrs. Dahl through the plaintiff, so as to enable the plaintiff to charge Dahl & Co. with the commission. The statement of claim then alleged that the defendants, in breach of the agreement, had supplied goods to Dahl & Co. otherwise than through the plaintiff, whereby the plaintiff lost his commission.

The defendants, in their statement of defence, denied the plaintiff's claim, and claimed against the plaintiff, by way of set-off and counter-claim, 230*l.* 0*s.* 9*d.*, for goods sold by them to the plaintiff. The plaintiff, by his reply, admitted that he was indebted to the defendants in the sum of 230*l.* 0*s.* 9*d.*

The case went down for trial before my brother Cleasby and a special jury, in London, on the 23rd and 24th of May, 1878, when the jury found a verdict for the plaintiff, on the claim for 114*l.* 17*s.* 6*d.*, and a verdict for the defendants on the counter-claim for 230*l.* 0*s.* 9*d.* The learned Judge directed that judgment should be entered for the plaintiff on the claim, and judgment for the defendants on the counter-claim for 115*l.* 3*s.* 3*d.*, being the balance, and the certificate of the associate was drawn up accordingly.

Upon the taxation of the costs, the Master treated this as a verdict for the defendants, and gave to them the costs of the cause, including, among other things, the costs of interrogatories by the plaintiff to the defendants, and allowed the plaintiff only the costs of his witnesses whose evidence was essential to establish his claim against the defendants to the extent to which he succeeded.

It was argued before me that the Master had proceeded upon an erroneous principle, and that he ought to have taxed in favour of the plaintiff all the costs of the cause incurred in respect of the claim, as to which he succeeded, and allowed to the defendants so much of the costs of the cause as were incurred by them in respect of the counter-claim, as to which they succeeded.

On the part of the defendants it was argued that both claim and counter-claim being for liquidated demands, the case should be dealt with as if the defendants had been the plaintiff, and had recovered an amount in excess of what was claimed against them by the other side.

Assuming that the position of the defendants is to be taken as being identical with that of a successful plaintiff who has recovered the balance, the course taken by the Master was clearly correct, being in accordance with a long-established practice; and it becomes now necessary to consider what is the position of the plaintiff and of the defendants under the Judicature Act and the Rules. By Order XIX. rule 3, "a defendant in an action may set off or set up, by way of counter-claim against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a statement of claim in a cross action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claim." And by Order XXII. rule 10: "Where in any action a set-off or counter-claim is established as a defence against the plaintiff's claim, the Court may, if the balance is in favour of

the defendant, give judgment for the defendant for such balance." And by Order LV. rule 1, which relates to costs: "Where any action or issue is tried by a jury, the costs shall follow the event, unless upon application made at the trial for good cause shewn the Judge before whom such action or issue is tried, or the Court, shall otherwise order."

Where the claim of both plaintiff and defendant is for a cause of action in the nature of a debt, and in the result a balance is found by the jury to be due from the plaintiff to the defendant, it appears to me that the same result ought to follow with respect to costs as would have followed before the Judicature Act in the case of a plaintiff who recovered a balance against a defendant, and that the event mentioned in Order LV. rule 1, is in such a case the recovery of the balance by the defendant. Where the counter-claim is in the nature of a claim for unliquidated damages, as in the case of a counter-claim for a *tort* or for a breach of contract, a different rule would apply, because it cannot be truly said that a plaintiff who seeks to recover a liquidated money claim against the defendant ought to foresee that the defendant will or may set up a counter-claim for unliquidated damages against him. Such a counter-claim may or may not be set up, and the defendant may prefer to bring a cross action, in which case the plaintiff would succeed in his action and be entitled to his costs. Where, however, there are cross accounts existing between the parties, or cross claims each of which is in the nature of a debt, it is often a mere accident which party is plaintiff and which defendant; and the plaintiff who asserts that the balance is in his favour and commences an action, and at the trial turns out to be in the wrong, ought not, in my judgment, to be allowed any of the costs of the litigation which he himself has improperly provoked, and in such a case those costs which fall under the denomination of costs of the cause should be paid by the plaintiff.

Several cases were cited to me in the course of the argument, but in none of them did the question now before me arise. The distinction, however, which I have alluded to, between a counter-claim for a debt and a counter-claim for unliquidated damages, was pointed out by Mr. Justice Manisty in his judgment in *Stooke* v. *Taylor* (1), and also by Mr. Justice Hawkins in *Neale* v. *Clarke* (2), and the observations made by those learned Judges, so far as they are applicable, would seem to support the view which I have taken.

It was further argued before me, on behalf of the plaintiff, that the Master on taxation ought, in any event, to have allowed to the plaintiff the costs of certain interrogatories exhibited by the plaintiff to the defendants, for the purpose of discovering to what extent the defendants had, in breach of their agreement, supplied goods to Dahl & Co. otherwise than through the plaintiff. As the defendants had rendered no account to the plaintiff as to these goods, it was said that the plaintiff was compelled to obtain the information required by him in support of his action by means of these interrogatories; and that as he had succeeded to the extent of 114*l.* 17*s.* 6*d.* he ought to have been allowed the costs of the interrogatories. With regard to this item, it appears to me that it might very fairly have been represented to the learned Judge who tried the cause as shewing good cause to him to order that these particular costs should not follow the event. No such application, however, was made, and no authority has been cited to me to show that, where the Judge before whom the action is tried has made no order upon the subject, it is the duty of the Master to exercise his discretion in such a case; and there are many reasons which lead me to think that such a course would be extremely inconvenient.

In the result, therefore, I uphold the taxation by the Master, and the summons to review must be dismissed with costs.

Application dismissed.

Solicitors—Scott & Barham, for plaintiff; Bell, Brodrick & Gray, agents for Rodgers, Thomas & Co., Sheffield, for defendants.

(1) 49 Law J. Rep. Q.B. 857; Law Rep. 5 Q.B. D. 586.
(2) Law Rep. 4 Ex. D. 286.

[IN THE COURT OF APPEAL.]
(*Appeal from the Exchequer Division.*)

1880. March 6, 16. } YEWENS *v.* NOAKES.*

Revenue—Inhabited House Duty—Tenements used for Trade Purposes only—Exemption—Caretakers—32 & 33 *Vict. c.* 14. *s.* 11.

Section 11 *of the* 32 & 33 *Vict. c.* 14 *enacts that "any tenement or part of a tenement occupied as a house for the purposes of trade only . . . . shall be exempt from inhabited house duties, although a servant or other person may dwell in such tenement or part of a tenement for the protection thereof."*

A clerk, in receipt of a salary of 150*l. a year, resided in part of his employer's trade premises for their protection, occupying, with his wife, five children, and a servant, five rooms and two attics in the upper part of the building:—*

Held (*reversing the judgment of the Exchequer Division*), *that the building was not exempt from duty within section* 11.

Appeal from a judgment of the Exchequer Division upon the following Case stated by the Commissioners of Inland Revenue.

At a meeting of commissioners for the division of Southwark, Surrey, held at 9 Three Crown Square, Southwark, on the 16th day of February, 1877, Mr. C. D. Field appeared as agent for Mr. C. Noakes, of 9 Southwark Street, Borough, hop merchant, against a charge for inhabited house duty of 500*l.*, at 9*d.* per pound upon the houses, Nos. 11 and 13 Southwark Street, aforesaid, for the year 1876-77, such houses having an internal communication throughout, upon the ground that they were solely used for trade purposes, and only otherwise occupied by a caretaker.

It appeared in evidence that Mr. Kepell, a clerk in Mr. C. Noakes's employ, at a salary of 150*l.* per annum, with his wife, five children and a servant girl about thirteen years old, occupied five rooms on the upper portion of the premises, three on the second floor, and two attics, coals and gas free, and his wife and girl cleaned the offices in the building.

It appeared in evidence that Mr. Kepell was only occupying so many rooms until some of them with three others were let, although he had resided in them for two years and a-half without being disturbed. It was also stated he had been placed there in consequence of a fire having occurred on the premises a short time before taking up his abode in them. Mr. Kepell admitted to have received 10*l.* advance of salary about twelvemonths before removing into the above premises, but none since.

The commissioners considering that as the premises were so solely used for trade purposes, and believing Mr. Kepell's position was simply that of a caretaker, allowed the exemption claimed; but the surveyor contended that Mr. Kepell was in a much superior position to that of a servant or other person referred to in the 11th section of 32 & 33 Vict. c. 14, which did not embrace the occupation of five rooms for the residence of himself, wife, five children and female servant in a building containing the offices of two hop merchants only; his residing on the premises was for other purposes than a caretaker, rendering them liable to assessment; and therefore declared his dissatisfaction with their decision, and required them to state and sign a case for the opinion of the High Court of Justice, Exchequer Division, which we hereby state and sign accordingly.

The Exchequer Division—Kelly, C.B., and Pollock, B.—gave judgment for Mr. Noakes, and the surveyor appealed.

The Solicitor-General (*Sir Hardinge Giffard*) and *A. V. Dicey*, for the Crown. —It is proper to bring before the Court the course of legislation prior to the passing of the statute under which the question in this case arises. The 48 Geo. 3. c. 55 first imposed a duty both upon trade premises and dwelling houses. Then came an Amendment Act (57 Geo. 3. c. 25), by which tenements or buildings, or parts of tenements or buildings, used exclusively for purposes of trade or of storing goods, and not slept in at night, are exempted from inhabited house duty. By

* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Brett, L.J.

6 Geo. 4. c. 7. s. 7 the commissioners are enabled to grant a licence authorising occupiers of houses, tenements or buildings used only for trade purposes in the daytime to appoint one of his or her servant or servants to watch and guard the premises in the night time, and occupiers are not thereby to be rendered liable to house duty. In section 11 of the 32 & 33 Vict. c. 14 (1) there are two variations from previous legislation: First, the servant is allowed to sleep in, and in that sense makes the premises his residence, whereas by the Act of Geo. 4 he could only watch them by night; and secondly, the words "other person" are added. This being an exemption must be strictly construed. The section does not enable a "servant or other person" to live in the premises with his wife and family. A general servant cannot claim the exemption, but only a servant for the purpose of protecting the premises. The wife and family of such a servant do not live there for the protection of the premises, and so are outside the exemption. Further, the clerk in the present case is not a "servant or other person" within the meaning of the section, which is meant to include servants in the nature of domestic servants; and the words "other person" refer to persons *ejusdem generis* with domestic servants put into the premises as caretakers only. It is to be remembered that the clerk, if he did not reside in the premises in question, would pay duty on a house elsewhere, so that the revenue loses that duty. They referred to *Busby* v. *Newson* (2).

MacIntyre and *W. Graham*, for the respondent.—By passing section 11 of the 32 & 33 Vict. c. 14 the Legislature intended to do away with the restrictions imposed by the 6 Geo. 4. c. 7. Thus a licence from the commissioners is no longer necessary, and the exemption from duty is extended to buildings which are taken care of by other persons as well as servants. Here the case finds that Mr. Kepell was there for the protection of the premises. If the object is to protect the premises, and not merely to make a benefit or profit to the person put into the premises, the exemption applies. It is submitted that a clerk is a servant within the meaning of the statute. He is there as caretaker, and his wife and family are the ordinary appendages of a caretaker, and the fact of their living with him does not prevent the exemption from applying.

The Solicitor-General replied.

Cur. adv. vult.

The Court delivered judgment, on the 16th of March, as follows:—

BRAMWELL, L.J.—I am of opinion that this appeal should be allowed. The building here is subject to the duty sought to be imposed unless it is within some exemption. I do not desire to rely too strongly upon the burden of proof being upon the respondent to shew that he is exempted. No doubt one must try to get at the meaning of the statute, but still it is for the respondent to shew that he is within the exemption he claims. In my opinion he does not do so. I think that when the various Acts which have been successively passed are looked at, it can be seen that the object of them was to remove that which was, in effect, a tax upon particular trades carried on under certain circumstances. If a trade could not be carried on without a warehouse or place to store produce in, and if the having that warehouse involved the necessity of a caretaker, to charge the warehouse with house duty, if there was no analogous tax upon a trade not requiring a warehouse, would evidently be to impose a tax upon the particular trade requiring one. The Legislature recognised the fact that there must be a caretaker of the premises by night as well as day, and that he must dwell there—that is, that there was no necessity for him to have some other place as his true dwelling.

(1) Section 11 enacts that "from and after the 5th day of April, 1869, any tenement or part of a tenement occupied as a house for the purposes of trade only, or as a warehouse for the sole purpose of lodging goods, wares or merchandise therein, or as a shop or counting-house, or being used as a shop or counting-house, shall be exempt from inhabited house duties, although a servant or other person may dwell in such tenement or part of a tenement for the protection thereof."

(2) 44 Law J. Rep. Exch. 143; Law Rep. 10 Exch. 322.

The Legislature, in effect, have said that, rather than trades should be taxed in this way, where a caretaker lived in the building, inhabited house duty should not be payable as it would have been if the person dwelling there had not been a caretaker. I am clearly of opinion that the person living in the building in this case was not in the situation of a mere caretaker. He lived there with his wife, five children and a servant. How can it possibly be said that such an occupation is within the reason of the Legislature in introducing the exemption. It is an exemption not for the benefit of the caretaker, but of the trader. If the respondent's argument is to prevail the Crown would lose a tax, which otherwise it would gain, on account of the necessity that the caretaker should occupy an inhabited house which would be subject to the duty. It may be said that the conclusion to be drawn would be that married men could not be caretakers. I do not say that, but I say that the house which they take care of must not be the dwelling of themselves and their families. If it is, they are not within the exemption. The meaning of the Act to my mind is plain; the words used are "servant or other person." I take that to mean that the house may be taken care of by a person who does not occupy the position of a servant. A servant is subject to the commands of his master as to the way in which he is to perform his duties. The Act contemplates a person who has agreed to take care of the premises, but not as a servant. I think it is impossible to hold that this particular case can be within either the intention, the spirit or the words of the Act. I think that so far as it is occupied by these persons it is an inhabited dwelling-house. The person occupying it is residing there, and having the benefit of his family residing there. It is not within the exemption. I do not like to rely on a dispensing power when construing a statute. But as a matter of fact the proper authorities, the commissioners, have a discretion which they are directed to exercise with respect to houses inhabited by caretakers and their wives. If it is said we are putting a pedantic construction upon the Act, which precludes a man from having his wife with him in the building which he occupies as a caretaker, I answer that that result cannot be obviated. What limit is to be put upon this sort of occupation? The man might have his father and mother, or their father and mother, living with him, as part of his family, without paying inhabited house duty if he lived in premises for the purpose of taking care of them. Why could he not have any number of relations and friends if he made them part of his family? I am of opinion that our judgment should be for the appellant.

Thesiger, L.J.—I agree that the appeal should be allowed, but not entirely upon the same grounds as those relied on by Lord Justice Bramwell. I cannot think that the exemption from inhabited house duty was intended to be confined to cases in which a man occupied premises without his wife. I found my view on this point partly upon considerations drawn from previous legislation *in pari materia*, partly on the practice of the commissioners on such legislation and partly from considering how these Acts ought to be construed having regard to that practice. As to the previous legislation, under the first Act, that of 48 Geo. 3. c. 55, inhabited house duty was imposed in respect both of trade premises and dwelling-houses. The only exemption bearing on the point before us was under schedule B. It is an exemption as to "every house whereof the keeping is or shall be committed or left to the care or charge of any person or servant who doth not pay rates to the church and poor, and who resides therein for the purpose only of taking care thereof." Then there is a proviso that "an assessment shall be duly made in every such case, and the fact be truly returned in the manner directed by this Act in other cases of exemption from the said duties, and the exemption be allowed by the commissioners for executing this Act."

That is an exemption relating to houses not occupied as dwelling-houses, and also to trade premises which may for the time be unoccupied. Where nobody lives in the premises except a person who does

not pay the rates and who is there for the purpose of guarding and watching them, he is exempted from house duty. In construing that Act, I do not think we should be justified in saying that the exemption would be lost because the caretaker had his wife and family with him in the house.

Looking at the habits of the community —especially in the metropolis—in the vast majority of instances, the caretaker in a building lives there with his wife and children, and the practice of commissioners has been to exempt a house from duty where the person occupying the premises with his wife and children is clearly and obviously an ordinary caretaker, and the persons living with him are what may be termed the ordinary appendages of a caretaker. Whilst it is true that we ought not to construe an Act itself by looking at the practice which has taken place in carrying the Act out, it is equally true that we are entitled to construe a subsequent Act not only with regard to the actual words used, but also to the practice which had grown up and existed at the time the subsequent Act was passed. Passing on to the 57 Geo. 3. c. 25, by which trade premises were exempted from house duty, at that time it was thought desirable that the exemption should be guarded by this restriction: "No person inhabiting, dwelling or abiding therein, except in the daytime only, for the purpose of such trade." The Legislature appears to have felt that this restriction was too strong, and that there ought to be some exemption under which premises might be watched and guarded at night as well as in the daytime. Accordingly the 6 Geo. 4. c. 7 was passed and dealt with the matter. Section 7 of that Act enacts that "upon all assessments of the said duties to be made for any year commencing from and after the 5th of April, 1825, it shall and may be lawful for the commissioners acting in the execution of the said Acts and of this Act, in their respective districts, and they are hereby authorised and empowered, at the instance and request of any occupier or occupiers of any house, tenement or building, for which exemption from the said duties is provided, and shall be duly claimed and allowed under the provisions of the said Acts, to grant to any such occupier or occupiers a licence in writing authorising such occupier or occupiers to appoint any one of his or her servant or servants named in such licence to watch and guard such house, tenement or building in the night time, and that the abiding of such a licensed servant therein for the purpose only of watching and guarding the same under such licence, shall not render the occupier thereof liable to the duties by the said Acts granted for the year in which such exemption shall be allowed." Now it would strike one that if my view of the Act of 43 Geo. 3 be correct, an exemption such as the one I have last read might be held to include the case of a servant going into premises for the purpose of protection, residing there during the night, and "residing" there in the sense which I have put upon the term in the first Act, namely, residing there with his wife and family. One would suppose, therefore, if my view be correct, there would be a provision that the exemption should not extend so far. And that is exactly what we find, because the Act goes on to say, "And which licence shall not in any case extend to authorising any servant or servants to be named therein, or any part of his or her family, to inhabit or dwell in any such house, tenement or building as a place of residence, anything in the said Acts contained to the contrary notwithstanding." No doubt it may be said that this proviso is put in *ex majori cautela*; but bearing in mind the practice of commissioners, by which they allowed exemption in cases of caretakers with their wives and families, this Act appears to me strongly to confirm my view that, except where the Legislature has expressly excluded the interpretation, the exemption with respect to an ordinary caretaker might extend to the caretaker and those residing with him in the ordinary way as his family.

When we come to the existing Act, the restriction in 6 Geo. 4. c. 7 is done away with altogether, the words used being very similar to those used in 48 Geo. 3. It appears to me, therefore, that, if this were the case of an ordinary caretaker,

the mere fact of his residing there with his wife and family would not exclude the occupier of the building from the benefit of the exemption which is given by these Acts. But I think, upon the facts stated by the commissioners, that this is not the case of an ordinary caretaker. It is not the case of a man occupying one or two rooms for the ordinary purpose of guarding the premises, but of a man occupying, with his wife, family and a servant, a considerable part of the building. I therefore think on that ground alone this appeal ought to be allowed. But there is another ground also: the words of section 11 of the statute under consideration refer to the case of a "servant or other person." It appears to me that the Legislature is using the term "servant" in its ordinary and popular sense; that is to say, not in the sense in which a clerk or manager may be called the servant of his employer, but in the sense of an ordinary menial or domestic servant. I think that is borne out by the Act of 6 Geo. 4. c. 7, which speaks of the occupier putting into his premises his "servant or servants." If so, what is the meaning of the words "other person." I do not propose to define those words exactly; definitions are proverbially dangerous; but I think it is obvious that by the words "other persons" a person of the same kind and description as a domestic servant is meant —a person standing somewhat on the same footing, and subject to the same conditions. A good illustration would be the case of a policeman put in to watch and guard an unoccupied house or trade premises. If so, it is obvious that a clerk with a salary of 150*l.* a year is not within the description of "servant or other person."

On these grounds, therefore, I think the appeal should be allowed. I would merely add, with reference to the difficulty of drawing the line in cases under this Act, that the commissioners must draw the line for themselves. If they had found as a fact that the caretaker in the present case was a caretaker simply, and was a "servant or other person" within section 11, although we might think their finding erroneous, I do not think we ought to interfere. But here the object of the commissioners, as appears from the Special Case, was to submit to the Court the very questions, and we are therefore justified in giving our decision upon them.

Baggallay, L.J.—I agree in thinking that this appeal should be allowed; and I prefer to rest my decision on the ground that, upon the facts stated in the Special Case, Mr. Kepell cannot be regarded as a servant or other person dwelling in the tenement in question for the protection thereof within the intent and meaning of the statute, without expressing any opinion as to whether, if Mr. Kepell could be regarded as such a servant or other person, his dwelling on the premises, together with his wife and other members of his family, would deprive the respondent of the right to claim exemption. As at present advised I should be disposed to doubt whether the circumstance that his wife or any other members of his family resided with the caretaker would necessarily deprive his employer of the right to claim exemption. My reasons for holding that Mr. Kepell was not a servant or other person within the meaning of the statute are the same as those which have been expressed by Lord Justice Thesiger, and I do not repeat them.

Judgment reversed.

Solicitors—The Solicitor of Inland Revenue, for appellant; Saffery & Huntley, for respondent.

[IN THE QUEEN'S BENCH DIVISION.]

1880. Nov. 8, 25. THE QUEEN (*on prosecution of* W. H. SMITH AND SONS) *v.* THE JUSTICES OF SURREY.

Poor Law—Rate—Appeal to Quarter Sessions — Notice of Appeal — Reasonable Time—17 *Geo.* 2. *c.* 38. *s.* 4; 12 *&* 13 *Vict. c.* 45. *s.* 1.

[For the report of the above case, see 50 Law J. Rep. M.C. 10.]

[IN THE COURT OF APPEAL.]

(Appeal from the Queen's Bench Division.)

1880. Nov. 17. } WARBURTON (*appellant*) *v.* HEYWORTH (*respondent*).*

Master and Servant—Contract of Service—Weekly Hiring—Piece Work—Forfeiture of Wages—The Employers and Workmen Act, 1875 (38 & 39 *Vict. c.* 90), *s.* 11.

By section 11 *of the Employers and Workmen Act*, 1875, "*in the case of a . . . . woman subject to the provisions of the Factory Acts*, 1833 *to* 1874, *any forfeiture on the ground of absence or leaving work shall not be deducted from or set off against a claim for wages or other sum due for work done before such absence or leaving work, except to the amount of the damage (if any) which the employer may have sustained by reason of such absence or leaving work.*"

The appellant, a woman subject to the provisions of the Factory Acts, 1833 *to* 1874, *worked in a cloth factory on the terms that the employment should be terminated by either party on giving fourteen days' notice, to be given on a Saturday; and that any person leaving his or her work without giving this notice, or before the expiration thereof, should forfeit or lose all wages then due or earned or unpaid. The appellant was paid for each piece of work done, the practice being that all the work completed was carried into the warehouse and booked up at three o'clock on Wednesday, and paid for on the Saturday following, work done after three o'clock being carried forward to the following week.*

The appellant left her work without notice before three o'clock on a Wednesday, having carried in the work she had completed up to twelve o'clock. No damage was caused to her employer by reason of her so leaving. On a complaint made by her in order to recover for the work so carried in, Justices stated a case setting out the foregoing facts, and containing a finding that she was employed on a weekly hiring:—

Held (*reversing the judgment of the Queen's Bench Division*), *that the appellant was employed to do piece work, and not on a weekly hiring; that the price of the work was due when she left her employment, so that section* 11 *applied to prevent a forfeiture; and therefore that she was entitled to recover.* (*Per* BRETT, L.J., *and* COTTON, L.J.), *where there is a weekly hiring, and the operative leaves work before the end of the week, no wages are "due" within section* 11, *which, therefore, does not apply.*

Gregson *v.* Watson (34 Law Times Rep. N.S. 143) *distinguished.*

Appeal from a judgment of the Queen's Bench Division (Cockburn, C.J., Lush, J., and Manisty, J.), on a case stated.

Upon the hearing of a complaint made under sections 4 and 9 of the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), Justices stated a case for the opinion of the Queen's Bench Division, which, so far as is material, was as follows:—

4. Upon the hearing of the said complaint it was proved on the part of the appellant, and found as a fact, that she was a weaver in the employ of the respondent, who is a power-loom cloth manufacturer in the borough of Blackburn, and was paid by the piece.

5. That the rules hereto annexed were in force in the mill of the respondent.

6. That all work done at the respondent's mill is booked up at three o'clock on the Wednesday afternoon in each week, and paid for on the following Saturday; all work booked after three o'clock on the Wednesday afternoon being carried forward to the following week.

7. That on Wednesday, the 29th of October, 1879, at a quarter-past twelve o'clock at noon, the appellant carried the cuts which she had completed into the warehouse and had them booked, and then returned to her looms until half-past twelve o'clock at noon when the work stopped for dinner, and then left her work without having given the required notice.

8. That on the following Saturday, the 1st of November, the appellant applied to the respondent for thirteen shillings and fourpence, the amount of wages which she alleged to be due at the time she left, and when she had completed the cuts in her looms; but payment was refused on

* *Coram* Baggallay, L.J.; Brett, L.J.; and Cotton, L.J.

the ground that they were forfeited by rules 15 and 16.

10. That the average amount of wages earned in one week in the respondent's mill was sixteen shillings and sixpence.

11. That there was no claim made by the respondent against the appellant for damage or loss sustained in consequence of her having left her work without notice.

14. We found that the hiring was a weekly one, and that the appellant was a woman subject to the provisions of the Factory Acts.

15. We, being of opinion that the week ended at three o'clock on the Wednesday afternoon, and not at a quarter-past twelve at noon, also that the appellant had not completed her work when she left her work without notice, and therefore that no wages were then due to her, dismissed the said complaint as before stated.

16. The question of law arising on the above statement therefore is, whether, in point of law, the judgment for the respondent is correct.

The following are the material rules referred to in the case:—

Rule 15: "No person shall leave his or her work for any cause whatever, without giving fourteen days' previous notice; such notice to be given in the warehouse on a Saturday. The same notice shall be given by the master, except in the cases provided for or referred to by rules 3, 4, 5, 6 and 12."

Rule 16: "Any person leaving his or her work without giving the notice required by rule 15, or before the expiration thereof, shall forfeit and lose all wages then due or earned or unpaid, and shall also be liable to be proceeded against according to law, as if there had been no such forfeiture."

Hopwood and *R. S. Wright*, for the appellant.—The case was not fully argued in the Queen's Bench Division, and the Court wishing the decision in *Gregson* v. *Watson* (1) to be tested in the Court of Appeal, gave a formal judgment for the respondent. It is submitted that, if there was a weekly hiring as found by the Justices, section 11 applies to prevent a forfeiture of the amount representing the value of the work done by the appellant up to the time of her leaving the employment. Section 3 of the Act provides that claims between employer and workman, whether liquidated or unliquidated, may be adjusted in the County Court. Here the appellant was entitled to be paid on a *quantum meruit* for the work done up to the time she left. The Legislature, by passing section 11, intended to give peculiar protection to women and children. The sum claimed was "due" within the meaning of the Act when she left, though it was not payable till the following Saturday. The decision in *Gregson* v. *Watson* (1) was wrong. If the Justices were wrong in finding a weekly hiring, the sum claimed was clearly "due" and earned when the appellant carried in her work; and, there being no allegation of any loss sustained by the employer in consequence of her leaving work, section 11 applies to prevent a forfeiture of any part of that sum.

Gully and *Attenborough*, for the respondent.—Section 11 was not intended to give relief against any forfeiture of wages at common law; it was meant only to provide against forfeitures under special contracts like that contained in these printed rules, and with respect to such contracts the Act allows a forfeiture only to the extent of the damage actually sustained by the employer. Here there was a weekly hiring, the amount of the weekly wages being computed according to the pieces of work carried in. In *Saunders* v. *Whittle* (2) the plaintiff was to be paid at the rate of 7*d.* per hour, payable every Saturday at noon, and the Court held that there was a weekly hiring, and that the plaintiff having left his work before the end of a week could not recover anything in respect of that work. In *Walsh* v. *Walley* (3), the contract was similar to the present one, and the Queen's Bench Division held that the plaintiff, a workman, who had left without giving the notice provided for in the rules, could not recover for work done

(1) 34 Law Times Rep. N.S. 143.

(2) 33 Law Times Rep. N.S. 816.

(3) 43 Law J. Rep. Q.B. 102; Law Rep. 9 Q.B. 367.

up to the time of booking up. The decision in *Gregson* v. *Watson* (1) was right, and should govern the present case.

BAGGALLAY, L.J.—If there had been a simple finding in this case that the hiring was a weekly hiring, I should have entertained very great doubt whether we could dissent from that finding. But those who stated the case have not only said what their finding is, but have set out in the case all the material circumstances upon which they came to the conclusion; and this finding becomes rather an inference of law than a pure question of fact. Now I find facts stated upon the face of this case which lead me to dissent from the view expressed in paragraph 14 of the case, that there was a weekly hiring here. No doubt it was a hiring of a weekly character because the payment was to be on every Saturday. But the amount to be paid is regulated by the quantity of piece-work done. The arrangement for payment was one for the practical convenience of the employers, and I do not think that the fact that the work was booked up on the Wednesday has any material bearing upon the question of what was the nature of the contract. There is the additional stipulation, in rule 15, that the operatives on the one hand, and the employers on the other, were bound not to put an end to the employment without giving fourteen days' notice, to expire on a Saturday; that stipulation is inconsistent with the hiring being a weekly one. I am of opinion that the operative was engaged to do piece-work, and that the price of it was earned before she absented herself from her work. It is not contended that if the money was earned it was forfeited within section 11 of the Act, to any extent, because the employer was damaged by her leaving work; but it is said that there was a weekly hiring, that she absented herself before the work was completed, and therefore that no wages at all were due to her. As to the cases cited, in *Gregson* v. *Watson* (1) the Court thought themselves bound by the findings of the County Court Judge, that there had been a weekly hiring, so that the case has no application to this. In *Walsh* v. *Walley* (3) the sum claimed was forfeited in either view, whether the hiring was weekly or not.

BRETT, L.J. — I am of opinion that the facts set out in the earlier part of the case stated shew that the agreement was for piece-work, to be paid for by the piece and not for a weekly hiring. Paragraph 14 of the case is a finding that, according to the view of the Justices upon those facts, there was a weekly hiring for weekly wages. If we had been bound by that finding, and if the appellant had left the service before the end of the week and before her wages became due, I am clearly of opinion that section 11 would have had no application whatever to this matter, because the appellant would have been seeking to recover before the Justices a sum which had never become due, or could become due, to her. But I think the facts set out at the beginning of the case do not justify the opinion of the magistrates that this was a hiring for weekly wages. In one sense it was so, no doubt, because the work was to be paid for weekly; but in my view the contract was that the appellant was to do piece-work, and to be paid a fixed price for each piece. As she finished each piece the price would be earned, but not yet "due" in the sense of being payable. The price was not payable till the subsequent Saturday, and it was then, in the sense of being payable, "due" only in respect of work completed up to three o'clock on the previous Wednesday. As to work done after three o'clock, that was to be paid for on the next Saturday but one. But the price was earned, and in that sense due, though not payable, when the work was finished and taken in. Another collateral part of the contract was that the appellant should work, on the terms of her being paid for each piece of work, as finished, from week to week, until she gave or received fourteen days' notice to leave, the notice to expire on a Saturday. The hiring was therefore weekly in the sense that it was from Saturday to Saturday—from week to week—to be put an end to by either party by fourteen days' notice to

end on Saturday. The contract, therefore, was double and collateral. Suppose the case of a man, as distinguished from a woman or child, working under this contract, who left his work without giving the notice required: then the money earned by him for the piece-work he had finished would be forfeited under rule 16. Therefore, if the appellant had been a man, under the circumstances which have happened, the payment for piece-work would have been forfeited. It is obvious, from the statements in the case, that the Justices' view was that the appellant's money was earned and due, but that it had become forfeited by virtue of rule 15. I think that rule would have caused a forfeiture of the money due to the appellant but for section 11 of the Act. The Act, in my view, refers only to forfeitures of money due, and limits the effect of them to a certain extent when the contract is with a woman, child or young person. The section does not wholly do away with forfeitures, but, if damage is done to the employer by reason of the operative leaving work, requires that, with respect to forfeiture by virtue of the contract, the employer shall deduct only the amount of that damage. It is not intended to wholly abrogate clauses in a contract which work forfeitures, but it is intended to protect young persons, women and children from so violent and arbitrary a clause as rule 15 in the present case. I cannot agree with Mr. Hopwood's construction of the section, that, if this had been a weekly hiring, the appellant would have been entitled to recover the value of her work until she left her service. No damage to the employer is claimed or alleged here, and there is no forfeiture of any part of money due to the appellant, because the forfeiture is set aside by the operation of the Act.

I am therefore of opinion that the appellant is entitled to the whole of her claim. This decision is not necessarily contrary to any of the cases which were cited in argument. In those cases there was a finding of fact as to the existence of a weekly hiring, and not an inference of law to be drawn from certain facts. Here the finding as to the weekly hiring is either inconsistent with the findings in the other part of the case, or it is an inference of law.

COTTON, L.J.—The Queen's Bench Division assumed that this case was covered by *Gregson* v. *Watson* (1). I think the law was correctly laid down in that case with respect to the true construction of section 11. In my opinion that section was not intended by the Legislature to give any persons coming within it a right to payment for work done which they would not have had by the common law; but it was intended to provide for forfeitures under rules like those in question here. As pointed out by Mr. Hopwood, forfeiture is the loss of something to which the person who incurs the forfeiture would otherwise be entitled. The words of the section are clear, that any forfeiture shall not be deducted from or set off against a claim for "wages or other sum due." It is aimed at rules like these, and does not apply to cases where the wages or other sums are by the common law not due. The difficulty here is to decide whether or not we are bound by the finding in the special case that this was a weekly hiring. Now that is an inference of law. The finding is inconsistent with the terms of rule 15, which provides that fourteen days' notice, to end on Saturday, must be given in order to put an end to the employment; and, in my opinion, we must look at all the facts stated, and draw an inference of law as to whether the hiring was weekly or not. It is stated that the appellant worked in a mill, and was paid by the piece; that the quantity of piece-work done by her was ascertained every Wednesday, and that by custom she was not paid for it till the next Saturday. The booking up of the work on Wednesday was merely the mode of ascertaining what sum was to be paid at the end of the week for the work done up to three o'clock on the previous Wednesday. Then there is the stipulation that the person employed shall not leave her work without giving fourteen days' notice, to end on Saturday. I am of opinion that the contract was for work to be paid for by the piece,

and not for a weekly hiring, and that the stipulation for fourteen days' notice was a separate and collateral term, for the breach of which either party could recover damages.

Therefore, there being no damage to the employer by reason of the appellant having left her work, the forfeiture is, by virtue of section 11, not enforceable at all, and the appellant is entitled to recover the whole amount claimed.

Judgment reversed.

Solicitors—Shaw & Tremellen, agents for Ainsworth, Son & Phillips, Blackburn, for appellant; E. Doyle & Sons, agents for T. & R. C. Radcliffe, Blackburn, for respondent.

[IN THE QUEEN'S BENCH DIVISION.]

1880. Nov. 8. Dec. 13.

ALLEN *v.* GARBUTT.

County Court—Admiralty Jurisdiction—Action in rem for Necessaries—Owner domiciled in Great Britain—County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 *Vict. c.* 71), *ss.* 2 *and* 3.

A County Court exercising Admiralty jurisdiction under the provisions of the County Courts Admiralty Jurisdiction Act, 1868, *cannot, as such, entertain a claim for necessaries against a British ship, whose owner is domiciled in Great Britain, for the Admiralty Court could not itself entertain such a claim, and the jurisdiction of a County Court is not more extensive in this respect.*

The Dowse (39 Law J. Rep. Adm. 46) *followed and approved.*

Motion for a prohibition, directed to the Judge of the City of London Court, forbidding him to proceed with the hearing of an action on the Admiralty side, for necessaries supplied to the ship *Merthyr*. The action was an action *in rem*. The ship was a British ship, and the owners were domiciled in England.

Gainsford Bruce, for the defendant.—The Judge of the City of London Court has no jurisdiction to hear the action. It is clear, and is admitted by the other side, that the High Court of Admiralty has no jurisdiction in such a suit as this, namely, in a proceeding for necessaries against a British ship, whose owners are domiciled in England. It is only in cases where the owner is domiciled out of England that the High Court of Admiralty has jurisdiction in such an action. It is contended, on the other side, that although the High Court of Admiralty has no jurisdiction in such a cause, a County Court, which for the present purpose the City of London Court is, has, by virtue of the provisions of the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), ss. 2 and 3. That Act gave Admiralty jurisdiction to County Courts, and the words used in section 3 are general—"any cause for necessaries;" and the plaintiff contends, and the Judge of the City of London Court held, that, by those words, jurisdiction was given to the County Courts in any cause for necessaries whatever, and that the limitation affixed to the jurisdiction of the High Court of Admiralty was, in the case of causes triable in a County Court, removed. Such a construction is clearly wrong—*The Dowse* (1); *Ex parte Michael* (2).

He was stopped by the Court.

Myburgh, for the plaintiff.—By 31 & 32 Vict. c. 71 jurisdiction in Admiralty causes was given to County Courts. Before that Act they had no such jurisdiction; their jurisdiction is therefore that which is defined by that Act.

[COCKBURN, C.J.—That Act confers upon County Courts Admiralty jurisdiction; that is to say, it gives jurisdiction in cases in which the High Court of Admiralty formerly had jurisdiction, but it does no more.]

It has been decided that it does, in *The Alina* (3); the question now raised is concluded by that case.

[BOWEN, J.—The decision in that case was upon the interpretation of a subsequent Act, 32 & 33 Vict. c. 51.]

(1) 39 Law J. Rep. Adm. 46; Law Rep. 3 A. & E. 135.

(2) 41 Law J. Rep. Q.B. 349; Law Rep. 7 Q.B. 658.

(3) 49 Law J. Rep. P.D. 40; Law Rep. 5 Ex. D. 227.

Allen v. *Garbutt*, *Q.B.*

The present point was decided by that case. There are no words of limitation in the section now under consideration.

[BOWEN, J.—Is not *Everard* v. *Kendall* (4) a decision against you?]

That decision is overruled by *The Alina* (3). The two Acts are analogous.

[BOWEN, J.—You cannot say they are quite analogous. Look at the preamble. And the second Act does not deal with Admiralty causes alone, but with maritime causes in addition.]

Admiralty and maritime are convertible terms, and *The Alina* (3) applies equally to both Acts.

Cur. adv. vult.

The written judgment of the Court (5) was (on Dec. 13) delivered by

MANISTY, J.—This is a proceeding *in rem* by action in the City of London Court for necessaries supplied to the ship *Merthyr*.

On the 8th of November Mr. Gainsford Bruce moved for a prohibition to restrain the Judge of that Court from proceeding further with the action, on the ground that the ship was a British ship, the owners of which were domiciled in Great Britain at the time of the institution of the cause; consequently, as he contended, the Court had no jurisdiction to entertain the action.

Mr. Myburgh shewed cause.

It has long been settled law that, independently of statute, the Court of Admiralty has no jurisdiction to entertain a suit for necessaries—*The Neptune* (6); *The Pacific* (7).

By the 3 & 4 Vict. c. 65. s. 6 jurisdiction was given to the Court of Admiralty to decide claims for necessaries supplied to any foreign ship or seagoing vessel, but that statute only applied to foreign vessels—*The Ocean Queen* (8).

By section 5 of the Admiralty Court Act, 1861 (24 Vict. c. 10), it is enacted that the Court of Admiralty shall have jurisdiction over any claims for necessaries supplied to any ship elsewhere than in the port to which the ship belonged, unless it is shewn, to the satisfaction of the Court, that at the time of the institution of the cause, any owner or part owner of the ship is domiciled in England or Wales. This section applies to British ships only—*The Ella A. Clarke* (9).

By section 2 of the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), Her Majesty in council was empowered to give Admiralty jurisdiction to County Courts; and by section 3 it is enacted that any County Court having Admiralty jurisdiction shall have jurisdiction to try and determine (among other things) any cause as to a claim for necessaries, in which the amount claimed does not exceed 150*l*.

By section 2 of the County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51), any County Court having Admiralty jurisdiction is empowered to try and determine causes, as to (among other things) any claim arising out of any agreement made in relation to the use or hire of any ship; and by section 3 of that Act it is enacted that the jurisdiction conferred by that Act and by the Act of 1868 may be exercised, either by proceedings *in rem* or by proceedings *in personam*.

By the 88th section of the Judicature Act, 1873, Her Majesty is empowered to confer on any inferior Court of civil jurisdiction the same jurisdiction in Admiralty as any County Court then had or might thereafter have.

By virtue of this provision and an Order in Council, the City of London Court has the same Admiralty Jurisdiction as a County Court.

Mr. Bruce contended that the Act of 1868 did not confer upon a County Court a more extensive jurisdiction in the case of a claim for necessaries than that possessed by the Court of Admiralty, and that, inasmuch as the Court of Admiralty could not have entertained the present action, neither could the City of London Court entertain it.

(4) 39 Law J. Rep. C.P. 234; Law Rep. 5 C.P. 428.

(5) Manisty, J., and Bowen, J. (Cockburn, C.J., had died since the argument.)

(6) 3 Hag. Adm. 129; on appeal, 3 Knapp, 94.

(7) 32 Law J. Rep. Adm. 121.

(8) 1 W. Rob. 459.

(9) Br. & Lush. 32; 32 Law J. Rep. Adm. 211.

In support of that contention he cited the case of *The Dowse* (1), decided in June, 1870, in which it was held that the County Court Admiralty Jurisdiction Act, 1868, does not confer on a County Court a more extensive jurisdiction as to a claim for necessaries than that exercised by the Court of Admiralty.

That case followed and adopted the principle of the decision of the Court of Common Pleas in the case of *Everard* v. *Kendall* (4), decided in April, 1870.

Mr. Myburgh, on the part of the plaintiff, admitted that the Court of Admiralty could not have entertained the action in question, but he contended that according to the true construction of the Acts of 1868 and 1869, a County Court could, and consequently the City of London Court can, entertain and decide it.

In support of that contention he cited the case of *The Alina* (3), decided in February, 1880.

Upon referring to that case, it will be found that it was a decision as to the effect of the Act of 1869, with reference to an action for a breach of a charter-party, as to which jurisdiction was given to the County Court, in express terms, by sub-section 1 of section 2 of the Act of 1869.

The Court of Appeal followed and adopted the decision of the Privy Council in the case of *The Argos* and *The Hewsons* (10), decided in 1872.

These decisions have reference to the construction of the Act of 1869, and do not touch the present question, which depends upon the construction of the Act of 1868.

The case of *The Dowse* (1) is in point as to the construction of the Act of 1868, and we should probably have felt bound to follow it even if we had doubted its correctness, but we do not entertain any such doubt. There will, therefore, be a rule absolute for a prohibition.

Solicitors—J. A. & H. E. Farnfield, for plaintiff; Maples, Teesdale & Co., agents for Scott & Cooper, Hull, for defendant.

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(10) 42 Law J. Rep. Adm. 1; Law Rep. 5 P.C. 134.

[IN THE QUEEN'S BENCH DIVISION.]

1880. Nov. 15. } TENNANT AND COMPANY *v.* ELLIS KISLINGBURY AND COMPANY.

Practice—Costs—County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 *Vict. c.* 71), *ss.* 3 *and* 9—*Order LV. rule* 1.

Order LV. rule 1 *of the Rules of the Supreme Court*, 1875, *which provides that "where any action is tried by a jury the costs shall follow the event," has repealed section* 9 *of the County Courts Admiralty Jurisdiction Act, which enacted that a plaintiff who should not recover a sum exceeding the amount to which the County Court has jurisdiction in Admiralty causes, should not be entitled to costs without a certificate from the Judge who tried the action.*

This was an action brought in the High Court of Justice for damage to a cargo of sugar. The amount claimed was under 300*l.* By sub-section 3 of section 3 of the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), jurisdiction is given to the County Court "as to any claim for damage to cargo in any cause in which the amount claimed does not exceed 300*l.*"

The action was tried by a jury, who gave a verdict for 73*l.* 3*s.* 10*d.* The Judge gave the plaintiffs judgment for that amount, but he was not applied to for any certificate under section 9 of the above-mentioned Act. That section says, "If any person shall take in any superior Court proceedings which he might without agreement have taken in a County Court, except by order of such superior Court or of a County Court having Admiralty jurisdiction, and shall not recover a sum exceeding the amount to which the jurisdiction of the County Court in that Admiralty cause is limited by this Act, he shall not be entitled to costs unless the Judge of the Superior Court before whom the cause is tried or heard shall certify that it was a proper Admiralty cause to be tried in a superior Court."

The plaintiffs in due course applied to the Master to tax their costs; the defendants objected on the ground that the plaintiffs had recovered less than 300*l.*, and the Judge had not given them any

certificate. The Master, having consequently refused to tax, the plaintiffs moved for an order to the Master to tax.

Patchett, for the plaintiffs, relied upon the principle of the decision of the House of Lords in *Garnett* v. *Bradley* (1).

Hilbery, contra.

PER CURIAM (2)—Section 9 of the County Courts Admiralty Jurisdiction Act, 1868, is inconsistent with and repealed by Order LV. rule 1 of the Rules of the Supreme Court, 1875, and the plaintiffs are entitled to their costs.

Order as prayed.

Solicitors—Mark Shephard, for plaintiffs; F. W. & H. Hilbery, for defendants.

[IN THE EXCHEQUER DIVISION.]

1880. Dec. 10. } SMITH *v.* THE PARKSIDE MINING COMPANY. THE PARKSIDE MINING COMPANY *v.* SMITH.

Arbitration—Motion to set aside Award —Time—Making "Complaint."

A motion to set aside an award made in an action in July may be made on notice of motion given on the 24th for the 27th of November.

Sir John Holker (*Myburgh* with him) moved on behalf of the Parkside Mining Company to set aside an award made on the 14th of July, 1880, in these actions.

The Solicitor-General (*Sir Farrer Herschell*) (*Crompton* with him), for Smith, objected that the motion was out of time.

On the 24th of November, the last day but one of Michaelmas Term in the old calendar, a motion was made in the Queen's Bench Division to set aside the award, but refused on the ground that no notice of motion had been given. On the same day, a notice of motion was given for the 27th of November.

Section 2 of 9 & 10 Will. 4. c. 15 enacts that "any arbitration or umpirage procured by corruption or undue means shall be judged or esteemed void and of none effect, and accordingly be set aside by any Court of law or equity, so as complaint of such corruption or undue practice be made in the Court where the rule is made for submission to such arbitration or umpirage before the last day of the next term after such arbitration or umpirage made and published to the parties, anything in this Act contained to the contrary notwithstanding."

Sir John Holker cited *The Corporation of Huddersfield* v. *Jacomb* (1), before Vice-Chancellor Malins, and affirmed by the Court of Appeal (2). In that case an affidavit had been filed, but the decision governs this case in principle. The motion made on the 24th of November although dismissed was a complaint.

The Solicitor-General, in reply, contended that the notice of motion was not "a complaint in the Court" within the statute. It was a proceeding outside the Court between the parties. The complaint in the Court was the motion. In *The Corporation of Huddersfield* v. *Jacomb* (1) an affidavit had been filed, but in this case nothing had been done in the Court.

HAWKINS, J.—I think the motion may be made. It is said that, first, the motion in the Queen's Bench Division, and, secondly, the notice of motion, were a sufficient complaint. In *The Corporation of Huddersfield* v. *Jacomb* (1) an affidavit was filed, but that made no substantial difference. The notice of motion was, I think, a complaint made in Court. I am not disposed to disagree with that decision of the Court of Appeal. In deference to that authority I think we must so hold, although I think there is more than was supposed in the argument that the motion in the Queen's Bench was a complaint in Court.

STEPHEN, J.—I am of the same opinion. I rest it on the case in the Court of Appeal, and not on the other ground.

Solicitors—Helder, Roberts & Gillet, agents for Brockbank, Helder & Brockbank, Whitehaven, for plaintiff; Gregory & Co., agents for J. R. Musgrave, Whitehaven, for defendants.

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(1) 48 Law J. Rep. Exch. 186.
(2) Field, J., and Manisty, J.

(1) 43 Law J. Rep. Chanc. 748.
(2) 44 ibid. 96.

[IN THE EXCHEQUER DIVISION.]

1880. Nov. 29, 30. Dec. 1, 2, 3, 20. } THE ATTORNEY-GENERAL *v.* THE EDISON TELEPHONE COMPANY OF LONDON (LIMITED).

Telegraphs—Telegraph Act, 1869—*Exclusive Privilege of the Postmaster-General—Telephones.*

A telephone, communicating the sound of the voice from the transmitting to the receiving end, by means of a wire carrying an electric current, is a telegraph within the meaning of sections 3 *and* 4 *of the Telegraph Act*, 1869, *whereby an exclusive privilege of transmitting communications by telegraph is given to the Postmaster-General.*

The subscribers to a telephone exchange company paying a rent to the company for the convenience of any two of them being put into communication together through the medium of various centres, are not within the exceptions in favour of private owners engrafted on the exclusive privilege of the Postmaster-General by sections 4 *and* 5 *of the Telegraph Act*, 1869.

Information against the defendants for transmitting, or aiding in transmitting telegrams in contravention of the exclusive privilege of the Postmaster-General, conferred by section 4 of the Telegraph Act, 1869.

The Attorney-General (*Sir H. James*), *The Solicitor-General* (*Sir F. Herschell*), *E. Kay*, *Simpson*, *W. Karslake* and *Moulton*, for the Crown.

Benjamin, *R. E. Webster* and *Cozens-Hardy*, for the defendants.

The facts and arguments sufficiently appear from the judgment.

The judgment of the Court (Pollock, B., and Stephen, J.) was (on Dec. 20) delivered by

STEPHEN, J.—This was an information filed by the Attorney-General against the Edison Telephone Company of London (Limited) and heard before my brother Pollock and myself on the 29th of November and the following days. The facts were not in dispute, and they were as follows:—

The defendant company was formed in August, 1879, for the purpose of working two patents granted to Mr. Edison, namely, one on the 30th of July, 1877, "for the invention of improvements in instruments for controlling by sound the transmission of electric currents and the reproduction of corresponding sounds at a distance;" and the other, on the 15th of June, 1878, "for the invention of improvements in telephones and apparatus employed in electric circuits." The nature of the instruments patented and the manner in which they are used by the company are as follows: The telephonic apparatus consists of three parts, namely—first, an instrument called a transmitting instrument, into which a person speaks; secondly, an ordinary telegraphic wire through which an electric current passes; thirdly, an instrument called a receiving instrument, at which another person hears sounds. The transmitting instrument consists of a mouthpiece, into which the person using the instrument speaks; a tympanum or disc, which vibrates under the impulse of the words spoken; and a substance brought into the lightest possible contact with the tympanum, and also brought into relation with the electric wire, the nature of which substance is such that the vibrations of the tympanum are by its means represented by variations in the electric current in the wire. The wire is exactly like any other telegraphic wire. The receiving instrument consists of a cylinder of chalk, which is damped by some chemical liquid, and is capable of being made to revolve by clockwork a metal disc which touches the cylinder of chalk and a tympanum. When the apparatus is to be used the chalk cylinder is made to revolve, whereby friction is produced between the surface of the cylinder and the disc which touches it. The electric current passes from the wire into the chalk, and as it passes decomposes a part of the liquid by which the chalk is moistened. The amount of decomposition is greater or less according to the variations produced in the current by the vibrations of the tympanum at the transmitting end. The decomposition of the fluid varies the degree of friction between the chalk cylinder as it revolves

and the metal disc applied to it. These variations are represented by vibrations in the metal disc, and these vibrations cause the tympanum at the receiving end to vibrate in correspondence with the vibrations of the tympanum at the transmitting end, and so to emit sounds equivalent to those which are uttered at the transmitting end. The sounds so reproduced differ from the sounds uttered by the speaker, but they reproduce these sounds with such precision and completeness that the voices of different speakers at the transmitting end can be recognised and distinguished from each other at the receiving end. This account of the apparatus used by the Telephone Company would, of course, be altogether incomplete for scientific purposes, but it is, we think, sufficient for the purpose of explaining our judgment.

We must now state the manner in which the apparatus described is used by the company. They have a central office in Queen Victoria Street, called the Central Exchange. They have also district offices in various parts of London called District Exchanges, and from the District Exchanges wires run to the houses or offices of subscribers in the neighbourhood. At each exchange, district or central, is an instrument called a switch board, by which any two wires running from that exchange can be connected with each other. The switch board is an instrument well known in telegraphic operations, and is constructed as follows: The wires running to the place where it is kept are brought down in front of the switch board in a vertical direction and parallel to each other. Behind, but not in contact with them, are horizontal wires. If it is desired to connect any two of the vertical wires, a metal peg is pushed through a hole in each of the vertical wires to be connected till the peg touches the horizontal wire running between and behind the vertical wire. The electric current in the first vertical wire then passes down the peg put through that wire, along the horizontal wire, up the peg passed through the second vertical wire, and along the second wire. If a subscriber, A, wishes to communicate with another subscriber, B, the process is as follows: A first attracts the attention of a servant of the company stationed at the District or Central Exchange, as the case may be. He does this by pushing a button, by means of which an electric current lifts a spring which keeps in position a small metal shutter, covering a number corresponding to A's name. The shutter falls. The servant upon this sees A's number, and connects his own receiving instrument with A's wire. A thereupon names the person to whom he wishes to speak, namely, B. The servant puts A's wire in communication with B's wire, and shuts the shutter which had been opened, and A and B converse. When their conversation is over one or both pushes his button and causes his shutter to fall, upon which the servant disconnects the wires.

If the subscribers' wires are each connected with the same District Exchange, the words spoken pass over three separate wires, or portions of wire, which may belong to three different people, namely, A's wire, which may belong to or be rented by A, the small length of wire on the switch board, which belongs to the company, and B's wire, which may belong to or be rented by B. If A and B have to communicate through the Central Exchange, the words spoken would pass over five separate portions of wire, namely —first, A's wire, to the District Exchange with which A communicates; second, the company's trunk wire from the District Exchange to the Central Exchange; third, the small portion of wire on the switch board at the Central Exchange; fourth, the company's trunk wire between the Central Exchange and the District Exchange, with which B communicates; and, fifth, B's wire to the District Exchange, with which B communicates. Of these numbers, 2, 3 and 4 belong exclusively to the company, No. 1 may belong to or be rented by A, and No. 5 by B. Agreements are made between the company and its subscribers by which the wire and the telephonic apparatus necessary for working it are leased to the subscriber at a rent in consideration of which the company contract, among other things, that they will, "Upon re-

quest made through the said telephone at any time during the continuance of this agreement, between the hours of 9 a.m. and 6 p.m., Sundays excepted, put the lessee in telephonic communication with the telephone of any other subscriber to the said exchange whose wire is free." The rents are so calculated as to leave a profit for the company after paying the expenses of maintenance, &c.

The information charges that the use in this manner of the apparatus described is an infringement of the exclusive privilege of the Postmaster-General as to the transmission of telegrams. We must now consider what that privilege is. It is created by the 4th section of the Telegraph Act, 1869 (32 & 33 Vict. c. 73), in these words: "The Postmaster-General .... shall .... have the exclusive privilege of transmitting telegrams within the United Kingdom of Great Britain and Ireland,... and shall also within that kingdom have the exclusive privilege of performing all the incidental services of receiving, collecting or delivering telegrams except as hereinafter provided." The third section defines the words employed as follows: "The term 'telegram' shall mean any message or other communication transmitted or intended for transmission by a telegraph. The term 'telegraph' shall, in addition to the meaning assigned to it in the Telegraph Act, 1863, mean and include any apparatus for transmitting messages or other communications by means of electric signals." The telegraph Act of 1863 defines "telegraph" thus: "The term 'telegraph' means a wire or wires used for the purpose of telegraphic communication, with any casing, coating, tube or pipe enclosing the same, and any apparatus connected therewith for the purpose of telegraphic communication."

Putting these enactments together and substituting the definitions given for the words defined, the material part of section 4 of the Act of 1869 will stand thus: "The Postmaster-General shall have the exclusive privilege of transmitting messages or other communications transmitted, or intended for transmission, by any wire or wires used for the purpose of telegraphic communication, with any casing, coating, tube or pipe enclosing the same, and any apparatus connected therewith for the purpose of telegraphic communication, or by any apparatus (other than such wire) for transmitting messages or other communications by means of electric signals." In simpler language, the Postmaster-General is to have the exclusive privilege of transmitting messages or other communications by any wire and apparatus connected therewith used for telegraphic communication, or by any other apparatus for transmitting messages or other communications by means of electric signals. The result of the definition seems to be that any apparatus for transmitting messages by electric signals is a telegraph, whether a wire is used or not, and that any apparatus, of which a wire used for telegraphic communication is an essential part, is a telegraph, whether the communication is made by electricity or not. It would include, on the one hand, electric signals made, if such a thing were possible, from place to place, through the earth or the air; and on the other, a set of common bells, worked by wires pulled by the hand, if they were so arranged as to constitute a code of signals. By section 6 of the Act of 1869, "any company, corporation or person who transmits, or aids, or is concerned in transmitting any telegram in contravention of the exclusive privilege" above referred to is rendered liable to a penalty of 5*l.* for every such offence. Penalties are not asked for by this information, but the allegation made by it is that an offence has been committed, and the question for our determination is, whether this is or is not the case.

The case for the Crown is that every such conversation as the one which we have supposed to take place between A and B is a "message or other communication transmitted by a wire used for the purpose of telegraphic communication with certain apparatus, namely, a transmitting and a receiving instrument connected therewith for the purpose of telegraphic communication;" and that whenever such a conversation takes place the speakers and the company, by their servant, transmit, and that the company, at all events, aid and are con-

cerned in transmitting such a message or communication. More particularly, it was argued that every member of this definition is satisfied by such a conversation so carried on. The conversation must be a communication, even if the word "message" is less appropriate. It is "transmitted" or sent through a wire used for the purpose of communication, and that communication is telegraphic according to the common use of language, though it involves no writing. The various affidavits filed give a complete history of the word "telegraph," and shew that from the first invention of semaphores till within the last few years no contrivance of the sort did literally write at a distance, but that the word was applied to a variety of contrivances which, by signals perceptible sometimes by the sense of sight and sometimes by the sense of hearing, conveyed intelligence to great distances in a much shorter time than a letter could be carried. On these grounds it was said that to hold such a conversation as described was to transmit a telegram within the meaning of the Act. As to the exceptions, it was contended for the Crown that the burden of bringing the case within one or more of them was upon the defendants, which was no doubt correct.

The arguments for the defendants may be reduced to three points: first, no communication by telephone is a telegram, because a telephone and a telegraph differ essentially; secondly, when two persons converse by means of a telephone they do not transmit a message or communication within the meaning of the Telegraph Act of 1869; thirdly, if such a conversation is the transmission of a message or communication within the Telegraph Act of 1869, it is within either the first or the second of the exceptions in section 5 of the Act of 1869. The first contention was supported by the following arguments: It was argued that telephonic communication consisted in the transmission of the human voice to distances greatly exceeding those to which it can naturally reach by means altogether unknown in 1863, or even in 1869, when the Telegraph Acts were passed which we have to construe, and this, it was said, is an entirely new result, produced by entirely new means. The transmitting instrument is, it was argued, quite new, the method of varying the force of the current in the wire by collecting and impressing upon it the vibrations of the human voice having been altogether unknown before the inventions of Mr. Graham Bell and Mr. Edison. In the same way the receiving instrument is absolutely new. In 1869 means were no doubt known by which the interruption and re-establishment of an electric current at the transmitting end of a wire would cause sound mechanically at the receiving end, but in such cases the sound was created at the receiving end—as, for instance, by magnetising and demagnetising a piece of iron, which when magnetised drew down on itself a small steel bar with a click, which resumed its position by means of a spring when the magnet ceased to act as such; but the transmission of the actual vibrations of the voice through the length of the wire and their retranslation into sound at the receiving end were unknown till the recent invention. Thus the means used were entirely new, and so was the result produced.

This is forcibly stated in various affidavits made by men of the highest scientific eminence. Sir W. Thompson says, "When the Telegraph Acts were passed the telephone had not been invented, and no one concerned in that legislation had the slightest idea, nor had anyone living the slightest idea, that it would be possible so to extend the power of speech as to enable persons at a distance to converse with one another." Professor Stokes says, "Neither the transmitter nor the receiver of the telephone in any way resemble in their mode of operation the corresponding parts of a telegraphic instrument, and if a single word is to be used to include both a telephone and a telegraph it must, in my opinion, be wide enough to cover every instrument which may ever be invented which employs electricity transmitted by a wire as a means for conveying information." Professor Tyndall says, "Prior to the labours of Bell and Edison it had never to my knowledge entered into the thoughts of

scientific men to transmit by means of electricity the tremors of the human voice, so as to reproduce audible and articulate speech at a distance. The proof that this was not only possible but practical appeared to those most familiar with experimental physics to be an application of electrical and acoustical science not only new but marvellous. I have, therefore, no hesitation in expressing the opinion that to confound the telephone with the telegraph would be to place in the same category utterly dissimilar things." Dr. Fleming, who has been engaged for many years in the study of the subject, says, "The Edison telephone is only a complicated form of speaking trumpet;" and he also says, "When I, standing in an enclosed room, shout to another person in an adjoining room, the waves of sound from my voice beat against the wall, transmit their motion to the particles of the wall, and those again hand on the motion to the air in the other room. In this case the molecules of the wall constitute an apparatus by which motion of the air in one place is repeated in another. The Edison telephone does just the same thing." So Lord Rayleigh says, "The speaking telephone is an instrument for artificially extending by the use of electricity the limits through which the human voice is audible. The only essential difference between a speaking telephone and a speaking tube is, that in the former vibrations are transmitted in the electrical, in the latter in the aerial, form." Mr. Hopkinson says much the same at greater length.

We see no reason to doubt the statements of these distinguished men as to the novelty and other scientific merits of the transmitting and receiving instruments. Our attention was certainly called to a remarkable passage in a work by the Vicomte du Moncel, published in 1857, which no doubt suggests the possibility of such a contrivance as the telephone. Much evidence was also given as to an instrument invented in 1861 by a German named Reis, which, it was contended, had more or less analogy to the telephone; but to these matters we attach no importance, because we cannot see in the speculation of Du Moncel, or in what was done by Reis, anything that can be said, either in science or practice, to have anticipated the telephone of Edison or of Bell. Whether it is correct to speak of the telephone as actually transmitting sound, and as being in the nature of a speaking trumpet or speaking tube, seems much more questionable. Sir George Airy, Professor Adams and Mr. Siemens expressly deny it, for reasons which we need not quote at length. Sir George Airy gives his reason in a very few words: "I do not believe that any such identity can be proved or reasonably stated to exist, and this I say for the reason that while we know the laws governing and the nature of the process which takes place during the transmission of sound through air, we really know nothing as to the nature and mode of operation of electric currents, or waves, or impulses, or tremors."

It was argued that no sound at all is perceptible between the transmitting and the receiving instrument; that the sound produced at the receiving end is produced not by the voice uttered at the transmitting end, nor by the vibrations set up by the voice in the electric current in the wire, but by the vibrations of the metal disc caused by the variations in the friction between the disc and the chalk cylinder. It was further said that the sound heard at the receiving end differs in a marked way from the sound uttered at the transmitting end, and that though the difference between two voices can be recognised at the receiving end, this no more proves identity between the sounds uttered and the sounds heard than the fact that you can distinguish the photograph of A from the photograph of B proves identity between the faces of A and B and the photographs of A and B respectively. A consideration not mentioned during the argument may perhaps be added. The telephone in the transmission of sound substitutes the velocity of electricity for the velocity of sound. If the sound made by the voice reached the receiving instrument of the telephone, it would reach it long after the telephone had spoken, and it seems difficult to say that two sound sseparately heard one after the other are each identical with the sound uttered, especially when the one

which arrives first makes a different impression on the ear both from the words as spoken and from the words as first heard. Mr. Cromwell Fleetwood Varley mentions that he and his brother arranged two parabolic sounding boards in such a manner that they were accurately directed towards each other, and that words spoken by one brother into the focus of the one parabola were heard by the other brother at the focus of the other parabola, at a distance of over two miles. It would take about eight seconds for the sound to traverse this distance. If, therefore, the words had been spoken into a transmitting instrument at one focus in telephonic connection with a receiving instrument in the other focus, the one sound would have been heard eight seconds before the other. Can it be said that the two sounds were one and the same sound, or that the one sound travelled simultaneously over the two intervals of space at two different rates of speed?

We do not think it necessary to express any opinion on a controversy which is more scientific than legal, and perhaps more properly metaphysical or relative to the meaning of words than scientific, as it seems to turn upon the nature of identity in relation to sound. It is enough to say that, whatever may be the merits of the controversy, it does not appear to us that the fact, if it is a fact, that sound itself is transmitted by the telephone establishes any material distinction between telephonic and telegraphic communication, as the transmission if it takes place is performed by a wire acted on by electricity. We are of opinion, then, that, fully admitting all that has been or indeed can be said as to the novelty and value of the telephonic transmitter and receiver, the whole apparatus, transmitter, wire and receiver, taken together form "a wire used for the purpose of telegraphic communication, with apparatus connected therewith, for the purpose of telegraphic communication"—that is, they are a telegraph within the definition of the Act of 1863, which is embodied by reference in the Act of 1869. The wire is a wire. The transmitting and receiving instruments are apparatus connected therewith for the purpose of conveying information by electricity; and this, as it seems to us, is telegraphic communication. Indeed, though for scientific purposes it may, no doubt, be necessary to distinguish between telegraphs and telephones, it seems to us that the word "telegraph," as defined in the Telegraph Acts, is (to use Professor Stokes's words) "wide enough to cover every instrument which may ever be invented which employs electricity transmitted by a wire as a means for conveying information." Indeed, looking to the extension of the definition inserted in the Act of 1869, the words "transmitted by a wire" might probably be left out of this definition.

That this view does no violence to the common use of language is proved, first, by the fact that in Mr. Edison's own specification the words "telegraph" and "telegraphic" are frequently used in reference to his invention, and that in *Webster's Dictionary*, published in 1856, an electro-magnetic telegraph is defined, under the head "Telegraph," as an "instrument or apparatus for communicating words or language to a distance by the use of electricity;" and under the head "Electro-magnetic telegraph," as "an instrument or apparatus which, by means of iron wires conducting the electric fluid, conveys intelligence to any given distance with the velocity of lightning."

Of course, no one supposes that the Legislature intended to refer specifically to telephones many years before they were invented, but it is highly probable that they would, and it seems to us clear that they actually did, use language embracing future discoveries as to the use of electricity for the purpose of conveying intelligence. The great object of the Act of 1863 was to give special powers to telegraph companies to enable them to open streets, lay down wires, take land, suspend wires over highways, connect wires, erect posts on the roofs of houses and do many other things of the same sort. The Act, in short, was intended to confer powers and to impose duties upon companies established for the purpose of communicating information by the action of electricity upon wires, and absurd consequences would follow if the nature and

extent of those powers and duties were made dependent upon the means employed for the purpose of giving the information. Suppose a company found it essential to erect posts along a highway, and suppose the body having control of the highway gave their consent, would the validity of the consent, and therefore the liability of the parties concerned to an indictment for obstructing the highway, notwithstanding such consent, be dependent on the question whether the messages were sent by an Edison's transmitter or by a Morse key? Or, again, suppose that the company favoured particular customers, and so enabled their friends to get great advantages in trade or speculation over other persons, could they say, "We have a right to do so, notwithstanding section 41, because we use telephones and not telegraphs"? Or, still more, if one of their clerks negligently refused to send a message or improperly divulged its contents, would they, for the same reason, be deprived of the summary remedy given by section 45? Nearly every section of the Act would supply an additional illustration of the general conclusion that, but for the monopoly established in 1869, the Edison Telephone Company would be as anxious to be included in the Act of 1863 as they are at present to be excluded from it; but this is only an accident, which cannot affect the interpretation of the Act.

Looking at the Acts from the point of view of the Crown, we are led by a different road to the same conclusion. If a telephone is not a telegraph, then a telephonic communication is not a telegram, and if so any company may not only transmit such messages, but may perform all the incidental services of collection and delivery; and if this is so there is nothing to prevent all the railroad and other companies in possession of telegraphs from applying to them telephonic transmitters and receivers, and carrying on the business of telegraphy just as they did before 1869. The customer would write his message at the counter and the clerk would speak it through the telephone instead of using a less perfect instrument. It is difficult to suppose that the Legislature intended to grant a monopoly so liable to be defeated, or that its language was meant to be so construed as to be limited to the then state of, perhaps, the most progressive of all sciences. In this connection we may dispose of one or two minor arguments by which it was attempted to shew a distinction between telephonic messages and telegrams. It was said to be essential to a telegraphic message that it should be sent not direct from party to party, but through the intervention of a messenger or clerk, and also that it should consist of signals having a conventional meaning, and not of actual words spoken.

It seems to us impossible to regard these matters as essential to the process. A clerk may be regarded merely as an extra link in a chain of communication, and signals are only imperfect substitutes for words. It would be a strange thing to say that improvements by which a step in a given process can be dispensed with, and by which the process itself may be perfected, destroy the character of the process. To take such a view would be to affirm that imperfections in an instrument are essential parts of it, and that their removal destroys it. Apart from this a practical difficulty arises. There has been a constant progress in the subject of electric communication from its first invention to the present day. Some of the means employed require no code of signals, and some can be worked by anyone who can read and write, without any assistance from clerks. The A B C instrument worked by moving a hand successively to all the letters forming the message, and this moved a corresponding hand at the other end of the wire. Any two persons who could spell could use these instruments. Hughes's type-printing instrument prints the message in capital letters on a long narrow strip of paper. A telegraph called Cowper's writing telegraph has lately been invented, the nature of which is that a person holding a pencil at one end of the wire can write or even draw with it, and that a facsimile is produced by a corresponding pen set in motion by the electric current at the other end of the wire. Two papers were produced before us written in what was said to be Chinese character and

exactly resembling each other. The one was written by a Chinese lady, and the other by the pen at the other end of the wire. Now, either these instruments are telegraphs and the messages sent by them telegrams within the Act, or they are not. If Cowper's writing telegraph is within the Act, it is difficult to say why a telephone is not. They equally dispense with clerks or messengers. If the sound is in any sense transmitted in the one case, the motions of the hand are in the same sense transmitted in the other. The one reproduces actual written words quite as accurately as the other reproduces words spoken, and if the one can properly be described as a complicated speaking trumpet, the other can with equal propriety be described as an elongated pen. If, on the other hand, Cowper's writing-telegraph is not within the Act, it is equally difficult to say why Hughes's type-printer is within it. It requires no messenger or servant, at least at the receiving end, and it employs no special code of signals. It is, however, impossible to doubt that it is included, for it was in common use long before the Act of 1869, having been invented in 1854, and having procured the Grand Prix for its inventor at the Paris Exhibition of 1867. The result seems to be that it is impossible to draw the line between these instruments, and that all or none must be regarded as coming within the definition of the term "telegraph" so often referred to. For all these reasons we hold that a telephone is a telegraph within the meaning of the Acts of 1869 and 1863.

The second point made by the defendant company was that, whether the telephone was a telegraph or not, the conversations held through it were not "messages or communications" sent by a telegraph within the meaning of the Act. This contention was founded partly on the argument that the directness of communication between the parties to the conversation rendered the word "message" inappropriate, and partly on the Telegraph Acts of 1863 and 1868, which, it was said, use the word "message" in the sense of a substance with a message written upon it, and on the Telegraph Act of 1869, which, it is said, uses the word "communication" in a peculiar sense. As to the word "message," it is, no doubt, true that in several sections it is so used; but in others it seems to us to be used in the sense of the purport or tenor of the message. It is, for instance, an offence to delay to "transmit or deliver" a message. "Transmit" obviously applies to the words and not to the paper; "deliver" to the paper and not to the words; and so in other cases. The same remark applies to the Act of 1868, in which the word "message" is frequently used, and which was commented upon by Mr. Webster minutely. All the difficulties raised or attempted to be raised appear to us to be capable of solution by the single principle already stated. The word "communication" in the definition of "telegram" given in the Act of 1869 was said to have found its way there from section 16 of the Act of 1868, which authorises the Postmaster-General to make contracts with the proprietors of newspapers and others for the transmission or delivery of "telegraphic communications" to them at certain times and on certain terms; and it was rather suggested than expressly argued that such communications only would be telegrams within the meaning of the definition of the Act of 1869. We do not agree with this view. The use of the word "communication" instead of message in section 16 of the Act of 1868 certainly favours the opinion that there might be communications which would not be properly described as messages; but there is nothing in the definition of a telegram in the Act of 1869 which suggests that the word "communication" which it contains is to be restricted to the communications mentioned in section 16 of the Act of 1868. It is very possible that the use of the word in the one section may have suggested its use in the other; but there is nothing to narrow its sense in the last-mentioned section. For these reasons we hold that a conversation held through a telephone is either a message, or, at all events, a communication transmitted by a telegraph, which is the definition of a telegram.

A small question was raised on the word "transmitted." When one person

speaks to another it was said he "makes," but does not "transmit," a communication. The answer is, that when he speaks through a wire some miles long he sends what he says through the wire, or transmits it. As the defendants contended that the very voice itself was so sent, this seems specially clear as against them. It was further argued that, admitting the conversations in question to be telegrams, they were still not within the Act of 1869, because the preamble of that Act recites that "similar powers to those conferred upon the Postmaster-General with respect to the exclusive privilege of conveying letters should be enacted with reference to the transmission of public telegraphic messages." This, it is said, confines the exclusive privilege as to telegrams within the limits within which the exclusive privilege as to letters is confined, and subjects it to the same tacit exceptions. But the exclusive privilege of the Postmaster-General as to letters is "the exclusive privilege of conveying from one place to another all letters" (7 Will. 4. and 1 Vict. c. 33. s. 2), subject to certain exceptions. No express exception applies to the case of a man who carries his own letter with his own hand to the person to whom it is addressed. Yet this exception has always been regarded as tacitly implied in the Act, and no one ever supposed that a man who came within it violated the Postmaster-General's exclusive privilege.

It was argued that, in like manner, if two friends communicated with each other directly by a telegraph of which they were joint owners, they would be outside of the sphere of the Act of 1869. To this argument there are, in our opinion, several conclusive answers. In the first place, we do not think that the recital in the preamble of the Act of 1869 ought to have the effect ascribed to it. Each Act must be construed independently. The practical inconvenience of construing the Post Office Act literally would be so very great that it can never have been seriously proposed so to construe it. It is enough to say that such a construction would have involved the consequence that when a letter was written it must be left on the table at which it was written till the postman called and took it away, visiting every room in every house for that purpose. Such a consequence is an absurdity; but there is no absurdity in supposing that the Legislature meant to prohibit private electric telegraphs. The extent to which they were intended to be prohibited will appear from the exceptions to be considered immediately. In the next place, there is no real analogy between a man carrying his own letter to his correspondent's house and two men telegraphing to each other. In the one case the act done can, by no conceivable means, injure the revenue. In the other case an apparatus must be employed which may readily be made to injure the revenue. The object of the Post Office Act is to give to the Postmaster-General an exclusive right to earn all that can be earned by carrying letters; but a man cannot pay himself for carrying his own letter. If he gets a friend to carry it for him he might pay, and this case is accordingly provided for by an express exception. In the third place, the customers of the Telephone Company do not in fact communicate directly with each other. They are put in communication by a servant of the company, and their messages travel in all cases over at least one wire, and in many cases over three separate wires, which are the property of the company. On all these grounds we hold that the conversations held through the telephone are infringements of the Postmaster-General's exclusive privilege, unless they can be shewn to be within the exceptions to that privilege.

We now pass to the exceptions. Those which are said to apply are the first and second in section 5 of the Act of 1869. The first is in these words: "Telegrams in respect of the transmission of which no charge is made, transmitted by a telegraph maintained or used solely for private use, and relating to the business or private affairs of the owner thereof." The second is: "Telegrams transmitted by a telegraph maintained for the private use of a corporation, company or person, and in respect of which, or of the col-

lection, receipt and transmission or delivery of which, no money or valuable consideration shall be, or promised to be, made or given." These exceptions resemble each other so closely that it is not easy to put a case of a telegram which would fall within the first exception, and which would not fall within the second. Every "telegraph maintained or used solely for private use" must be a "telegraph maintained for the private use of a corporation, company or person." A "telegram for which no charge is made" does not differ materially from a "telegram in respect of which, or of the collection, receipt and transmission or delivery of which, no money or valuable consideration shall be, or promised" (the words "shall be" seem to be wanted before "promised") "to be, made or given." And a message "relating to the business or private affairs of the owner" of the telegraph by which it is sent is a telegram. Thus the second exception seems to contain everything which can fall within the first and nothing more, except possibly telegrams not charged for transmitted by a telegraph used solely for private use and relating to the business of the owner of the telegraph, such telegraph not being maintained by the owner. But no case occurs to us in which a man is likely to own a telegraph and use it exclusively for his own business and yet not to maintain it. Some light may perhaps be thrown upon the subject by an obscure provision in the first exception. This exception authorises individuals to keep telegraphs for their own use, and to send messages by them relating to their own affairs so long as no charge is made for the messages. This condition is, as it stands, unintelligible. How could a man make a charge to himself for sending a message on his own telegraph about his own affairs? It suggests that the exception may have been originally intended to provide for two classes of telegrams, sent by telegraphs maintained or used solely for private use, namely, first, telegrams relating to the private affairs of the owner; and, secondly, telegrams relating to other people's affairs, sent as an exceptional favour and not charged for; but this is certainly not said. The second exception provides not only for nearly every case provided for by the first exception, but also for the case which seems to have been, for some reason, omitted from the first exception, namely, telegrams relating to the affairs of the owner's friends sent gratuitously; for the telegrams to which the second exception refers may relate to any subject so long as they are not charged for, and so long as the telegraph by which they are sent is maintained for the private use of any corporation, company or person.

Probably some amendment made while the Act was passing through Parliament was the cause of this confusion, but, however this may have been, the effect of the two exceptions seems to us to be that if a person, company or corporation has a telegraph maintained *bona fide* for his or its own use—if, for instance, a banker has a telegraph to communicate between his office in the city and another office in a distant part of London, or if under the Act of 1868 (s. 9, sub-s. 8) a railway has made arrangements with a coal master upon the company's system for a private telegraph between his coal pit and a station, they may not only send telegrams on their own affairs, but may also, under special circumstances, and if no charge is made, send messages on the affairs of others. This view of the exceptions shews how wide the exclusive privilege granted to the Postmaster-General was intended to be. But for them it would be unlawful for the owner of works spread over a great space of ground to have a telegraph to communicate between the different parts of the establishment, or for a man of business with two offices in different parts of London to have a telegraph between them. This supports what we have already said as to the difference between the exclusive privilege of the Postmaster-General in relation to telegrams and in relation to letters. The privilege relating to telegrams seems to us to be the wider of the two.

It was argued by the defendants that they were within the first exception, because in it the word "owner" ought to be read as including "owners," the effect of which was said to be that two persons might contribute to keep up a

telegraph, and use it for communicating with each other on affairs interesting to either, that each of them might again communicate with others, and that thus the country might in theory be covered with a network of telegraphic wires, each connecting two persons only. It was further suggested that if this were lawful, it would be lawful in order to avoid circuity and complication to consolidate the individual wires into a small number owned by a large number of subscribers, and this it was said was practically what was done by the defendant company. This ingenious argument appears to us to be unfounded, both in law and in fact. The exceptions seem to us to apply exclusively to telegraphs kept either by a single owner or under some express provision of the Telegraph Acts, like the one already referred to; but, quite apart from this, it is obvious that the telegraphs of the defendant company are neither owned nor maintained by the subscribers, nor are they used solely by the owners. The switch board and the trunk wires are the property of the defendant company, and they are essential to the system of communication adopted. Moreover, a charge in the shape of rent is made for the transmission of messages, and from this the company derives a profit. Each of these circumstances takes the case out of the exceptions, or rather prevents them from applying to it. Lastly, it was asked by the defendants when and by whom the offence (if any) of the defendant company was committed. To this we think the answer is, that if several persons combine to do an illegal act, each is guilty of the whole of it, so that when A sends a telegram to B by means provided by the company for that purpose, and under the provisions of a contract by which it is carried out, A, B and the company are all guilty of an offence under section 6 of the Act of 1869, namely, the offence of transmitting a telegram. Apart from this, we think that when the company's servant puts A in telephonic communication with B, the company aids and is concerned in transmitting a telegram, which, again, is an offence under the same section.

The result is, that we give judgment for the Crown, with costs. There will, accordingly, be declarations in the terms of paragraphs 1 and 2 of the prayer, an injunction in the terms of paragraph 3, and an order that an account be taken as in paragraph 4.

Judgment for the Crown.

Solicitors—Watson Horace, for Crown; Waterhouse & Winterbotham, for defendants.

[IN THE HOUSE OF LORDS.]

1880. Nov. 24, 27. } DEBENHAM AND ANOTHER *v.* MELLON.

Husband and Wife—Wife's Authority to pledge Husband's Credit for Necessaries—Secret Revocation of Authority.

Where a husband and wife live together and the husband has forbidden the wife to buy goods on credit, without giving notice to anyone of the fact, he is not liable for the price of goods supplied to her order by a tradesman with whom she had not dealt before being forbidden to buy on credit, although the goods consist of clothes for the wife and children suitable to their position in life.

Jolly *v.* Rees (15 Com. B. Rep. N.S. 628; 33 Law J. Rep. C.P. 177) *approved and followed.*

This was an appeal from a judgment of the Court of Appeal (reported 49 Law J. Rep. Q.B. 497; Law Rep. 5 Q.B. D. 394) affirming one of Bowen, J.

The action was brought to recover 42*l.* the price of clothing supplied by the plaintiffs to the order of the defendant's wife for the use of herself and the defendant's children. The wife was living with her husband at Bradford, where both were employed in managing a hotel. The goods were admitted to be necessaries in the sense that they were suitable to the position in life of the defendant. Before the wife began to deal with the plaintiffs the defendant had agreed with her that he would make her

an allowance, and that she should not order goods upon credit, but no notice of that agreement had been given to anyone. Bowen, J., left to the jury the question whether the husband had revoked the authority of his wife to pledge his credit; and, on their finding that he had, gave judgment for the defendant.

The Court of Appeal affirmed this judgment. The plaintiffs appealed.

Benjamin and *A. L. Smith*, for the appellants.—The law as to the authority of the wife to pledge the husband's credit for necessaries is, it is contended, as follows: When husband and wife are living together, the wife has an ostensible or presumptive authority to buy on credit goods which are within her province; but that authority may be withdrawn, and the presumption of such authority is rebutted by proving express withdrawal and notice given. When they are not living together, if the separation is by the husband's fault, the wife has an absolute authority in law which cannot be rebutted: if by the wife's fault, she has no authority; if by mutual consent, there is a presumption in favour of her authority rebuttable by proof that the husband makes her a sufficient allowance.

That there is some authority in a wife cohabiting with her husband is admitted in all the cases. Sometimes it is called a *prima facie* authority, at other times presumptive, apparent or implied. It cannot be contended that a secret revocation can take away the authority, whatever it is. In *Dyer* v. *East* (1) Kelynge, C.J., said, "The husband must pay for the wife's apparel, unless she elope, and he give notice not to trust her; that is the case of *Manby* v. *Scott* (2), which was a hard judgment, but we will not impeach it." In *Etherington* v. *Parrot* (3) Lord Holt says, "If the husband have solemnly declared his dissent, that she shall not be trusted, any person that has notice of this dissent trusts her at his peril after." See also 2 *Strange*, 1214, *note by Nolan*, and the *dicta* of Lord Ellenborough in *Waithman* v. *Wakefield* (4); of Bayley, J., in *Holt* v. *Brien* (5). As to the nature of the authority, Littledale, J., in *Montague* v. *Benedict* (6), cites with approval a passage in *Com. Dig.*—Baron and Feme (Q). That "if a wife buy necessary apparel for herself the assent of the husband shall generally be intended." To the like effect are the observations of the Judges in *Read v. Legard* (7). Till *Jolly* v. *Rees* (8) no one ever doubted that a secret revocation was not enough to take away the wife's authority. The decision in that case is at variance with the judgment of the Court of Exchequer in *Ruddock* v. *Marsh* (9), which, comparing a wife to a partner, laid down that she had "authority with reference to such matters as are usually within the control of the wife." There the husband had supplied the wife with money to keep the house. So, in *Johnston* v. *Sumner* (10), Pollock, C.B., said, "If a man and his wife live together, it matters not what private agreement they may make, the wife has all usual authorities of a wife." The authority of *Jolly* v. *Rees* (8) is weakened by the dissent of Byles, J., and the case has been doubted since by Cockburn, C.J., in *Morgan* v. *Chetwynd* (11). There has been no decision on the point since; and the simple question here is whether *Jolly* v. *Rees* (8) is good law.

The appellants do not necessarily contend that notice of the revocation should actually reach a tradesman in order to bind him; but they say that there must be some solemn and public declaration of the revocation, not a mere private agreement between husband and wife, the knowledge of which they keep entirely to themselves.

Willis and *McCall*, for the respondent.—The agency of the wife arises not

(1) 1 Mod. 9.
(2) 2 Sm. L. C. (8th ed.) 445, at p. 468; 1 Lev. 4.
(3) 2 Ld. Raym. 1006.
(4) 1 Campb. 120.
(5) 4 B. & Ald. 252.
(6) 3 B. & C. 631; 2 Sm. L. C. (7th ed.) 467.
(7) 6 Exch. Rep. 636; 20 Law J. Rep. Exch. 309.
(8) 15 Com. B. Rep. N.S. 628; 33 Law J. Rep. C.P. 177.
(9) 1 Hurl. & N. 601.
(10) 3 ibid. 261; 27 Law J. Rep. Exch. 341.
(11) 4 Falc. & F. 457.

from the marriage, but from the conduct after the marriage. For if she be living apart from her husband voluntarily upon any terms, the husband is not liable for goods supplied to her—*Eastland* v. *Burchell* (12). So if she elope, though the tradesman be ignorant of the fact. There must be acts subsequent to the marriage, mere cohabitation not being enough. Thus, if the husband had gone with the wife to buy goods, or had given her money to pay the bills when they came in, or if he put her into the position of housekeeper, which he did not do here, he would be liable. In fact, the wife's authority is exactly like that of a servant. When it is spoken of as a presumptive authority, it is not meant that marriage and cohabitation are evidence from which a tradesman has a right to presume agency in the absence of notice to the contrary, but merely that they are some evidence from which, in the absence of other circumstances, a Court would presume agency.

Here, again, the goods were not necessaries except in the sense that they were proper if the wife had not already got them. And this is important as bearing upon the effect of a secret revocation. For if notice were held necessary, the wife might give separate orders to different tradesmen, each of which by itself might be reasonable and proper, but the total quantity of goods supplied might be altogether extravagant. As to the general law on the subject—see *Renaux* v. *Teakle* (13), *Reid* v. *Teakle* (14), *Mizen* v. *Pick* (15), *Montague* v. *Benedict* (6), *Seaton* v. *Benedict* (16), *Manby* v. *Scott* (2). In *Etherington* v. *Parrot* (3), *Holt* v. *Brien* (5), and the cases referred to in the note in 2 *Strange*, 1214, there had been previous dealings with the tradesman recognised by the husband. Cresswell, J., said in *Atkyns* v. *Pearce* (17) that *Ruddock* v. *Marsh* (9) could only be sustained upon that ground. The *dictum* of Pollock, C.B., in *Johnston* v. *Sumner* (10) was unnecessary to the decision. *Moylan* v. *Nolan* (18) is a decision of Irish Judges which followed *Jolly* v. *Rees* (8).

The following cases at Nisi Prius were cited to shew that notice of revocation had not been considered necessary before *Jolly* v. *Rees* (8)—*Atkins* v. *Curwood* (19), *Freestone* v. *Butcher* (20), and *Dennys* v. *Sargeant* (21).

Benjamin, in reply.

THE LORD CHANCELLOR (LORD SELBORNE).—This case raises the very important question whether the decision of the Court of Common Pleas in 1864, in the case of *Jolly* v. *Rees* (8), which, so far as I know, has not been seriously called in question since that time, and which was never brought to this House for consideration, is right.

The point determined was this, as I understand it, that the question whether a wife has authority to pledge her husband's credit is to be treated as a question of fact, to be determined upon the circumstances of each particular case, whatever may be the rules of law as to the *prima facie* presumptions to be drawn from a particular state of circumstances.

That principle is now controverted, and the first question is, whether the mere fact of a marriage implies a mandate by law making the wife (who cannot herself contract, unless so far as she may have a separate estate) the agent in law for the husband, to bind him and to pledge his credit, by what otherwise might be her own contract if she were a *feme sole*.

It is sufficient to say that all the authorities shew that there is no such mandate in law, except in the particular case of necessity—a necessity which, perhaps, *prima facie* may arise when the husband has deserted the wife, or compelled her to live apart from him, without properly providing for her, but which, when the husband and wife are living together, cannot be said ever *prima facie* to arise,

(12) 47 Law J. Rep. Q.B. 500; Law Rep. 3 Q.B. D. 432.
(13) 8 Exch. Rep. 680; 22 Law J. Rep. Exch. 241.
(14) 13 Com. B. Rep. 627; 22 Law J. Rep. C.P. 161.
(15) 3 Mee. & W. 481.
(16) 2 Sm. L. C. (7th ed.), 475; 5 Bing. 28.
(17) 2 Com. B. Rep. N.S. 763; 26 Law J. Rep. C.P. 252.
(18) 17 Ir. C. L. 427.
(19) 7 C. & P. 756.
(20) 9 ibid. 643.
(21) 6 ibid. 419.

because if in point of fact she is maintained, there is, in that state of circumstances, no *prima facie* evidence that the husband is neglecting to discharge his proper duty, or that there can be any necessity for the wife to run him into debt, for the purpose of keeping herself alive or supplying herself with necessary clothing.

I therefore lay aside that proposition, and think it clear that there is no mandate in law by the mere fact of marriage applicable to such a state of circumstances as we have at present.

Then the next question is, whether the law implies a mandate from cohabitation. If it does, on what principle does it do so? Cohabitation is not, like marriage, a *status*, or a new contract—it is a general expression for a certain condition of facts; and if the law does imply any such mandate from cohabitation, it must be as an implication of fact, and not as a necessary conclusion of law. There are, no doubt, various authorities which say that the ordinary state of cohabitation between husband and wife carries with it some presumption, some *prima facie* evidence, of an authority to do those things which, in the ordinary circumstances of cohabitation between husband and wife, it is usual for a wife to have authority to do. Mr. Benjamin says that those words are not the best which might be used for the purpose, but that "apparent authority" or "ostensible authority" would be better. I am not at all sure that Mr. Benjamin's words may not be very good words for that ordinary state of circumstances in the case of cohabitation between husband and wife, out of which the presumption arises, because in that ordinary state of circumstances the husband may truly be said to do acts, or to consent evidently to acts, which hold the wife out as his agent for certain purposes. Then the word "apparent" or the word "ostensible" becomes appropriate. But where there is nothing done, nothing consented to by the husband, to justify the proposition that he has held out the wife as his agent, then I apprehend that the question whether, as a matter of fact, he has given the wife authority, is one that must be examined upon the whole circumstances of the case. No doubt, though not intending to hold her out as his agent, and though she may not actually have had authority, the husband may so have conducted himself as to entitle a tradesman dealing with him to rely upon some appearance of authority. If he has done so he may be bound, but the question must be examined as one of fact, and all the authorities, as I understand them, practically treat it so, when they speak of this as a presumption *prima facie* not absolute, not in law, but capable of being rebutted; and when Lord Chief Baron Pollock, in the case of *Johnston* v. *Sumner* (10), said that all the usual authorities of a wife under those circumstances might be assumed, notwithstanding any private arrangement, I apprehend that he had in view that state of facts under cohabitation, when a wife is managing her husband's house and establishment, which usually raises the presumption which, when once raised by the husband's acts, or by his assent to the acts of his wife, doubtless as against the person relying upon that appearance of authority, might not be got rid of by a mere private agreement between the husband and wife. Lord Chief Baron Pollock, in another case which was cited during the argument, namely, the case of *Renaux* v. *Teakle* (13), said that the case of the wife, as to principle, at all events, was not different from that of anybody else in an establishment. If there is an establishment, of which there is a domestic manager—although, perhaps, the wife is the most natural domestic manager, and the presumption may be strongest in particular circumstances when she is so—yet the presumption is the same from similar facts, even if she be not a wife, but merely a woman living with a man and passing as his companion, with or without the assumption of the name of wife. It is also the same if the person to whom the domestic management is delegated is a housekeeper, or a steward or any other kind of servant. Therefore it is in all these cases really a mere question of fact.

Now in this case that ordinary state of circumstances which usually accompanies cohabitation, when there is a house and an establishment, is entirely wanting.

There was here no house, there was here no establishment, and none of these things were done in the way of living upon credit for the ordinary necessary purposes of providing for the daily wants of an establishment which ordinarily raise the presumption. The husband and wife were both servants of a company of hotel-keepers at Bradford. They not only were their servants, but they lived in the hotel which belonged to their employers; the whole of their board and lodging (which, I take it upon the evidence, included that of their children) was found for them, and therefore there was no household to be managed; there was no domestic management at all, in point of fact. The credit, such as it was, was given by a London tradesman to a woman living in Bradford in these circumstances. No single act was done by him which shews that he was dealing upon the faith of any appearance of authority in the wife, for he made out all the bills to the wife in her own name, which, no doubt, would not have prevented him from resorting to the husband, if the husband was otherwise liable, but which certainly does not assist his case as tending to shew that he was misled by any appearance of authority into supposing that he was giving credit to the husband. That the husband never knew any of these things is made perfectly clear. The necessary conclusion of fact is that the husband never did hold out his wife as having any authority, by any act, or by any consent of his, either to the plaintiff or to the class of persons to whom the plaintiff belongs, and of whose dealings the plaintiff might be presumed to have any knowledge.

Then, if the plaintiff can recover at all, it must be either because there was, notwithstanding this state of things, an authority in fact, or because there is an authority in law from the necessity of the case. I think it would really be doubtful whether the ordinary presumption even shews the authority in the state of facts which I have mentioned; but taking it to be so, seeing that the clothes might be necessary for the wife, and that if there were no means of supplying them otherwise, it would be the husband's duty to supply them, the evidence conclusively shews that there was no authority in fact. It is said that when this married pair lived—four or five years before the beginning of the dealings between the wife and the plaintiff, and a considerably greater distance of time before this particular debt was contracted—at Westward Ho, in Devonshire, there were some other people who did give credit to the husband, the wife acting as his agent. That the plaintiff ever heard of that is not so much as suggested. More than four years before any dealings with the plaintiff began, that state of things, being disapproved by the husband, was put an end to. The husband expressly determined and revoked any authority which he might previously have given to the wife; and he afterwards, at the time this debt was contracted, made her an allowance amply sufficient for any necessary purposes of her clothing, according to the state of the circumstances and his condition in life. It is said that of that revocation the plaintiff had no notice; but the plaintiff had no notice of the circumstances that made the revocation necessary; he never had notice of any single fact except that this was a married woman; and more than four years before the beginning of his dealings with the wife, there was an ending of the authority (if ever it had been given to her) to bind her husband as his agent towards other persons.

Then the question is, whether, because these articles are found to be in some sense necessaries in their nature, the husband can be bound. It would be perfectly clear that when a reasonable allowance is made by the husband to the wife, as in this case was made—sufficient to cover a proper expenditure for her own and her children's clothing—it is totally impossible to imply *ex necessitate* any authority of hers in law to bind him, even if she had purported to do so.

These observations seem to me to dispose of the whole case; but I must add that, without going into the authorities, I think if the principles which run through them from first to last are regarded, rather than casual *dicta*, coloured as they necessarily would be by the circumstances of particular cases, in one judgment or in another, the whole of the

judgments being consistent with reason and justice, are also consistent with the decision which was arrived at by the majority of the Court of Common Pleas in the case of *Jolly* v. *Rees* (8).

Therefore I humbly move your Lordships that this appeal should be dismissed, and that the judgment of the Court below should be affirmed.

LORD BLACKBURN.—If it were not that this case is precisely identical with the case of *Jolly* v. *Rees* (8), I should think it desirable to speak more at length than I propose now to do. The opinion upon which I advise your Lordships to act is, that the majority of the Court in the case of *Jolly* v. *Rees* (8) were right in the judgment which they gave, and it is admitted that that governs the present case. I also think that the judgment which my brother Byles gave upon that occasion (which it is admitted might, if it were good, apply to the present case) was not correct as applied to that case, and is not applicable now.

I premise, as did the majority of the Court in *Jolly* v. *Rees* (8), by saying that no question arises here as to what would be the case if the wife had been left destitute, and had not been allowed what was proper for her estate and condition. If there had been desertion or cruelty, so that she had not been supplied with what was proper, no question arises here as to whether she would not have had authority to pledge her husband's credit to get such things. But that is not the case here at all. This is simply a case where a husband is living with his wife, though they are not keeping up any household establishment; and he, in fact, makes her an allowance, which both husband and wife seemed to think, so far as one can judge from appearances, would be sufficient to enable her to supply herself with all necessary clothes. She did get clothes, and there was evidence which satisfied the jury that the husband really and truly told her that she was not to pledge his credit, and that she had assented.

The question comes to be, first, Had she, from her position as wife, authority to pledge her husband's credit, although the husband had revoked that authority? I grant that the fact of a man living with his wife frequently, and indeed always, does afford evidence that he entrusts her with such authorities as are commonly and ordinarily given by husband to wife. I should say that it might be a matter of doubt whether it is so perfectly certain that the articles supplied by milliners are always to be procured upon the credit of the husband, so as to make that a *prima facie* part of the authority. But I will assume that it would be so. In the ordinary case of the management of a household the wife is the manager of the household, and would necessarily get short and reasonable credit on butchers' and bakers' bills and such things; and for those she would have authority to pledge the credit of the husband. I think that if the husband and wife are living together, that is a presumption of fact from which the jury may infer that the husband really did give his wife such authority. But even then I do not think the authority would arise, so long as he supplied her with the means of procuring the articles otherwise. But that is not the present question, which is this: Had the wife a mandate to order the clothes which it would be proper for her in her station in life to have, though the husband had forbidden her to pledge his credit, and had given her money to buy clothes? I think, for the reasons given by the majority of the Court in *Jolly* v. *Rees* (8), and also by the Judges in the Court of Appeal in this case, that there is no authority and no principle for saying that the wife had authority to pledge her husband's credit. I quite agree that if the husband knew that the wife had got credit, if he had allowed the tradesmen to suppose that he himself had sanctioned the transactions by paying them, or in other ways, it might very well be argued that he would have given such evidence of authority that, if he did revoke it, he would be bound to give notice of the revocation to the tradesmen and to all who had acted upon the faith of his authority and sanction. That would be the general rule, that where an agent is clothed with an authority, and afterwards that authority is revoked, unless that revocation has been made known to those who have dealt

with him, they would be entitled to say, "The principal is precluded from denying that that authority continued to exist which he had led us to believe, as reasonable people, did formerly exist." Now, there may be many cases in which the husband has so sanctioned his wife's pledging his credit, but there is not any such case here. Those cases in Ireland which have been referred to seem, as far as I could see by a slight glance, to be cases where the husband had assented to the contracts in such a way that he could not deny them afterwards. With that we have nothing at present to do. But I cannot agree with my brother Byles that there is any authority established by the cases that the fact of a wife living along with a husband alone entitles the tradesmen to presume that the husband has given an authority so as to preclude the husband from denying it. I think that when husband and wife are living together, it is open to the husband to prove, if he can, the fact that the authority does not exist—it being a question for the jury whether a *bona fide* authority did or did not exist. This is not a case of withdrawing authority once given. The question is, whether the plaintiff, who had never dealt with the wife or the husband before, was entitled to assume that there was such an authority implied in the mere fact that the wife was living with her husband; and I think the law is not so.

LORD WATSON.—In this case I shall content myself with saying that, notwithstanding the able and ingenious argument of the learned counsel for the appellants, I am very clearly of opinion that, both upon principle and according to the authorities, the case of *Jolly* v. *Rees* (8) was well decided; and I therefore concur in the judgment which your Lordships propose.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors—Boyce & Ridley, for plaintiff; J. C. Button & Co., for defendant.

[IN THE COURT OF APPEAL.]

(*Appeal from the Common Pleas Division.*)

1880. Dec. 1.

CARTER *v.* STUBBS.*

Practice — Order dismissing Action— Extension of Time for appealing from— Jurisdiction — Discretion — Order LVII. rule 6.

A Master having made an order dismissing an action unless the plaintiff filed an answer to interrogatories within seven days, the plaintiff swore his affidavit in answer on the seventh, but did not file it until the eighth day from the date of the order. After taking out intermediate summonses to extend the time for delivering notice of trial, and to rescind the Master's order, the plaintiff took out two summonses—one to extend the time for appealing from that order, the other to vary it by extending the time for answering interrogatories; and a Judge made the order asked for on each of these two summonses:—Held (*affirming the judgment of the Common Pleas Division*), *that the Judge had jurisdiction to make the order under rule* 6 *of Order LVII.; and that no sufficient ground had been shewn for interfering with the discretion exercised.*

Appeal from a judgment of the Common Pleas Division, affirming two orders made at chambers by Hawkins, J.

The case in the Court below is reported *ante*, p. 4, where the facts are fully stated.

Gould, for the defendant.—It is admitted that the terms of rule 6 of Order LVII. are wide enough to give jurisdiction to make the orders appealed from, but the rule must be construed according to the subsequent decisions, and upon those decisions it is clear there was no jurisdiction, because when the time for answering interrogatories had run out the action was dead, and could not be revived—*Doyle* v. *Kaufman* (1). In *Whistler* v. *Hancock* (2) it was held,

* *Coram* Selborne, L.C.; Baggallay, L.J.; and Brett, L.J.

(1) 47 Law J. Rep. Q.B. 26; Law Rep. 3 Q.B. D. 340.

(2) 47 Law J. Rep. Q.B. 152 Law Rep. Q.B. D. 83.

where a Master had made an order under rule 1 of Order XXIX., dismissing an action for want of prosecution unless a statement of claim was delivered within a certain time, and the time was allowed to run out without the statement of claim having been delivered, that the action was dead and there was no jurisdiction, upon a subsequent application, to grant further time for delivering statement of claim. *Wallis* v. *Hepburn* (3) was decided upon the same ground. *Burke* v. *Rooney* (4) is distinguishable from the present case. The decision really does not amount to more than that there may be special circumstances which raise an equity against the person seeking to take advantage of a mistake by which the action has become extinct. If there was a jurisdiction to make the two orders appealed against, Hawkins, J., and the Court below have exercised a wrong discretion in extending the time for appealing. The cases have laid down a principle that an extension of time ought not to be granted when the ground of the application is mere mistake on the part of the applicant's advisers in calculating time—*The International Financial Society* v. *The City of Moscow Gas Company* (5), *Krehl* v. *Burrell* (6), *M'Andrew* v. *Barker* (7), *In re Mansel. Rhodes* v. *Jenkins* (8), *King* v. *Davenport* (9), *Blyth* v. *Young* (10).

R. T. Reid appeared for the plaintiff.

Lord Selborne, L.C.—It is not necessary to hear counsel for the respondent. On the question of jurisdiction there can be no possible doubt; the terms of rule 6 of Order LVII. are admitted to be sufficient to enable that to be done which has been done here unless some limitation has been put upon them by judicial authority. I cannot discover in all the authorities any foundation for the proposition that there was no jurisdiction to make the orders. *Whistler* v. *Hancock* (2) and *Wallis* v. *Hepburn* (3) are the only two cases which bear upon the question of jurisdiction. Those cases are perfectly intelligible, because there was a subsisting order putting an end to the action. There was no appeal against that order, but some other application to the Court for leave to proceed with the steps of the action, and it was held that, under the existing circumstances, the action was dead and the application could not be granted. The decisions in those cases can have no application whatever to the present case, where the application was in form for an enlargement of the time for appealing from the Master's order; which application, by rule 6, may be made after the time for appealing provided for by the rules has elapsed. The objection, therefore, on the ground of want of jurisdiction, cannot be supported by authority. The other cases cited are entirely consistent with each other. In some cases the application was granted and in some it was not, the decision in each case depending upon the particular circumstances. In each case the question is, whether, as a matter of judicial discretion, having looked into all the circumstances, leave should be given. The circumstances of the present case are these: The time for appealing had elapsed before there was any occasion for appealing if the plaintiff intended to comply with the order to answer interrogatories. I think it right to infer that he did intend to comply with the order, because he swore the affidavit in answer to the interrogatories within the time allowed by the Master: it was a slip of the solicitor's clerk in not putting upon the file of the Court within that time a copy of that affidavit. Perhaps the proceedings which followed upon that slip should have been taken more promptly; some of them, certainly, were not taken with much intelligence; but ultimately they resulted in the proper form of application being adopted, and a proper order being made. I do not think we ought to overrule

(3) Law Rep. 3 Q.B. D. 84 *n.*

(4) 48 Law J. Rep. C.P. 601; Law Rep. 4 C.P. D. 226.

(5) 47 Law J. Rep. Chanc. 258; Law Rep. 7 Ch. D. 241.

(6) 48 Law J. Rep. Chanc. 252; Law Rep. 10 Ch. D. 420.

(7) 47 Law J. Rep. Chanc. 340; Law Rep. 7 Ch. D. 701.

(8) 47 Law J. Rep. Chanc. 870; Law Rep. 7 Ch. D. 711.

(9) 48 Law J. Rep. Q.B. 606; Law Rep. 4 Q.B. D. 402.

(10) Law Rep. 13 Ch. D. 416.

the concurrent discretion exercised by Mr. Justice Hawkins and the learned Judges of the Common Pleas Division. The defendant has not been personally in fault, and there is nothing in the circumstances to lead us to say that he should suffer for the error which was made.

BAGGALLAY, L.J.—I am of the same opinion. I think the order made for extending the time for appealing was clearly within the jurisdiction given by the 6th rule. A discretion to make such an order is given in terms by the rule. It is difficult to imagine a more extended discretion, though of course it is to be exercised judicially. The two cases cited —*Whistler* v. *Hancock* (2) and *Wallis* v. *Hepburn* (3)—are not in point, because no application to extend the time for appealing from the order putting an end to the action was made. Such an application was made in *Burke* v. *Rooney* (4), and the Court held there was jurisdiction to extend the time, though no doubt there were also in that case special circumstances on which the Court gave leave.

A discretion has been exercised in the present case by Mr. Justice Hawkins, and concurred in by the Common Pleas Division; it would require a very strong case to induce me to differ from their opinion, and I am not prepared to do so.

BRETT, L.J.—The first question is, whether there was jurisdiction under rule 6 to make both the orders appealed against. The first of these orders was to enlarge the time for appealing from the order of the Master dismissing the action unless the plaintiff answered interrogatories within seven days. Rule 6 is in the largest terms, and under it there was power to enlarge the time for appealing against the order of Master Francis, though the time had run out. When time was enlarged that order stood as good, and Mr. Justice Hawkins then made the second order, to enlarge the time for answering interrogatories. Cases have been cited to shew that he had no jurisdiction, but in those cases the Court had no jurisdiction because no summons had been taken out to enlarge the time for appealing against the order dismissing the action, and the cause was dead. In *Burke* v. *Rooney* (4), the mistaken mode of proceeding in the other cases was found out, and the same course was taken as in the present case, and it was held clearly to give the Court jurisdiction. I think *Burke* v. *Rooney* (4) was right, and the other cases were also right. The only limitation in rule 6 is as to the terms upon which an extension of time can be given. They are to be "such as the justice of the case may require;" otherwise the power of the Judge to make the order is as large as possible.

It is said that if there was jurisdiction to make the orders the Judge has exercised his discretion wrongly. It is said that a rule has been laid down by this Court pointing out the frame of mind in which we ought to approach this question; and, according to the argument, if a solicitor's clerk makes a slip, the consequence of which may be a loss of 10,000*l.* to the client, we cannot give an extension of time to remedy the effect of that which can be proved to be a mere error. The cases cited were under rule 15 of Order LVIII., the terms of which are different from those of Order LVII. rule 6. Rule 15 speaks of "special leave," and there is no such phrase in rule 6. But I entirely agree with what I understood to be the view of the Lord Chancellor that there is immense difficulty in Judges laying down any rule as to special circumstances to arise in the future. It is impossible they can do so. One can only say with respect to cases upon the exercise of discretion, that when exactly the same facts occur again the decisions must be followed. Here I see no reason for overruling the decision arrived at by Mr. Justice Hawkins and the two Judges of the Common Pleas Division.

Judgment affirmed.

Solicitors—Wild, Browne & Wild, for plaintiff; Hunters, Gwatkin & Haynes, for defendant.

[IN THE EXCHEQUER DIVISION.]

FRY, J. 1880. Dec. 15. } MATHEWS *v.* JEFFERY.

Metropolitan Burial Act (15 *&* 16 *Vict. c.* 85), *s.* 33—*Grave—Real Estate—Heir—Certain Grave.*

Spaces were granted in perpetuity by a burial board pursuant to the Metropolitan Burial Act to E. and her heirs. E. died intestate:—Held, *that the exclusive right of burial in the spaces vested in her heir.*

This was a case heard on further consideration by Mr. Justice Fry, after a trial at Stafford Summer Assizes. The facts were as follows:—

In 1873 Eliza Mathews, on the occasion of the death of her husband, Edward Mathews, purchased two grave spaces in Hanley Cemetery of the corporation of that town, acting in their capacity of the burial board for the district under the several Acts of Parliament in force in respect to burials, and by a conveyance under their common seal the corporation granted "unto the said Eliza Mathews, and her heirs, the exclusive right of burial in the grave spaces numbered respectively 16,555 and 16,556 on the plan of grave spaces in the second-class ground consecrated, and containing respectively an area of nine feet by four feet superficial square measure, in the cemetery, situated at Hanley aforesaid, being part of the ground provided by the said burial board. To hold the same to the said Eliza Mathews, her heirs and assigns, for ever, for the purpose of burial, subject to the payment of such fees or sums as are reserved and made payable by the said Acts or by the said burial board, and to the regulations now in force, or which may hereafter be issued with regard to interments in the said cemetery by Her Majesty's Secretary of State, or by the said burial board, or any other competent authority." The power under which the corporation made the grant was derived from the 33rd section of the Metropolitan Burial Act (15 & 16 Vict. c. 85), portions of which Act were made applicable to district burial boards by 16 & 17 Vict. c. 134. s. 7.

Section 33 of 15 & 16 Vict. c. 85 enacts: "Any burial board, under such restrictions and conditions as they think proper, may sell the exclusive right of burial, either in perpetuity or for a limited period, in any part of any burial ground provided by such board, and also the right of constructing any vault or place of burial with the exclusive right of burial therein, in perpetuity, or for a limited period, and also the right of erecting and placing any monument, gravestone, tablet or monumental inscription in such burial ground, but there shall be payable to the incumbent or minister of the parish out of the fees or payments to be paid in respect of any rights acquired under this enactment, in the consecrated part of such burial ground (in lieu of the fees or sums which he would have been entitled to on the grant of the like rights in the burial ground of his parish), such fees or sums as shall be settled and fixed by the vestry, with the approval of the bishop of the diocese; or if no such fees or sums shall have been so settled, then such fees as he would by law or custom have been entitled to on the grant of the like rights in the burial ground of his parish."

Eliza Mathews buried her deceased husband in the grave spaces. She died in 1874, and was herself buried in the spaces. She died intestate. The plaintiff was her eldest son, her heir-at-law and administrator. The defendant was husband of a daughter of Eliza Mathews, and his wife, under the will of Edward Mathews, her father, was entitled for her separate use to an equal share with her brothers and sisters in her father's estate. The defendant had caused the body of his infant child to be buried in the grave spaces. The plaintiff in consequence brought this action and claimed—First, Possession of the grave spaces; second, 500*l.* damages for trespass; and, third, An injunction to restrain the defendant from continuing to retain possession of the grave spaces, from continuing to keep his child buried there and from continuing to interfere with the plaintiff's rights.

The defendant by his statement of defence alleged that the purchase-money for the grave spaces had been paid by

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Eliza Mathews out of money belonging to her husband's estate, and he claimed on that ground to be entitled in right of his wife to bury his children in the spaces. He also claimed to be entitled on the alternative ground that the grave spaces were personal property of Eliza Mathews, and his wife was one of her next-of-kin.

And he also submitted that the grant by the corporation operated as an appropriation of the burial plots as a place of burial for all the descendants or family of Eliza Mathews, being inhabitants of the district of the Burial Board of Hanley.

When the trial took place, at Stafford, the Judge left it to the jury—First, To say whether the grave spaces were purchased out of the estate of Edward Mathews; and, second, To assess damages for the trespass.

The jury found that the grave spaces were purchased out of money belonging to the estate of Edward Mathews, and assessed the damages at one farthing.

Jelf and *H. D. Greene*, for the plaintiff, contended that he had the property in and exclusive control over the grave spaces, either as heir of E. Mathews, if the word "heir" was a word of limitation, or, if not, as *persona designata*, even if the spaces were personal property and passed to the personal representative, he was the person entitled.

Anstey and *Tyssen*, for the defendant, argued that the usual faculty for a vault was granted to a man and the members of his family—*Roseler* v. *The Vicar of Northfleet* (1), *Magnay* v. *The Rector of St. Michael's* (2), *Bryan* v. *Whistler* (3), 1 *Phillimore's Ecclesiastical Law*, 884; and also the proper form of granting a faculty of a pew was to a man and the members of his family—2 *Phillimore's Ecclesiastical Law*, 1802.

Such faculties, they argued, conferred rights to the use of the grave or pew, as the case might be, on all the members of the grantee's family who fulfilled the requisite condition of occupying the house to which the pew was attached, or living in the parish where the churchyard was situated. By analogy, a grant in perpetuity under the Metropolitan Burials Act conferred a right on every member of the grantee's family residing in the burial district to bury the body of a deceased member of the family, at any rate if he died in the district.

If this were not the proper view of the mode in which the right of interment was to be exercised by analogy to the Cemeteries Clauses Act (10 & 11 Vict. c. 65. s. 44), the right to the grave spaces was personal estate and was to be used by all the next-of-kin of the purchaser in common.

FRY, J., stated the facts, and said—The defendant denies the *prima facie* title of the plaintiff as the person mentioned in the grant on two grounds, or two analogies.

The defendant says that the right obtained by Eliza Mathews vested in her whole family, and that any member of her family had a right to bury any other member, provided that the deceased resided in the parish. That is a very wide claim, and the only foundation for the argument is that in certain cases of a grant of a faculty for a pew the form of the grant is to a man and his family. Whether the members of such family have any right to insist on their occupation of the pew is a point on which no authority is brought, and I am asked to infer from the mere fact of that being a common form of grant that such right always vests in every member of a family. I do not come to that conclusion at all. I think very serious difficulties would arise if there were no person capable of deciding who had a right to use the grave or pew. That is attempted to be got over by saying that the incumbent or burial authorities have a right to regulate the burials, so as to prevent anything unseemly; but it seems to me that, if only on the ground of convenience, there must be some interested person in whom the right is vested. And as for the form of the grant of a faculty for a pew, it is to be borne in mind that the object of the faculty is to exclude other parishioners rather than to define the rights of the family.

(1) 3 Adams, 15.
(2) 1 Hag. Ec. 48.
(3) 8 B. & C. 288.

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The only other analogy which is attempted to be presented is that of certain public cemeteries, where, under the Cemeteries Clauses Act, grants may be made, and the property is vested in the grantee as personal estate. Such provision was incorporated in the earlier Acts, and not in this, and does not strictly apply. In this case the Legislature has said the burial board may grant in perpetuity. It must be able to point out the person and class of persons who are to take, and here the board has pointed out Eliza Mathews and her heirs; and I cannot suppose that any person except those named in the grant have a right.

[His Lordship also held that the fact that the purchase was wrongfully made with money belonging to the estate of Edward Mathews gave no right in the grave spaces to the defendant, as the husband of one of the persons interested in the estate, and gave judgment for the plaintiff.]

Solicitors—Peace & Co., agents for A. Challinor, Hanley, for plaintiff; Lewellyn & Ackrill, agents for Lewellyn & Ackrill, Tunstall, for defendant.

[IN THE COMMON PLEAS DIVISION.]

1880. Nov. 26, 27. } LATTER *v.* BRADDELL, WIFE AND ANOTHER.

Assault—Coercion—Consent.

The plaintiff, a housemaid in the service of the defendants B, was accused by her mistress of being pregnant. A doctor, who had been sent for by the mistress, went with the plaintiff into her bedroom, told her to lie down on the bed and take off her dress, stays and drawers, which she did, but protested and cried. No force was used by the doctor, nor did he do anything beyond what was necessary to ascertain if the plaintiff were pregnant or not. The plaintiff brought an action against her master, her mistress and the doctor. At the end of the plaintiff's case the Judge dismissed the case as against the master and mistress, and the jury found a verdict for the other defendant, the doctor. The plaintiff obtained a rule nisi for a new trial on the ground of misdirection:—Held (*by* LINDLEY, J.), *that the nonsuit was right, as there was no evidence of force or coercion such as to have deprived the plaintiff of her will; but there was evidence that she in fact consented to the examination, although protesting, and with tears.* Held (*by* LOPES, J.), *that the nonsuit was wrong, and that there ought to be a new trial, as the consent given (if any) was not one with which the will went, but a submission to what was done obtained through a belief that the plaintiff was bound to obey her master and mistress, and through fear of evil consequences to herself, induced by the conduct of her master and mistress.*

This was an action for damages for an assault, tried before Lindley, J., at the last Manchester assizes. At the trial the learned Judge withdrew the case from the jury as against Captain and Mrs. Braddell, on the ground that there was no evidence of the non-consent of the plaintiff on which the jury could reasonably act. The jury found a verdict for the defendant, the doctor. A rule was obtained calling on the defendants to shew cause why the verdict should not be set aside and a new trial had on the ground that the learned Judge wrongly withdrew the case from the jury as against the defendants Braddell, and that the verdict was against the weight of evidence.

The facts and arguments appear sufficiently from the judgments delivered.

Addison shewed cause.

Murphy and *Jordan* supported the rule.

The following cases were cited in support of the argument against the rule: *Christopherson* v. *Bare* (1); *The Queen* v. *Lock* (2).

The following judgments were (on Dec. 3) delivered by

LOPES, J.—This was an action of assault which was tried before my brother Lindley, at the last Manchester assizes, and

(1) 11 Q.B. Rep. 473; 17 Law J. Rep. Q.B. 109.

(2) 42 Law J. Rep. M.C. 5; Law Rep. 2 C.C.R. 10.

resulted in a verdict for the defendant Sutcliffe. The learned Judge at the end of the plaintiff's evidence withdrew the case against Captain and Mrs. Braddell from the jury, holding that there was no evidence against them upon which a jury could reasonably act.

A rule was obtained calling upon the defendant to shew cause why the verdict should not be set aside and a new trial had on the ground that the Judge ought not to have withdrawn the case as against Captain and Mrs. Braddell, and that the verdict was against the weight of evidence. The Court is now asked to make that rule absolute. I think the rule should be made absolute. The case, in my opinion, is a very important one, and I regret that I am not able to come to the same conclusion as my brother Lindley. I need not say that I have felt compelled to differ from him after mature and careful consideration. I think the case against Captain and Mrs. Braddell ought to have been left to the jury. I do not think it was correct to tell the jury that to maintain this action the plaintiff's will must have been overpowered by force or the fear of violence. This I understand was the direction given by the learned Judge to the jury in summing up the case against the defendant Sutcliffe, and I presume this view of the law induced him to withdraw from the jury the case against Captain and Mrs. Braddell.

I will now call attention to the facts. The plaintiff was a housemaid in the service of Captain and Mrs. Braddell. Captain and Mrs. Braddell had been absent from home, and returned on the 23rd of December. From some information given by a charwoman, Mrs. Braddell came to the conclusion that the plaintiff was in the family way. On the 27th of December Mrs. Braddell told the plaintiff to pack up and leave before twelve o'clock, as she was in the family way. This the plaintiff denied. Mrs. Braddell replied, "The doctor will be here directly." (The doctor had been previously sent for unknown to the plaintiff.) Mrs. Braddell told the plaintiff to go to her room. The plaintiff cried. Mrs. Braddell forbade her to speak. The plaintiff went to her bedroom. The doctor came and went to the plaintiff's bedroom. The plaintiff cried and said she never had such treatment before. She asked the doctor what he was going to do, and said she did not wish to be examined. The doctor said he was a professional man, and told the plaintiff to take off her dress. The plaintiff said she did not like to do so. The doctor said Never mind, it would satisfy Mrs. Braddell and him. The doctor told the plaintiff to take off her petticoat. The plaintiff cried and said she did not like to take off her other things. The doctor said, "You must." The plaintiff took off her stays. The doctor said she must take off her chemise. The plaintiff said she did not like to do so. The doctor said she must, and told her to slip her arms through. The doctor then told her to lie on her back on the bed and to loosen the strings of her drawers. He then pinched her breasts and stomach and sounded it. The plaintiff cried all the time. The doctor, after examining her, said she was all right, and he must speak seriously to Mrs. Braddell about it. The plaintiff then dressed. During the examination the plaintiff and the doctor were alone—there was no female in the room. Mrs. Braddell refused to give the plaintiff a character. The plaintiff in answer to a question put to her by the learned counsel swore that what was done was not with her consent. This was the evidence given by the plaintiff, and the learned Judge held there was no evidence of non-consent on her part as against Captain and Mrs. Braddell to be left to the jury, and withdrew the case as against them from the jury.

If the plaintiff voluntarily consented, or if, in other words, the assault was committed with her leave and licence, the action is not maintainable; and to justify the ruling of the learned Judge, what was done must have been so unmistakably with the plaintiff's consent that there was no evidence of non-consent upon which a jury could reasonably act. It seems to me there was abundant evidence of non-consent to be left to the jury.

The sending for a doctor by a master or mistress and directing him to examine a female servant, without first apprising her, is, in any circumstances, an arbitrary

and high-handed proceeding, and cannot, in my opinion, be justified unless the servant's consent is voluntarily given. A submission to what is done, obtained through a belief that she is bound to obey her master and mistress; or a consent obtained through a fear of evil consequences to arise to herself, induced by her master's or mistress's words or conduct, is not sufficient. In neither case would the consent be voluntarily given: it would be a consent in one sense, but a consent to which the will was not a party. The plaintiff's case is stronger. She swears she did not consent. I know not what more a person in the plaintiff's position could do unless she used physical force. She is discharged without a hearing, forbidden to speak, sent to her room, examined by her mistress's doctor alone, no other female being in the room, made to take off all her clothes and lie naked on the bed. She complains of the treatment, cries continuously, objects to the removal of each garment and swears the examination was without her consent. Could it be said, in these circumstances, that her consent was so unmistakably given that her state of mind was not a question for a jury to consider? I cannot adopt the view that the plaintiff consented because she yielded without her will having been overpowered by force or fear of violence. That, as I have said, is not, in my opinion, an accurate definition of consent in a case like this.

I do not understand why, if there was a case against the doctor there was none against Captain and Mrs. Braddell. The doctor was employed to see if the plaintiff was in the family way. The plaintiff does not suggest in her evidence that he did more than was necessary for ascertaining that fact. If this is so, the Braddells are responsible for what was done by the doctor.

It is said there ought to be no new trial as against the doctor. I cannot agree with the definition of consent given by the learned Judge, and I think the withdrawing the case against the Braddells influenced the jury in finding for the doctor. They would naturally think the doctor only did what he was told. The Braddells put him in motion, and it would be hard, when the principals are acquitted, to find the agent guilty.

There should be a rule absolute for a new trial.

LINDLEY, J.—I am of opinion that, assuming everything said by the plaintiff in this case to be true, a verdict in her favour against the master and mistress could not be supported in point of law, and that as to them she was properly nonsuited.

The plaintiff was in service with the defendants Braddell, who on their return after an absence from home received information from the charwoman which caused Mrs. Braddell to bid the plaintiff leave her service by twelve o'clock on the day that order was given, as she was in the family way. The plaintiff denied this, and Mrs. Braddell then said, "Well, the doctor will be here directly, and we shall then see." The plaintiff was then told to go to her bedroom, and she went, whither the doctor on his arrival followed her. He told her to take off her garments, which she did, saying, however, "Must I take off this?" or that she "did not like to take off that," as each article of clothing had to be removed by her under the doctor's directions. She also said that she cried and protested, and that it was all done without her consent. The examination was, however, submitted to by her, and the doctor found that the plaintiff was not in the family way. This is the assault complained of.

The plaintiff's case cannot be put higher than this, namely, that, without consulting her wishes, her mistress ordered her to submit to be examined by a doctor, in order that he might ascertain whether she (the plaintiff) was in the family way, and that she (the plaintiff) complied with that order reluctantly—that is, sobbing and protesting—and because she was told she must, and she did not know what else to do. There was, however, no evidence of any force or violence, nor of any threat of force or violence, nor of any illegal act done or threatened by the mistress beyond what I have stated; nor did the plaintiff in her evidence say that she was in fear of the mistress or of the doctor, or that she was in any way overcome by fear. She said she did not

consent to what was done; but the sense in which she used this expression was not explained, and to appreciate it regard must be had to the other facts of the case. The plaintiff had it entirely in her own power physically to comply or not to comply with her mistress's orders, and there was no evidence whatever to shew that anything improper or illegal was threatened to be done if she had not complied. It was suggested that her mistress ordered the examination with a view to see whether she could dismiss her without paying a month's wages. But there was no evidence of any threat to withhold wages, nor of any conversation on the subject of wages, until the plaintiff was paid them on leaving. The question, therefore, is reduced to this: Can the plaintiff, having complied with the orders of her mistress, although reluctantly, maintain this action upon the ground that what was done to her by the doctor was against her will, or might properly be so regarded by a jury? I think not. It is said that the jury ought to have been asked whether the plaintiff in effect gave her mistress leave to have her examined, or whether the plaintiff's will or mind went with what she did. But, in my opinion, such questions inadequately express the grounds on which alone the defendants can be held liable. The plaintiff was not a child; she knew perfectly well what she did and what was being done to her by the doctor. She knew the object with which he examined her, and upon the evidence there is no reason whatever for supposing that any examination would have been made or attempted if she had told the doctor she would not allow herself to be examined. Under these circumstances I am of opinion that there was no evidence of want of consent as distinguished from reluctant obedience or submission to her mistress's orders, and that in the absence of all evidence of coercion, as distinguished from an order which the plaintiff could comply with or not as she chose, the action cannot be maintained.

I have examined all the decisions I can find on assault, battery, duress and allied subjects, but I can find no authority in support of such an action as this. The cases most favourable to the plaintiff are those like *Atkinson* v. *Denley* (3), in which money paid under compulsion in the sense of unfair or improper dictation or oppression has been recovered back. But in all such cases there has been another element, namely, either mistake or no consideration, or an illegal consideration, for the payment in addition to the element of coercion; and, in my opinion, such cases are no guide for the proper determination of an action for assault and battery.

A question somewhat like this arose incidentally in *Biffin* v. *Bignell* (4), in which a jury had to consider whether a wife had been forced by her husband to live apart from him. She had been properly confined in a lunatic asylum. Shortly before she was discharged cured her husband offered her an allowance if she would live apart from him, but if she would not he said he would send her to another asylum. She accepted his terms, came out of the asylum and lived apart from her husband, who paid her the stipulated allowance, but who was afterwards sued for her board and lodging. Baron Bramwell told the jury that the agreement would not be binding on the wife if her assent to it was obtained by the threat that if she did not consent she would be sent to another asylum. But the Court held that this was a misdirection, on the ground that the threat, such as it was, did not amount to duress or anything like.

In the present case there was no evidence of any threat at all, in the event of non-compliance with the orders of the mistress; and it appears to me that there was no evidence to shew that Mrs. Braddell did anything illegal, or, in other words, to shew that what she ordered to be done was done against the plaintiff's will in any accurate sense of that expression. This, however, is what has to be established—see *Christopherson* v. *Bare* (1).

I do not, however, wish to be understood as being of opinion that the plaintiff had no cause of complaint against her

(3) 6 Hurl. & N. 778; affirmed 7 ibid. 934; 30 Law J. Rep. Exch. 361.

(4) 7 Hurl. & N. 877; 31 Law J. Rep. Exch. 189.

Latter v. *Braddell, C.P.*

mistress; but, in my opinion, the real substantial grievance was that the plaintiff accused of being in the family way was ordered to be examined, and when the accusation proved to be unfounded was summarily dismissed without any apology. Whether the mistress could or could not have justified such harsh conduct I cannot say, not having heard her evidence. But, harsh as such conduct apparently was, it does not affect the question on which this action turns. I cannot, however, help thinking that if the conduct of the mistress as regards the manner of dismissal had been more considerate, the impossibility of maintaining this action would be more plainly apparent.

As regards the doctor, who is made a defendant, I am of opinion, for the reasons already given, that there was no misdirection in point of law, and that the verdict in his favour was perfectly correct. His conduct throughout was kind and considerate; and whatever grievance the plaintiff may have against her mistress, she has none whatever against the doctor. This action has been tried twice, and although I am extremely reluctant to adhere to my own opinion when other persons who are more likely than I am to be right think I am wrong, I cannot give my voice for further litigation in a case in which I feel convinced no injustice has been done.

I am of opinion that this rule ought to be discharged.

Rule discharged.

Solicitors—Toulmin, Smith & Fuller, agents for Atkinson, Dendy & Paterson, Manchester, for plaintiff; Shaen, Roscoe & Co., for defendants.

[IN THE QUEEN'S BENCH DIVISION.]

1880. Nov. 10. MOGG (*appellant*) *v.* THE OVERSEERS OF YATTON (*respondents*).

Poor-rate—Rateable Occupation—Sale of Grass—Licence of Exclusive Pasturage for Ten Months.

[For the report of the above case, see 50 Law J. Rep. M.C. 17.]

[IN THE COURT OF APPEAL.]

(*Appeal from the Exchequer Division.*)

1880. Nov. 27. 1881. Feb. 5. THE ATTORNEY-GENERAL *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY.*

Revenue—Railway Passenger Duty—Duty added to Fare—Extra Charge for Sleeping Accommodation—5 & 6 Vict. c. 79, ss. 2 and 4.

By 5 & 6 Vict. c. 79 duty is payable on all sums received or charged for the hire, fare or conveyance of passengers upon any railway. A private Act fixed the maximum rates to be charged by the defendants for the conveyance of passengers, the tolls for the use of carriages and every other expense incidental to the conveyance aforesaid, except government duty.

The defendants added the duty to the fares, which were fixed in some cases at the maximum and in some cases below the maximum rate allowed, and charged passengers the sum total as the price of a ticket.

An information having been laid by the Crown claiming duty on the sum so added to the fare,—

Held (*affirming the judgment of the Exchequer Division*), *that the Crown was entitled to duty upon the sum so added.*

The Crown, by the same information, claimed duty on sums charged by the defendants to first-class passengers in addition to the ordinary fare, for the use of a sleeping carriage provided with beds, lavatories and attendance, in which such passengers could remain undisturbed till such hour as they might choose to be called, even though they had arrived at their journey's end at an earlier hour.

Held *also* (*affirming the judgment of the Exchequer Division*), *that the Crown was entitled to duty upon the sum charged for the extra accommodation.*

Appeal by the London and North Western Railway Company from a judgment of the Exchequer Division.

The case is reported 49 Law J. Rep. Exch. 670, where the material portions of the information are set out. The

* *Coram* Lord Coleridge, L.C.J.; Baggallay, L.J.; and Brett, L.J.

questions raised on the appeal were, first, whether, regard being had to the provisions of 5 & 6 Vict. c. 79, and of 9 & 10 Vict. c. cciv., the Crown was entitled to duty on the amount added by the railway company to the passenger fare to cover the duty payable to the government on that fare; and, secondly, whether the Crown was entitled to duty upon sums of money received by the railway company for the use of sleeping carriages provided by them for first-class passengers, who alone could use these carriages, and who paid for such accommodation a sum in addition to the ordinary first-class fare.

The railway company do not in all cases charge the maximum fare allowed by law in the case of first- and second-class passengers, but they do charge the maximum fare in nearly every case to third-class passengers; and in addition to the fare, whether maximum or not, they charge passengers a further sum calculated at the rate of five per cent. to cover the duty.

The railway company run by certain of their trains sleeping carriages in which they provide sleeping and lavatory accommodation and attendance. Such carriages are, on arriving at their destination, placed on a siding, and the passengers can remain undisturbed in them until such time as they choose to be called.

The Crown claimed duty on the extra sums charged to cover the duty, and also on those charged for the use of these sleeping carriages.

The Exchequer Division gave judgment for the Crown on both points.

The railway company appealed.

The Solicitor-General (*Sir F. Herschell*), with him *Dugdale*, for the appellants.—The railway company claim to add the government duty of five per cent. on to the third-class passenger fare; they do so add it, and they keep a separate account of the sums so received; and as the sums so received are not received for the hire, fare or conveyance of passengers within the statute (1), it is contended that no duty is payable on them, whether the fares to which the duty so added are

(1) 5 & 6 Vict. c. 79. s. 2: "And be it enacted, That in lieu of the duties by this Act repealed, there shall be raised, levied, collected and paid unto and for the use of Her Majesty, her heirs and successors, in and throughout Great Britain, . . . for and in respect of the passengers conveyed upon any railway, . . . the several duties or sums of money set down in figures against the same respectively, or otherwise specified and set forth in the schedule to this Act annexed, and that the said schedule shall be deemed and taken to be a part of this Act. . . ."

Section 4: "And be it enacted, That the proprietor or company of proprietors of every railway in Great Britain, and every other person who shall carry any passengers for hire in or upon any railway in Great Britain, shall from time to time, and at all times, keep and enter, or cause to be entered, in a book or books to be kept for that purpose, . . . a just and true account of all and every sum and sums of money which shall be received or charged daily by or for such proprietor or company, or other person, for the hire, fare or conveyance of all such passengers as aforesaid, whether the same shall be received for the conveyance of passengers on the railway of such proprietor or company, or other person only, or on such last-mentioned railway and any other railway or on any such other railway only, and for or in respect of all which sums of money the duties charged by this Act shall in manner hereinafter directed be paid by the said proprietor or company, or other person so receiving or charging the same as aforesaid, without any deduction or abatement thereout, on any account or pretence whatever; and the proprietor or company of proprietors of any railway so receiving or charging any such sums of money as aforesaid, shall also in like manner keep and enter, or cause to be entered, an account of all such sums of money paid or accounted for, or to be paid or accounted for by such proprietor or company to the proprietor or company of proprietors of any other railway (specifying the same) upon which any of such passengers shall be carried or conveyed as his or their share or proportion of any such sums of money so received or charged as aforesaid, or as or for in the nature of toll or otherwise for the use of such last-mentioned railway in the conveyance of such passengers; and the proprietor or company of proprietors of every such last-mentioned railway shall in like manner keep and enter, or cause to be entered, an account of all sums of money so paid or accounted for to him or them as last aforesaid, and for or in respect of which the duties shall, or ought to have been, paid as aforesaid by such first-mentioned proprietor or company. . . . And such proprietor or company, or other person, shall . . . . pay . . . . the duties chargeable under this Act, for or in respect of all and every the sum and sums of money so received as aforesaid. . . .

"Schedule containing the duties by this Act granted on stage carriages, . . . and also the duties in respect of passengers conveyed for hire by carriages travelling upon railways (that is to say)—For and in respect of all passengers conveyed for

fixed at or within the maximum rate allowed by Parliament (1).

[LORD COLERIDGE, L.C.J.—Has Parliament empowered the railway company to act as collector for the government?]

The railway company is obliged to collect the duty, and that marks the distinction between what is and what is not subject to duty—the company collects but does not receive the duty. If the duty were repealed the company would be unable to charge it any longer, for the sum is earmarked as duty and is in no sense a fare. That the company might charge the duty to passengers was clearly contemplated by Parliament, for the special Act of the defendants provides that certain charges shall include every expense except government duty (2).

[BRETT, L.J.—That is to say, although the appellants are not empowered to charge the duty, it is said the exception implies that they may.]

If reference be made to that part of the appellants' private Act which follows immediately after the provisions as to fares, it will be found that for the conveyance of goods certain sums are permitted to be charged which it is stipulated shall cover every expense except a reasonable sum for loading and unloading (2), and this supports the argument that under clauses exactly similar in construction and enactment the government duty, like the unloading charge, may be charged in addition to the fare.

The argument on behalf of the defendants as to those cases in which the fare is within the maximum rate allowed to be charged is not so strong, for the company might doubtless charge the whole as fare, inasmuch as there is nothing to earmark that part which is fare and to distinguish it from that part which is duty; but the case where the fare is fixed at the maximum rate is thereby rendered all the stronger.

[BRETT, L.J.—Could the appellants demand in such a case, first, a named sum for fare, and then, separately, a definite sum for government duty?]

That is the contention of the railway company, and the legislation on the subject contains nothing to forbid them from doing so.

The question as to the duty claimed on the hotel accommodation provided by the company in their sleeping carriages must be one of degree; but it is submitted that charges for beds and attendance are not charges made or received for the conveyance of passengers.

Sir H. Giffard (with him *W. Karslake*) was directed to confine himself to the question of the duty on the sums received for the use of the sleeping carriages.—Railway companies are created by statute for certain purposes: their object and duty is to convey passengers for hire, and the duty claimed is duty on the moneys so received. Railway companies are not authorised to keep hotels, and although this company has by statute leave to keep certain hotels, that is a special exception. All the matters on which duty is claimed are matters ancillary to the conveyance of the passenger; it is only a passenger who can use the hotel accommodation (as the appellants call it) thus provided, so that the money thus received is, within the words of the appellants' Act (2), a charge for, and an expense incidental to, conveyance.

Cur. adv. vult.

LORD COLERIDGE, L.C.J. (on Feb. 5, 1881), read the judgment of the Court:—

By the 2nd section of the Railway Passengers Duty Act (5 & 6 Vict. c. 79) a duty is made payable in respect of all passengers carried for hire upon or along

hire upon or along any railway, a duty at and after the rate of 5*l.* for every 100*l.* upon all sums received or charged for the hire, fare or conveyance of all such passengers."

(2) 9 & 10 Vict. c. cciv. (local and personal) s. lxiii.: "That the maximum rate of charges to be made by the company for the conveyance of passengers along the said railway, including the tolls for the use of the railway, and of carriages and for locomotive powers, and every other expense incidental to such conveyance as aforesaid except Government duty, shall not exceed the following sums. . . . And with respect to the conveyance of goods the maximum rates of charge to be made by the company for the conveyance thereof, including the tolls for the use of the railway and waggons or trucks or locomotive power, and every expense incidental to such conveyance, except a reasonable sum for loading, covering and unloading of goods, . . . shall not exceed the following sums. . . ."

railway, and it is enacted that such shall be "at and after the rate of r every 100*l.* upon all sums received harged for the hire, fare or convey- of all such passengers." It appears in fixing the sums to be paid by ngers conveyed by their railways, lefendants have taken into account amount of duty to which they con- ed they would be liable, and have d to the sum which, but for such ity, they would have deemed a suf- t fare, a further sum, calculated at ate of five per cent. upon the former, ver the amount of duty; and they ; that the last-mentioned sum so cal- ed is the full amount of duty pay- by them, though the aggregate of wo sums is the amount charged to eceived from the passenger.

e Attorney-General, however, con- that according to the true con- tion of the Act the amount of duty rly payable is a sum equal to five cent. upon the aggregate amount by the passenger.

e first question raised by the present mation is, which of these two con- ons should prevail. The Exchequer ion has decided, and, in our opinion, rightly decided, in favour of the n. The only question which we have nsider is as to the construction of Act; neither the way in which the any have arrived at the fares which deem it necessary or expedient to e to the passengers who use their ays, nor the mode in which they their accounts, can affect this ques- f construction. In our opinion the age of the Act is free from doubt: rice which the passenger is called to pay, and does pay, for his ticket, ut which he is not at liberty to l by the railway, is the sum charged m and received by the company for onveyance to his destination, of ver items it may be composed; and it is upon this price or sum that mount of duty is by the Act directed calculated.

liance has been placed by the de- nts upon the language of a clause e of their local and personal Acts 10 Vict. c. cciv.), which fixes the maximum rates which they are to be at liberty to charge for the conveyance of passengers, and provides that such maximum rates shall include the tolls for the use of the railway, and of carriages, and for locomotive power, and every other expense incidental to such conveyance except government duty; and it has been urged that if the defendants can only charge the maximum rate with five per cent. additional upon that maximum rate, and have to pay duty upon the aggregate sums, they will be substantially receiving something less than the maximum. This may be so if they are at liberty to add anything to the maximum rate, though doubts may be entertained and have been expressed as to their power to do so; but, assuming such to be the case, any loss to which the company may be thereby subjected is due to the provisions of their local and personal Act, which has imposed fetters upon them and cannot affect the construction of the Railway Passengers Duty Act, which was passed four years previously.

But a second question has been raised in the action, the answer to which should, in our opinion, upon consideration, be also answered in favour of the Crown.

It appears that to certain of their trains running in the night what are termed sleeping carriages are attached, for the use of which by persons who have taken first-class tickets an extra charge is made. These carriages afford not only special accommodation for sleeping, but lavatories and other conveniences. The persons travelling in these carriages have particular privileges: they are not disturbed during the night by demands to exhibit their tickets, and should they arrive at their destination early in the morning they may remain in their sleeping berth until it is convenient for them to leave; a special servant also is attached to these carriages, whose duty it is to call the passengers in the morning and to supply them with hot water.

A separate charge is made for this accommodation, and a separate ticket given to the passenger who desires to avail himself of it.

The defendants contend that they are not liable to pay duty on the price of

their separate tickets. The Exchequer Division has held that they are.

We are of the same opinion. We regard the additional accommodation afforded by the sleeping carriages as differing in no essential particular from the superior accommodation afforded by a second-class carriage over a third, or by a first-class carriage over both. If the company issued tickets to all passengers alike at the price charged to passengers travelling in third-class carriages, and then issued second tickets at corresponding prices to those desiring to travel in a higher class of carriage, it could hardly be contended that duty would not be payable upon the prices paid for such second ticket. The passenger who is content to travel in a third- or second-class carriage in the day might well desire to travel in a carriage of higher class by night, and in like manner a passenger ordinarily travelling by day in a first-class carriage might desire the additional accommodation at night of a sleeping carriage. No separate charge is made in the present case; the charge, though written on a separate ticket, is, in our opinion, part of one charge for the conveyance of the passenger in a particular way, and is therefore a part of the charge for the conveyance of a passenger received and charged for such conveyance. We are of opinion that the appeal should be dismissed.

Judgment affirmed.

Solicitors—R. F. Roberts, for appellants; the Solicitor of Inland Revenue, for the Crown.

[IN THE QUEEN'S BENCH DIVISION.]

1880. Dec. 11. THE QUEEN *v.* GAUNT.

Elementary Education Act, 1870 (33 & 34 *Vict. c.* 75), *s.* 91—*School Board Election — Corrupt Practices — Penalty and Disqualification on Conviction—Summary Jurisdiction of Justices.*

[For the report of the above case, see 50 Law J. Rep. M.C. 32.]

[IN THE COMMON PLEAS DIVISION.]

1880. Dec. 10. COTTAM (*appellant*) *v.* GUEST (*respondent*).*

Tramways Act, 1870 (33 & 34 *Vict. c.* 78), *s.* 54—*User of Colourable Patent—Flanged Wheels.*

The appellant made use of a patent whereby a lever, when set in motion, raised or lowered a movable small revolving disc at the inner side of the two front wheels of an omnibus, which disc acted like a flange in the ordinary tramway-car wheel when lowered, but when it was raised the omnibus could travel on the roadway apart from the tramway:—Held, *that this combination of open wheel and flanged wheel was an arrangement within section* 54 *of the Tramways Act*, 1854.

This was an appeal from a conviction of the magistrates upon a case stated under 20 & 21 Vict. c. 43, which set out an information laid before the stipendiary magistrate for the borough of Salford against the appellant, alleging an unlawful use of a certain tramway, with a carriage having wheels suitable only to run on the rail of such tramway, he, the said Cottam, not being a licensee or lessee from or by the tramway company or Board of Trade. The case stated also set out the statute under which the charge was made (33 & 34 Vict. c. 78. s. 54), and the arguments adduced on either side at the hearing, and that the Justices, after hearing the said arguments, were of opinion that in law the "aforesaid revolving discs, wheels or rollers applied and used as aforesaid, were wheels suitable only to run on the tramway," and that therefore they convicted the appellant in a penalty of forty shillings and costs. The question for the Court was, whether the said revolving discs, wheels or rollers, applied and used as aforesaid, were wheels within the meaning of the Act suitable only to run on the rail of the tramway. If the Court so thought, the conviction was to stand. If otherwise, the conviction to be quashed.

Mellor (*Channell* with him), for the appellant, contended that the contrivance

* *Coram* Denman, J., and Lindley, J.

did not make the wheels either flanged wheels or wheels suitable only to run on the rails of a tramway; and that there was no evidence of any impediment to running tramcars by reason of the omnibus fitted with this disc. The appellant has a right to "pass along or across every or any part of any road along or across which any tramway is laid, whether off or on the tramway, with carriages not having flange wheels or wheels suitable only to run on the rail of the said tramway" (1).

Sir F. Herschell (*Solicitor-General*) (with him *Smyly*), argued that the conviction ought to be affirmed, on the ground that the disc or roller was within the purview of the statute, as it made the wheel both a flanged wheel and one suitable only for the rails of a tramway whilst in use; that the object of the Tramways Act was to aid the construction of tramways; and that this, an improved kind of tramcar, would militate against that object; that the tramway companies were empowered to levy tolls for the use of the tramway; whereas conveyances fitted with this patent would be able to use the rails without paying such tolls.

DENMAN, J.—I am of opinion that the conviction by the magistrates was right in this case. The 54th section of the Tramways Act, 1870, enacts, "That if any person except under a lease from or agreement with the promoters, or under licence from the Board of Trade as by this Act provided, uses a tramway or any part thereof with carriages having flange wheels or other wheels suitable only to run on the line of such tramway, such person shall for every such offence be liable to a penalty not exceeding 20*l*." A model of the conveyance objected to has been shewn to us, and may be described thus: It has four ordinary wheels with a revolving disc against each of the two forewheels, movable at will by means of a lever which when let down acts as a flange attached to the tire of the wheels. If this be the true description of the contrivance, as I think it is, the conviction is evidently right, for when the disc is down on the tramway there is a use of a carriage having flange wheels; and this is only the common-sense view of the matter, for though the use be only temporary, and the contrivance can be applied or disconnected at will, still, if during use it be of the same shape as and perform the functions of a flanged wheel, it must be regarded as such. But there is a further ground on which I think the conviction is right. These wheels with the discs attached are, when used for the purpose of passing along the tramway, suitable only for uses on the tramways. With the discs down the vehicle could not progress along the ordinary road. The third ground for affirming the conviction is, that the discs themselves are, in my opinion, wheels suitable only for use on tramways. They are describable as wheels, and are only of use to enable an ordinary conveyance to run along the tramrails. On these three grounds, therefore, I think the magistrates decided justly and rightly.

LINDLEY, J.—I am of the same opinion. The object of the Tramways Act was to prevent carriages using the tramway. The argument for the appellant is, I think, too narrow. The plain meaning of the statute is, that you must not have flange wheels, or anything to answer the same purpose. This is an ingenious but a colourable contrivance to evade the statute, and is the very thing against which the 54th section is pointed, namely, the unfair and colourable user of the tramway.

The 62nd section is not an authority to use the tramway, but only to use the roadway, notwithstanding the tramway; that is to say, the public are thereby protected in their use of the road. The conveyance, the model of which we have seen, may be correctly called a greatly improved tramcar, for when the disc is down the wheel cannot leave the rail, as it is to all intents and purposes a flange wheel at the point of contact with the rail. It is therefore only a colourable arrangement to keep the wheel on the rail, which would act antagonistically to the rights of the tramway company or their lessees. I think, therefore, the application should be dismissed with costs.

(1) 33 & 34 Vict. c. 78. s. 62.

Cottam v. *Guest, C.P.*

Mellor, for the appellant, asked leave to appeal, on the ground of the importance of the case to the appellant, who held a patent.

DENMAN, J.—I think the section (2), giving us power to allow an appeal in these cases, does not apply where, as in this case, we have no doubt.

Appeal dismissed with costs.

Solicitors—Milne, Riddle & Mellor, agents for W. Duckworth, Manchester, for appellant; Bower & Cotton, agents for W. A. Lynde, Manchester, for respondent.

[IN THE COURT OF APPEAL.]

1880. Nov. 19. RIVAZ (*suing on behalf, &c.*) *v.* GERUSSI BROTHERS AND COMPANY AND ANOTHER.*

Marine Insurance—Concealment—Material Facts—Fraudulent Declarations of Value upon Policies—Facts material to the Risk—Evidence for the Jury.

The defendants effected two open policies of marine insurance, dated the 1st and 5th of October respectively, with the plaintiff and other underwriters to follow other named policies covering shipments of fruit, "to be hereafter declared and valued as interest may appear," from ports in Greece to London. In an action by the underwriters claiming a declaration that the policies of the 1st and 5th of October were obtained by fraud and concealment of material facts, and to set them aside, it was proved that upon the policies prior to the 1st and 5th of October, the defendants had declared shipments after the arrival of the goods at much smaller sums than the value at which the shipments had been at risk and insured by those policies. The jury found that those declarations were made falsely and fraudulently, and were material to the subscription of the policies of the 1st and 5th of October; that the underwriters were induced to subscribe those two policies by the declarations of value made by the defendants upon the former ones; that the defendants concealed and abstained from declaring the amounts which had been at risk and insured by the previous policies, and that it was material to the risk taken by the underwriters to be informed of the matters so concealed. Judgment having been entered for the plaintiff, it was,—Held, *that there was evidence for the jury of such a concealment of material facts as would tend directly to affect the mind of a reasonable underwriter in determining him whether or not to underwrite the policies of the 1st and 5th of October, and whether or not he would accept the premiums offered; that judgment was, therefore, rightly entered for the plaintiff; and that, fraud having been proved, the defendants were not entitled to a return of premiums paid on the two later policies.*

Judgment of FIELD, J., *affirmed.*

Appeal from a judgment of Field, J., after trial with a jury.

The following are the material facts proved in evidence or admitted at the trial:—

The plaintiff was an underwriter at Lloyd's, and sued in this action on behalf of a number of other underwriters at Lloyd's. The defendants carried on business as merchants in London as Gerussi Brothers & Co., and one of the defendants, M. Gerussi, also carried on business at Patras in his own name. In the months of September, October and November, 1875, the defendants opened a series of policies of marine insurance at Lloyd's to cover shipments of fruit and produce from Greece and the Ionian Isles to London or Liverpool. The following are the particulars of these policies:—

On the 3rd of September, 1875, the defendants effected a policy of insurance for 25,000*l.* on fruit and/or other produce from any port or ports in Greece and/or Ionian Islands to London and/or Liverpool by steamers warranted to sail on or before the 1st of November, "on fruit and/or produce to be hereafter declared and valued as interest may appear, but should

(2) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 45.

* *Coram* Baggallay, L.J.; Brett, L.J.; and Cotton, L.J.

any accident happen before such declaration, invoice cost charges and ten per cent. to be the value." The plaintiff and all the persons, with a few exceptions, on whose behalf he sued, underwrote this policy.

On the 1st of October, 1875, the defendants effected another similar policy for 20,000*l.*, which was to follow and succeed the policy of the 3rd of September. The plaintiff and, with few exceptions, the others on whose behalf he was suing, underwrote this second policy.

On the 7th of October the defendants effected another similar policy for 20,000*l.*, to follow and succeed the policy of the 1st of October. The plaintiff, and nearly all the persons on whose behalf he was suing, underwrote this third policy.

On the 3rd of November the defendants effected another similar policy for 20,000*l.*, to follow and succeed the policy of the 7th of October. This fourth policy was also underwritten by the plaintiff and nearly all the persons on whose behalf he was suing. The policies of the 7th of October and the 3rd of November were based on slips dated the 1st and 5th of October respectively.

On the 5th of November a steamship named the *Vindamora* was sunk in the Thames in the course of a voyage from Patras to London, and a loss occurred thereby with respect to a large shipment of currants shipped by M. Gerussi at Patras and consigned to Gerussi Bros. in London. A large claim on the underwriters was made by the defendants, under the policies of the 7th of October and the 3rd of November, in respect of this loss. On investigating the claim, the underwriters discovered that the defendants had made false declarations of value with respect to shipments under the policies of the 3rd of September and the 1st of October. In many instances the declarations were made after the arrival of the ships carrying the goods in respect of which the value was declared, and it appeared from a comparison of the defendants' books with the declarations that, on the shipments prior to the 1st of October, the defendants had declared the values of the shipments at sums amounting to about 11,900*l.*, whereas in fact the invoice prices of the goods shipped, plus ten per cent., amounted to a sum of about 19,700*l.* The total value of the goods which had been at risk under the four policies up to the date of the loss of the *Vindamora* was about 72,000*l.*; the values of these goods had been declared by the defendants at sums amounting to about 52,000*l.*

The relief claimed by the plaintiff's statement of claim was as follows:—

1. That it may be declared that the policies of the 7th of October and the 3rd of November respectively were obtained by fraud and concealment of material facts, and that such policies may be respectively set aside and cancelled, or that an account may be taken of the shipments which have been at risk and insured by the said policies of the 3rd of September, 1st of October, 7th of October and 3rd of November respectively, and of the values which ought to have been declared in respect thereof; and that the declarations on the said policies respectively may be varied or rectified accordingly.

2. That the defendants may be restrained by the order and injunction of this honourable Court from dealing with or transferring the policy of the 3rd of November, 1875.

3. That the plaintiff may have such further and other relief as the circumstances of the case may require.

The following were the questions left by Field, J., to the jury, and their answers:—

1. Did the defendants declare any of the shipments prior to the *Vindamora* at less sums respectively than the values at which the same shipments had been at risk and insured by their policies? Answer, Yes.

2. Did they make such declarations falsely and fraudulently, and were such declarations material to the subscription of the said policies, and were the plaintiffs induced thereby to subscribe them? Answer, Yes.

3. Did the defendants conceal and abstain from declaring the amounts which had been on risk and insured by their policies? Answer, Yes.

4. Was it material to the risk taken

by the underwriters to be informed of the matters so concealed and abstained from being declared? Answer, Yes.

5. Were the policies of the 7th of October and the 3rd of November taken out by the defendants with the fraudulent intention of declaring goods upon them at less than the value at which they ought to have been declared? Answer, Yes.

The jury also found that risk had been incurred to the extent of 72,659*l.* on the four policies.

Field, J., after further consideration, gave judgment for the plaintiff.

The defendants appealed.

The Attorney-General (*Sir H. James*) and *Benjamin* (*Romer* with them), for the defendants.—The underwriters are not entitled to the relief claimed. The jury have not found that there was any fraudulent misrepresentation by the defendants with respect to the two policies based on the slips of the 1st and 5th of October, but only a concealment; and in order to vitiate the policies there must be some concealment of a material fact which would tend directly to increase the risk of the voyage. The concealment alleged here is only that the defendants had misconducted themselves with respect to former policies. On open policies, as were these, it is immaterial, with respect to the risk of the voyage, to the insurer to know how much remains unexhausted on previous policies. *Duer on Insurance*, vol. ii. p. 388, states the correct rule, which is, that those facts only are necessary to be disclosed which, "as material to the risks considered in their own nature," a prudent and experienced underwriter would deem it proper to consider. In *Sibbald* v. *Hill* (1) the distinction between a fraudulent misrepresentation and a concealment was not noticed, but in that case the fact represented to the underwriters did bear directly on the risk. The judgment in *Ionides* v. *Pender* (2) has carried the doctrine as to concealment far enough. There are many facts which a jury might find were material to be known to the underwriter—for instance, that the proposed assured was a person of noted bad character, and had been convicted of scuttling a ship—but the policy ought not to be vitiated through the non-disclosure of such facts. The remedy in the present case is sought after the loss has occurred; the declarations can be readjusted to their proper amount, and the parties remitted to their original position. They also referred to *Stephens* v. *The Australasian Insurance Company* (3).

Butt and *J. C. Mathew*, for the plaintiff.—The jury have found fraud against the defendants, and the rule is well settled that there can be no readjustment of premiums or liability in such a case.

They were not required to argue further.

Baggallay, L.J.—This action has been brought by the underwriters for the purpose of obtaining a declaration that two several open policies of marine insurance were obtained by fraud and concealment of material facts on the part of the assured, and for the purpose of having those policies set aside. In the view which I take of the case it is unnecessary to consider the alternative claims made by the plaintiff. The circumstances under which the action is brought are as follows: [His Lordship stated the facts.] When the loss occurred to the *Vindamora* in the Thames, it was found by the underwriters to have been the defendants' practice in declaring upon the policies effected previously to those of the 7th of October and the 3rd of November, 1875, to make declarations of the values of shipments of goods covered by the earlier policies for less amounts than the values ought to have been declared at, so that the earlier policies really covered greater values than appeared from the defendants' declarations. From the second finding of the jury it would appear that the declarations on the earlier policies were known to the plaintiffs when they subscribed the two latter policies which are in question here. The third and fourth findings are in truth findings that there was a non-disclosure by the defendants of facts which were

(1) 2 Dow, 263.

(2) 43 Law J. Rep. Q.B. 227; Law Rep. 9 Q.B. 531.

(3) 42 Law J. Rep. C.P. 12; Law Rep. 8 C.P. 18.

material to be known to the underwriters in guiding them to arrive at a determination whether or not they would accept the risks proposed in the two later policies at the premiums offered. It is impossible in the face of those findings to say that this was not a non-disclosure of material facts within the intent and meaning of the decisions.

I am of opinion, therefore, that the appeal should be dismissed.

BRETT, L.J.—The question in this case is, whether the two policies based on the slips of the 1st and 5th of October ought not to be declared invalidated in respect of any loss which may have occurred or might occur to the underwriters after the making of those policies, on the ground that at the time the policies were entered into there was a fraudulent concealment of a material fact by the defendants. The question is precisely the same as if the defendants, upon a loss occurring after the 1st of October, had sued the underwriters to recover upon one or both of the policies. The concealment relied upon is this: the two policies are upon cargoes coming from abroad in a ship or ships, the fruit or produce shipped to be afterwards declared and valued as interest might appear; and these policies were to succeed other named policies, and upon these former policies the defendants had made improper declarations of the value of the produce shipped. These declarations were not merely improper but fraudulent. They were fraudulent because, after arrival, and when the goods were safe, the values were declared at much smaller sums than they actually were; the object being that the defendants, when the risk was over, might make the premiums which had been paid cover larger values than they ought to have done. Apparently there was more to run out under the former policies than was in fact the case, and the underwriters, assuming the alleged state of things under the former policies to be made known to them, would naturally be led to suppose that, inasmuch as the defendants must declare first on the former policies, the two later policies could not be made effective by the defendants until shipments to a certain considerable amount had been made under the former ones; whereas there was a much smaller sum to be exhausted under the former policies than had been declared, so that the two later ones would be much sooner called into effect. The jury have found in effect that there was a concealment from the underwriters upon a matter which would affect a reasonable underwriter's mind as to whether or not he would underwrite the policy, and as to the rate of premium. That being the finding of the jury, the question is, whether there was any evidence to support it. It was argued that there was no evidence upon which it could be properly found that the facts concealed were material to be known to the underwriters, because it was said that their want of knowledge of these facts could have no effect upon the risk against which they insured; the risk being whether or not the ship would arrive safely—in other words, the risk of the voyage. A passage from Duer was cited to support this proposition.

Now, in the first place it appears to me that the case decided in the House of Lords—*Sibbald* v. *Hill* (1) holds the exact contrary to that. The very same argument was used on behalf of the assured in that case, when it was attempted to confine the definition of material facts to such facts only as it is in the present case alleged ought to be taken into account. The true proposition is that stated in *Phillips on Insurance*, s. 531, that "concealment in insurance is where, in reference to a negotiation therefor, one party suppresses, or neglects to communicate to the other, a material fact, which, if communicated, would tend directly to prevent the other from entering into the contract, or to induce him to demand terms more favourable to himself, and which is known or presumed to be known to the party not disclosing it, and is not known, or presumed to be so, to the other."

That proposition must be expanded not in compliance with that stated by Duer, but according to the proposition stated by Parsons (vol. i. p. 495). The decision of Lord Blackburn in *Ionides* v.

Pender (2) clearly shews that Duer's proposition is wrong, and that Parsons and Phillips lay down the right rule, and that view is in concurrence with the decision in *Sibbald* v. *Hill* (1) in the House of Lords. The true rule seems to be the following: Concealment in a policy of marine insurance is where, in reference to the negotiation for the policy, one party conceals a material fact, and that fact is one which would affect the mind of a reasonable underwriter, governing himself by the principles and calculations commonly applied to policies and risks, in determining him whether or not he will enter into the contract at all, and whether at one rate of premium or another. The real question in the present case is, whether or not we ought to say that there was no evidence upon which the jury could find that a reasonable underwriter could be governed in his decision within the rule I have stated, if he had known the facts with respect to the defendants' declarations of value upon the prior policies. I am of opinion that the concealment was upon a matter which would so affect the decision of any reasonable underwriter, and I therefore think the jury were entitled to find as they did. If so, there was not only a concealment, but a fraudulent concealment of facts, which the defendants knew ought to have been disclosed to the underwriters; and there can, therefore, be no return of premiums. I think the verdict and judgment were right, and this appeal should be dismissed.

COTTON, L.J. — I am of the same opinion. It was not disputed—indeed it was found at the trial—that there had been previous policies on goods to be shipped by the defendants, and that before the 1st of October they had declared, on those previous policies, goods to the value of 19,000*l.* at about 11,000*l.* The jury by their second finding say that those declarations were made falsely and fraudulently by the defendants, and that the declarations were material to the subscription of the policy, and that the plaintiffs were induced thereby to subscribe the policy. I understand that finding to involve that the underwriters at the time they subscribed the two last policies knew the amount declared on the previous ones; and there is then a further finding that the defendants concealed and abstained from disclosing the amounts which had been at risk on the previous policies. That finding is not disputed. The question is, Can the two later policies be upheld under the circumstances? It is said that no concealment would vitate a policy unless it was a concealment of facts directly concerning the risk. I think that is not the correct rule. It is not the rule which was adopted by the House of Lords in *Sibbald* v. *Hill* (1) or in *Ionides* v. *Pender* (2), when Lord Blackburn disputed the rule laid down by Duer, and agreed with that stated by Parsons. Here it is found that the underwriters were induced to underwrite the policies by the statement of the declarations made under the previous policies, and also that it was a fact material to be known to them what was the amount remaining on the previous policies. In my opinion, the facts concealed here come within the correct rule as to concealment of material facts, and I see no reason to question the findings of the jury, or to say there was nothing upon which the jury could properly find that the underwriters were induced to grant the two later policies upon the faith of the declarations made by the defendants upon the two prior ones.

Judgment affirmed.

Solicitors—Waltons, Bubb & Walton, for plaintiff; Hollams, Son & Coward, for defendants.

[IN THE COURT OF APPEAL.]

(Appeal from the Queen's Bench Division.)

1880. Dec. 8, 9. } MULLINS *v.* TREASURER OF THE COUNTY OF SURREY.*

Justice of the Peace—Expenses of conveying Prisoners to Gaol—27 Geo. 2. c. 3. s. 1.; 11 & 12 Vict. c. 42. s. 26; 28 & 29 Vict. c. 126. ss. 5 and 8—The Prisons Act, 1877 (40 & 41 Vict. c. 21), ss. 4, 28, 57—Period of Committal—Prison Authority.

The liability to pay the expenses of conveying prisoners committed to prison by a magistrate to the gaol named in the warrant of commitment is, by section 4 of the Prisons Act, 1877, transferred, in all counties except Middlesex, from the county treasurer to the Secretary of State.

Judgment of the Queen's Bench Division reversed.

Appeal from a judgment of the Queen's Bench Division on a Special Case.

The case is fully reported 49 Law J. Rep. Q.B. 257.

The arguments in the Court of Appeal were substantially the same as in the Court below, and are sufficiently shewn, together with the material sections of the statutes bearing on the question in dispute, in the judgments, *post*.

The Solicitor-General (Sir F. Herschell), E. Clarke and *E. Baggallay*, for the appellant.

Sir H. Giffard and *Poland*, for the respondent.

LORD SELBORNE, L.C.—The Divisional Court, from which this appeal is brought, evidently felt considerable difficulty in dealing with the question. Mr. Justice Lush, for whose opinion I need not say we have the highest respect, expressly said so. But, independently of that, it is obvious that the learned Judges must have felt serious difficulty, because they frankly admit in their judgment that the conclusion they come to is unsatisfactory. One of the learned Judges says that the result of his conclusion is, that the proviso at the end of section 57 of the Act of 1877 must be rejected altogether, and that is repeated by Mr. Justice Manisty. With great deference, I am by no means satisfied that if there had been no proviso I should have come to a conclusion different from that at which I actually arrive, which is in favour of the appeal. But at all events it is clear that if we can avoid rejecting the proviso by a construction which the words can properly bear, we ought to do so, and to give effect to the proviso, as well as to every other part of the enactment. I observe also (and that increases my impression of the difficulty which they felt) that the two learned Judges did not proceed upon the same grounds.

Mr. Justice Lush bases his construction of the Act upon the meaning which he thinks ought to be attributed to the words "committed to prison," or rather to the word "committed" in that context in the 57th section. That appears to be the whole foundation of his judgment. On the other hand, Mr. Justice Manisty founds his judgment principally on the words "as would, if this Act had not passed, have been payable by a prison authority;" and in the construction of these words apparently relies very much upon the inapplicability of the construction which he did not adopt to the county of Middlesex. Now to deal with those different grounds of judgment separately: I will first endeavour to follow Mr. Justice Lush in answering the question, What is the meaning of the word "committed" in the definition of a prisoner as a person "committed to prison" in the 57th section? The learned Judge says that, looking to the words of the 4th section, which throws "the maintenance of prisons and of the prisoners therein" on the Secretary of State, that "committed" must mean "actually in prison." I confess I cannot adopt that conclusion. But for the word "therein" in the 4th section I should have thought it quite clear, both from the natural and popular use of the words "committed to prison," which ought not to be departed from without reason, and also from the manner in which they have been used by the Legislature in other acts *in pari materia*, that

* *Coram* Lord Selborne, L.C.; Baggallay, L.J.; and Brett, L.J.

fixed at or within the maximum rate allowed by Parliament (1).

[LORD COLERIDGE, L.C.J.—Has Parliament empowered the railway company to act as collector for the government?]

The railway company is obliged to collect the duty, and that marks the distinction between what is and what is not subject to duty—the company collects but does not receive the duty. If the duty were repealed the company would be unable to charge it any longer, for the sum is earmarked as duty and is in no sense a fare. That the company might charge the duty to passengers was clearly contemplated by Parliament, for the special Act of the defendants provides that certain charges shall include every expense except government duty (2).

[BRETT, L.J.—That is to say, although the appellants are not empowered to charge the duty, it is said the exception implies that they may.]

If reference be made to that part of the appellants' private Act which follows immediately after the provisions as to fares, it will be found that for the conveyance of goods certain sums are permitted to be charged which it is stipulated shall cover every expense except a reasonable sum for loading and unloading (2), and this supports the argument that under clauses exactly similar in construction and enactment the government duty, like the unloading charge, may be charged in addition to the fare.

The argument on behalf of the defendants as to those cases in which the fare is within the maximum rate allowed to be charged is not so strong, for the company might doubtless charge the whole as fare, inasmuch as there is nothing to earmark that part which is fare and to distinguish it from that part which is duty; but the case where the fare is fixed at the maximum rate is thereby rendered all the stronger.

[BRETT, L.J.—Could the appellants demand in such a case, first, a named sum for fare, and then, separately, a definite sum for government duty?]

That is the contention of the railway company, and the legislation on the subject contains nothing to forbid them from doing so.

The question as to the duty claimed on the hotel accommodation provided by the company in their sleeping carriages must be one of degree; but it is submitted that charges for beds and attendance are not charges made or received for the conveyance of passengers.

Sir H. Giffard (with him *W. Karslake*) was directed to confine himself to the question of the duty on the sums received for the use of the sleeping carriages.—Railway companies are created by statute for certain purposes: their object and duty is to convey passengers for hire, and the duty claimed is duty on the moneys so received. Railway companies are not authorised to keep hotels, and although this company has by statute leave to keep certain hotels, that is a special exception. All the matters on which duty is claimed are matters ancillary to the conveyance of the passenger; it is only a passenger who can use the hotel accommodation (as the appellants call it) thus provided, so that the money thus received is, within the words of the appellants' Act (2), a charge for, and an expense incidental to, conveyance.

Cur. adv. vult.

LORD COLERIDGE, L.C.J. (on Feb. 5, 1881), read the judgment of the Court:—

By the 2nd section of the Railway Passengers Duty Act (5 & 6 Vict. c. 79) a duty is made payable in respect of all passengers carried for hire upon or along

hire upon or along any railway, a duty at and after the rate of 5*l.* for every 100*l.* upon all sums received or charged for the hire, fare or conveyance of all such passengers."

(2) 9 & 10 Vict. c. cciv. (local and personal) s. lxiii.: "That the maximum rate of charges to be made by the company for the conveyance of passengers along the said railway, including the tolls for the use of the railway, and of carriages and for locomotive powers, and every other expense incidental to such conveyance as aforesaid except Government duty, shall not exceed the following sums. . . . And with respect to the conveyance of goods the maximum rates of charge to be made by the company for the conveyance thereof, including the tolls for the use of the railway and waggons or trucks or locomotive power, and every expense incidental to such conveyance, except a reasonable sum for loading, covering and unloading of goods, . . . shall not exceed the following sums. . . ."

any railway, and it is enacted that such duty shall be "at and after the rate of 5*l.* for every 100*l.* upon all sums received or charged for the hire, fare or conveyance of all such passengers." It appears that in fixing the sums to be paid by passengers conveyed by their railways, the defendants have taken into account the amount of duty to which they considered they would be liable, and have added to the sum which, but for such liability, they would have deemed a sufficient fare, a further sum, calculated at the rate of five per cent. upon the former, to cover the amount of duty; and they insist that the last-mentioned sum so calculated is the full amount of duty payable by them, though the aggregate of the two sums is the amount charged to and received from the passenger.

The Attorney-General, however, contends that according to the true construction of the Act the amount of duty properly payable is a sum equal to five per cent. upon the aggregate amount paid by the passenger.

The first question raised by the present information is, which of these two contentions should prevail. The Exchequer Division has decided, and, in our opinion, has rightly decided, in favour of the Crown. The only question which we have to consider is as to the construction of the Act; neither the way in which the company have arrived at the fares which they deem it necessary or expedient to charge to the passengers who use their railways, nor the mode in which they keep their accounts, can affect this question of construction. In our opinion the language of the Act is free from doubt: the price which the passenger is called upon to pay, and does pay, for his ticket, without which he is not at liberty to travel by the railway, is the sum charged to him and received by the company for his conveyance to his destination, of whatever items it may be composed; and if so, it is upon this price or sum that the amount of duty is by the Act directed to be calculated.

Reliance has been placed by the defendants upon the language of a clause in one of their local and personal Acts (9 & 10 Vict. c. cciv.), which fixes the maximum rates which they are to be at liberty to charge for the conveyance of passengers, and provides that such maximum rates shall include the tolls for the use of the railway, and of carriages, and for locomotive power, and every other expense incidental to such conveyance except government duty; and it has been urged that if the defendants can only charge the maximum rate with five per cent. additional upon that maximum rate, and have to pay duty upon the aggregate sums, they will be substantially receiving something less than the maximum. This may be so if they are at liberty to add anything to the maximum rate, though doubts may be entertained and have been expressed as to their power to do so; but, assuming such to be the case, any loss to which the company may be thereby subjected is due to the provisions of their local and personal Act, which has imposed fetters upon them and cannot affect the construction of the Railway Passengers Duty Act, which was passed four years previously.

But a second question has been raised in the action, the answer to which should, in our opinion, upon consideration, be also answered in favour of the Crown.

It appears that to certain of their trains running in the night what are termed sleeping carriages are attached, for the use of which by persons who have taken first-class tickets an extra charge is made. These carriages afford not only special accommodation for sleeping, but lavatories and other conveniences. The persons travelling in these carriages have particular privileges: they are not disturbed during the night by demands to exhibit their tickets, and should they arrive at their destination early in the morning they may remain in their sleeping berth until it is convenient for them to leave; a special servant also is attached to these carriages, whose duty it is to call the passengers in the morning and to supply them with hot water.

A separate charge is made for this accommodation, and a separate ticket given to the passenger who desires to avail himself of it.

The defendants contend that they are not liable to pay duty on the price of

those words refer to the authority given by the magistrates for the person being in prison. That appears to me clearly the sense in which corresponding language is used in Jervis's Act (11 & 12 Vict. c. 42), in the 25th and 26th sections of which power is given to Justices by a warrant in a certain form to commit any person accused to the common gaol or house of correction for the "purpose of being there safely kept until he shall be delivered by due course of law." The verb "commit" there expresses the act of the Justices, and must not, therefore, as I apprehend, be read as referring to the actual reception of the prisoner into prison. The forms which are referred to in those sections distinctly shew that is the meaning, because the act of the Justices addressed to the constable and keeper of the prison in form T 1 is called the "warrant of commitment," and it is in form an order to take the person accused and him safely convey to the prison, and there deliver him, and the keeper is to receive him. Then there is the gaoler's receipt for the prisoner, and the Justices' order thereon for payment of the constable's expenses in executing the commitment. The commitment is a thing therefore executed by the constable, whose duty of course ceases when the man gets into the prison; and amongst the expenses that are allowed is one for the subsistence of the prisoner while in custody—that means, in the constable's custody after commitment. Therefore, nothing can be more clear than that the word "commitment" in that statute, which is the general statute antecedent to that of 1877, means the act of the Justices in ordering the commitment. On what ground are we to depart from that sense and adopt in its stead the time of actual imprisonment under an order of commitment in this particular case? As far as I can see, the learned Judge proceeded only on this ground, that the word "therein" occurs in the 4th section, which says that on and after the commencement of the Act all the expenses incurred in respect of the maintenance of prisons to which the Act applies "and of the prisoners therein," shall be defrayed out of moneys to be provided by Parliament? With great deference to the learned Judge, it does not seem to me that the word "therein" has the meaning which he ascribes to it. Its meaning is "the maintenance of prisoners who are imprisoned in the prisons to which this Act applies." I grant, therefore, that if you cannot shew the man to have been a prisoner in any such prison, he is not a person whose maintenance is provided for; but when you turn to the 57th section and take it in connection with the 28th section of the Act of 1877, it seems perfectly clear that the maintenance of a prisoner includes expenses incurred not only while he was in prison, but when he is on his way there, and includes as much those under the original order of commitment before he came into prison at all as those which may be incurred in afterwards removing him from one prison to another. The 28th section, to which Mr. Baggallay referred us in reply, says "a prisoner shall be deemed to be in legal custody whenever he is being taken to or from, or whenever he is confined in, any prison in which he may be lawfully confined." He is not in prison *de facto* until he gets there; but, for the purposes of the Act, and the custody which the Act speaks of, he is equally a prisoner, and deemed to be in legal custody on his way to prison, and this 57th section expressly says that the "maintenance of the prisoner" (which must refer to those words as they are found in the 4th section) includes "all necessary expenses" (I omit the word "such" for the present: I will refer to it afterwards) "incurred in respect of a prisoner for" (*inter alia*) "custody, safe conduct and removal from one place of confinement to another, or otherwise from the period of his committal to prison until his death or discharge from prison." It strikes me, taking the words of the former Act, the statute of the 11th and 12th Vict. c. 42, with the 28th section of this Act, that the man who has become a prisoner by being received into prison is to have his maintenance provided for in the sense of covering all the expenses before and after he is so received. I, therefore, am unable to accede to this interpretation of the word "committed," which is the foun-

dation of Mr. Justice Lush's judgment. His construction, in my view, is not made necessary by the use of the word "therein" in the 4th section, and, if not made necessary by that word, it is excluded by the rest of the Act, as well as by the natural sense of the words.

Then we come to the ground on which Mr. Justice Manisty rested his judgment, and there I agree that if these expenses cannot be brought within the words of the 57th section, "such necessary expenses . . . . as would, if this Act had not passed, have been payable by a prison authority," then undoubtedly the appellants must fail. But is there really sufficient ground for saying that the expenses do not fairly or reasonably come within those words? Now these expenses are the expenses of conveying the prisoner under the warrant of commitment to the prison, which had been provided for by the 27 Geo. 2. c. 3, and the 11 and 12 Vict. c. 42, in this manner: In substance Justices of the peace might give a warrant on the county treasurer to pay those expenses to the constable in all counties, except Middlesex, and the county treasurer receiving that warrant was bound to pay them, and was to be allowed them in the accounts. Under the Acts constituting that officer, the accounts are to be allowed and passed by the Justices, or under their authority, at quarter sessions. The whole matter relates to that part of the duty of the Justices which is concerned with prisoners, and with the conveyance of them to prison. The Justices were *de facto* the "prison authority" within their own county before those words became technical words under statute, and by the 28 and 29 Vict. c. 126 they are expressly made the "prison authority" within the meaning of those words as used in that statute, and evidently as repeated in the Act of 1877. As to all prison expenses incurred within the prison the Justices were, beyond a doubt, the prison authority; those expenses were paid out of the county rate, the same fund out of which the expenses in question in this case are paid. The expenses are *in pari materia*, and cannot, I think, be supposed to have been thrown on the county rates under an order of one or more Justices made on the county treasurer in any other view than as expenses *ejusdem generis*, which ought to be borne, elsewhere than in Middlesex, in the same manner as prison expenses. Although it is true that the hand to pay them is the hand of the county treasurer, he pays them under warrant—not, I agree, from the Justices in quarter sessions, but from one of the same body acting under a statutory authority in discharge of a duty which belongs to Justices as such; and these expenses are paid by the county treasurer out of the fund which is under the control of the Court of quarter sessions, and the expenses are allowed necessarily by them and entered in his accounts, which they pass. The reasonable interpretation of the words "payable by a prison authority" is to refer them not to the hand which is to pay, but to the persons from whom the payment is to come. The whole question, which is fairly open to doubt and controversy, is, whether the allowance of those expenses by Justices at quarter sessions is an act done by them as the prison authority. It is a question of considerable refinement, and I do not say whether I should have been more embarrassed than I am now if I had not found anything further in the Act to assist me. But there is the proviso which says that nothing in the Act "shall exempt a prisoner from payment of any costs or expenses, in respect of his conveyance to prison or otherwise, which he would have been liable to pay if this Act had not passed." Then when I turn to the Act of Geo. 2 and the Act of 11 & 12 Vict. c. 42, which deal with the very expenses now in question, I find that in those Acts the primary liability is thrown on the prisoner if he has means; and it is only in default of those means that the liability is thrown on the county treasurer. The learned Judges below fairly state that the effect of their conclusion is to render the proviso nugatory; but I think I see in that proviso sufficient to satisfy me that it was expressly intended under the general words of the section to cover these expenses which those general words most clearly, as I think, would include, unless it is to be held that they

are not included, because the Justices may be said not necessarily to be acting as a prison authority when they pass the treasurer's accounts, and because the treasurer is not himself a prison authority, but the Justices are. The proviso seems to me to remove any difficulty which might have been felt on that ground. With regard to the circumstance that the county of Middlesex is dealt with (I know not for what reason) in an exceptional manner by the Acts of Geo. 2 and 11 and 12 Vict. c. 42, and that the parish has to pay this class of expense under those Acts, and not the county rate, all I can say is, that being so, that the county of Middlesex will not get the benefit of this Act of 1877. Why it should not I do not know, but it is clear that in the county of Middlesex these expenses are not paid in any sense whatever by a prison authority; but that the Act does not apply to the county of Middlesex can be no reason why it should not apply wherever those expenses are payable by the Justices in quarter sessions assembled, and the proviso is perfectly sensible if it applies to all counties in England except the county of Middlesex. I think, therefore, this appeal ought to be allowed.

BAGGALLAY, L.J.—I am of the same opinion. The 4th section of the Prisons Act of 1877 provides in very general words for the payment out of moneys to be provided by Parliament of certain expenses incurred in respect of the maintenance of prisoners. But when we come to the 57th section of the same Act of Parliament we find what the words "maintenance of a prisoner" are to include. They are to include "all such necessary expenses incurred in respect of a prisoner for food, clothing, custody, safe conduct and removal from one place of confinement to another, or otherwise," within certain limits of time; but the expenses which are to be so provided for out of moneys to be provided by Parliament are subject to two qualifications. The first qualification is, that they must have been incurred during the period commencing with the committal of the prisoner to prison, and ending with his death or discharge from prison. The second qualification is, that they must be such expenses as would, if the Act had not passed, have been payable by a prison authority. I think the expense of conveying a prisoner to prison, then, to await his trial for felony, clearly comes within the definition of an expense incurred in respect of his "custody, safe conduct or removal from one place of confinement to another," or, within the more general words "or otherwise," which may apply to other expenses *ejusdem generis*. I think, therefore, there can be no doubt that the expenses in question here were within the section if the two qualifications to which I have referred are satisfied. As to the first qualification I am unable to take the view of Mr. Justice Lush in the Court below that the committal to prison is limited to the time when the prisoner becomes actually lodged in the prison. I am disposed to think, on the construction of the language used in the section, apart from what may be found in any other Acts, that the order of committal by the magistrates, under which the constable acted in conveying the prisoner to prison, was the committal to prison; but that view appears to be entirely borne out by the 25th and 26th sections of Jervis's Act (11 & 12 Vict. c. 42), and the schedules to that Act, for we there have in the 25th section, as has been already pointed out by the Lord Chancellor, the warrant referred to as that which commits, or the act of the magistrate when he issues his warrant described as committing a prisoner to prison. That view is carried forward in the 26th section; and when we turn to the form of the warrant of committal, and of the receipt given by the gaoler on reception of the prisoner, and to the certificate, or rather the order, of the treasurer for the payment of the expenses incurred by the constable, we also find that view of the case is entirely borne out. The warrant is called the "warrant of commitment," and the receipt and payment of the constable's expenses are referred to in the schedule of the Act as "gaoler's receipt to the constable for the prisoner, and Justices' order thereon for payment of the constable's expenses in executing the commitment." Executing the com-

mitment was simply the conveyance of the prisoner from the place at which he was committed to the prison to which he was committed. Then, as regards the second qualification, I agree with the Lord Chancellor that these were expenses which were substantially payable by the "prison authority," or rather by the Justices in quarter sessions, who by another Act of Parliament are made in terms that which they previously were, the "prison authority;" and they are expenses which have been always payable by them. No doubt the order upon the treasurer to pay is made by an individual magistrate, and the Act of Parliament requires, when that money has been paid by the treasurer, that it shall be allowed by the quarter sessions out of the county rate—the same rate which did bear all the other prison expenses. For these reasons I am of opinion that the appeal should be allowed.

BRETT, L.J.—If I could put my opinion forward in a form different from that in which the Lord Chancellor has expressed his judgment I should think it only respectful to the learned Judges below to do so, but I cannot. I agree with every step of the reasoning that has been expressed by the Lord Chancellor, and in the form in which every step has been expressed.

Judgment reversed and entered for the defendants.

Solicitors—Hare & Fell, solicitors for the treasury, for plaintiff; F. F. Smallpeice, for defendant.

[IN THE COMMON PLEAS DIVISION.]

1880. Dec. 6. } HARMON *v.* PARK.*

Returning Officer—Respondent to Election Petition—Corrupt Practices (Municipal Elections) Act (35 & 36 *Vict. c.* 60) *—Ballot Act*, 1872 (35 & 36 *Vict. c.* 33).

Petitioner and another were proposed as candidates for election to a municipal ward in which there was one vacancy. The mayor at the time of the nomination decided that the petitioner was disqualified by reason of a mistake in the description of the petitioner on the burgess roll. The other candidate was thereupon declared duly elected, and the alderman of the ward next day duly published such declaration of election.

The petitioner joined the mayor as respondent to his petition against the election, as being a "returning officer whose conduct is complained of," within the meaning of 35 & 36 *Vict. c.* 60. *s.* 13. *sub-s.* 6 *:—*

Held, *that the mayor was rightly joined.*

This was a motion by way of appeal from an order of Stephen, J., striking out from an election petition the name of the mayor, by whose decision the petitioner had been declared disqualified, and who had been joined as respondent thereto together with the candidate.

G. Bruce, for the petitioner.—The Corrupt Practices (Municipal Elections) Act (35 & 36 Vict. c. 60), s. 13. sub-s. 6 (1), provides that any returning officer whose conduct is complained of may be made respondent in an election petition.

The 35 & 36 Vict. c. 33. s. 20. sub-s. 1 (2) defines the words "returning officer" as meaning any officer presiding at the election. There being no other candidate, the mayor practically decided the election, and the real election was complete when the mayor had decided against the nomination of the petitioner. He was

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* *Coram* Denman, J., and Lindley, J.

(1) 35 & 36 Vict. c. 60. s. 13. sub-s. 6: "Where a petitioner complains of the conduct of a returning officer he shall be deemed to be a respondent."

(2) 35 & 36 Vict. c. 33. s. 20. sub-s. 1: "The term 'returning officer' shall mean the mayor or other officer, who under the law relating to municipal elections presides at such election."

therefore the officer presiding at the election, and thus a returning officer. There are provisions for amendment when there is a mistake in the description of the candidate on the burgess roll, though not when the mistake is on the nomination paper. The petitioner therefore complains of the conduct of the mayor, an officer presiding at the election, and therefore a returning officer within the definition.

It has been the practice to make the mayor a respondent—*Soper* v. *The Mayor of Basingstoke* (3), *Mather* v. *Brown* (4), *Gothard* v. *Clarke* (5).

Ridley, for the respondent.—By the Municipal Corporation Act, 1835, the alderman is presiding officer, whether there is a poll or not, and not the mayor, as in parliamentary elections under the Ballot Act. The election is not complete until declared by the alderman.

By the sections of 22 Vict. c. 35 relating to elections, the nomination must take place two days before the election. The mayor has some of the duties of the alderman to perform, it is true, but having decided on the question of the validity of the nomination, he is *functus officio*, and the election is presided over by the alderman. Otherwise why should it be provided that a printed list of the nomination papers should be published in the ward four days before the election? The alderman must therefore preside after the mayor's decision—that is, at the election. The alderman is the only returning officer, and, whoever may be really to blame, is the only person to be made respondent beside the candidate elected.

DENMAN, J.—I am of opinion that the order of Mr. Justice Stephen should be rescinded. The case turns entirely on the construction of several Acts. By the Municipal Corporation Act, 1835, s. 43, it is provided that the alderman shall preside at elections, and by the Ballot Act, 1872, that the mayor or alderman shall preside, but it is evident that the last-named section refers to two cases. Where there are no wards, there the mayor is to have the whole conduct of the election, but where there are wards the president's office is to be filled by the alderman of the ward. Though, therefore, there is nothing making the mayor returning officer in all cases, yet section 20 of the Ballot Act, 1872, must be taken to be in part incorporated with the provisions of the Corrupt Practices (Municipal Elections) Act, 1872.

Now by section 2, sub-section 1 (6) of the last-named Act, a returning officer is defined as "a person, under whatever designation, presiding at an election," but I do not think it means that such person must necessarily preside throughout the election. The definition would be well satisfied by anyone who on any occasion requiring a president acts as such. Sub-section 6 of section 13 of the same Act (1) provides that where a petition complains of the conduct of a returning officer he shall be deemed to be a respondent. The question in this case is, Can the mayor be made a respondent? It is contended on his behalf that he cannot be so joined, because this being a case of election to a ward the alderman of that ward is the proper president of the election. But looking at the varied use of the word "election" one sees that it is not always construed as meaning the same thing. Sometimes it is intended only to include nominations, since, if there are only as many candidates nominated as there are vacancies, or if by the decision of the president the number of candidates be reduced to the number of vacancies, the nomination becomes in reality the election. In this case, by reason of the decision of the mayor the number of candidates was reduced to the number of vacancies, and thus the mayor really presided at the election, or at least at part of the election. The petitioner has no complaint against the alderman of the ward, nor in fact against anyone but the

(3) 46 Law J. Rep. C.P. 422; Law Rep. 2 C.P. D. 440.

(4) 45 Law J. Rep. C.P. 547; Law Rep. 1 C.P. D. 596.

(5) 49 Law J. Rep. C.P. 474; Law Rep. 5 C.P. D. 253.

(6) 35 & 36 Vict. c. 60. s. 2. sub-s. 1: "'Returning officer' means a person, under whatever designation, who presides at an election."

mayor. If anyone coming within the definition of a returning officer has given cause of complaint he may be made a respondent: not necessarily, however, to be cast in costs, although cases of outrageous conduct can be conceived in which costs might be given against the returning officer. It is unnecessary to go into the other sections more minutely, for it is very evident that the mayor was presiding at this election, and there is no ground for making any but him respondent. Of course if the alderman had done anything to injure the petitioner he also could be joined.

LINDLEY, J.—The only question in this case is, Ought or ought not the mayor to have been joined as respondent to the petition? There is no abstract question as to a returning officer. The 35 & 36 Vict. c. 60. s. 13 says who are to be petitioners and who respondents in a petition against an election, and provides that if the conduct of any returning officer be complained of he shall be made respondent. That plainly means anyone in any way or sense a returning officer. But it is contended that it means a returning officer only in one way and one sense, and that that returning officer is the alderman, and that the mayor is in no sense a returning officer. But in the event which happened the election was in fact decided at a meeting of which the mayor was the president. No other meeting was possible, and the election was there and then over, the remaining steps being merely machinery for making the election public. The 35 & 36 Vict. c. 33. s. 1 (7) shows that the election takes place at the time of nomination, if the numbers nominated within the time therein specified do not exceed the number of vacancies. The mayor is therefore, I think, a returning officer within the strict meaning of the words; but even if not I think he is a returning officer for the purpose of being made a respondent. The order of Mr. Justice Stephen must be rescinded.

Order rescinded. Costs to abide the event of the petition.

(7) 35 & 36 Vict. c. 33. s. 1: "If at the expiration of one hour after the time appointed for the election no more candidates stand nominated than there are vacancies to be filled up, the returning officer shall forthwith declare the candidates who may stand nominated to be elected, and return their names to the Clerk of the Crown in Chancery."

Solicitors—Bell, Brodrick & Gray, agents for W. Snowball, Sunderland, for petitioner; Brownlow & Howe, agents for H. Ritson, Sunderland, for respondent.

[IN THE COMMON PLEAS DIVISION.]

1880. Nov. 20.

CARRARD *v.* MEEK.

Bill of Sale—Statement of Consideration—Prior Unregistered Bill of Sale—Bills of Sale Act, 1878 (41 *&* 42 *Vict. c.* 31), *ss.* 8 *and* 9.

A bill of sale was expressed to be "in consideration of the payment of 81*l.* 18*s. by the grantee to the grantor, and in further consideration of the payment of* 16*l.* 3*s. by the grantee to the sheriff of Surrey for and at the request of the grantor." The former sum was a past payment and the latter sum was a present payment made in discharging an execution levied on the goods of the grantor*:—Held, *a sufficient setting forth of the consideration within section* 8 *of the Bills of Sale Act*, 1878.

Section 9, *by which a subsequent bill of sale executed within or on the expiration of seven days after the execution of a prior unregistered bill of sale is, under certain circumstances, void, does not affect a subsequent bill of sale executed after the expiration of that time.*

Interpleader issue to determine whether certain goods in the possession of one William Blin were the property of the plaintiff, who claimed them under a bill of sale, or of the defendant, who had seized them in execution of a judgment recovered by him against William Blin. The facts were brought before the Court in the form of a Special Case, of which the following are the material particulars:—

In November, 1878, an execution was

levied by the sheriff of Surrey on part of the goods of Blin on certain premises occupied by him for the sum of 28*l.*, and thereupon sold by the sheriff to the plaintiff for that amount; the receipt then given by the sheriff was not registered. At the same time the sheriff, at the request of Blin and the plaintiff, made an inventory and valuation of the remaining goods on the premises, and the plaintiff thereupon purchased them from Blin for the amount of such valuation, namely, 81*l.* 18*s.*, and took a receipt of Blin; this receipt was not registered.

The following is a copy of the receipt:—

"Received of Miss C. Carrard the sum of eighty-one pounds eighteen shillings, being the value of the surplus of my goods at 125, Loughborough Road, Brixton, sold by me, after valuation and inventory taken by the sheriff of Surrey this day, Nov. 21.

81*l.* 18*s.*
Wm. Blin.
Nov. 21/78."

The said goods remained in the possession of Blin, and a few days before the 10th of January, 1879, another execution was levied on them in an action against Blin for the sum of 16*l.* 3*s.* 6*d.* The plaintiff thereupon claimed the goods under title of the said sale, but, the sheriff having interpleaded, upon the hearing of the interpleader summons, the Master ordered the claim of the plaintiff to be barred with costs by order dated the 10th of January, 1879.

An agreement was afterwards, on the said 10th of January, 1879, entered into between Blin and the plaintiff, by which the plaintiff agreed to pay on behalf of Blin to the sheriff the said sum of 16*l.* 3*s.* in consideration that Blin should give the plaintiff a bill of sale on the goods on the premises aforesaid for the said sum of 16*l.* 3*s.* and 81*l.* 18*s.*, amounting to a total of 98*l.* 1*s.* This agreement was duly carried out, and the bill of sale was registered on the 15th of January, 1879.

The bill of sale was thus expressed:—

"This indenture made the 15th day of January, 1879, between William Blin of the one part and Catherine Carrard of the other part, witnesseth that in consideration of the payment of 81*l.* 18*s.* by the said Catherine Carrard to the said William Blin, and in further consideration of the payment of 16*l.* 3*s.* by the said Catherine Carrard to the sheriff of Surrey for and at the request of the said William Blin, the said William Blin doth hereby sell, transfer, &c."

No receipt was indorsed on the bill of sale.

The defendant on the 11th of March, 1879, obtained judgment against Blin for the sum of 79*l.* 11*s.*, and under the said judgment execution was duly issued for that amount, and the goods on the premises aforesaid were seized by the sheriff of Surrey. The said goods were thereupon claimed by the plaintiff, and the question for the opinion of the Court was, whether the bill of sale was valid as against the judgment of the 11th of March, 1879, and execution thereon, in favour of the defendant. The Court to be at liberty to draw inferences of fact.

T. Willes Chitty, for the plaintiff, in support of the bill of sale, argued against the following objections to its validity, which were brought forward by the defendant: First, that the consideration was not truly set forth in the bill of sale; secondly, that as it was given in lieu of the receipt of November, 1878, which ought to have been registered, and as a security for the same debt, it was void under section 9 of the Bills of Sale Act, 1878 (1).

(1) By 41 & 42 Vict. c. 31 (Bills of Sale Act), 1878. s. 8, which came into operation on the 1st of January, 1879, it is enacted that "every bill of sale to which the Act applies shall be duly attested, and shall be registered under the Act within seven days after the making or giving thereof, and shall set forth the consideration for which such bill of sale was given."

Section 9: "Where a subsequent bill of sale is executed within or on the expiration of seven days after the execution of a prior unregistered bill of sale, and comprises all or any part of the personal chattels comprised in such prior bill of sale, then, if such subsequent bill of sale is given as a security for the same debt as is secured by the prior bill of sale, or for any part of such debt, it shall, to the extent to which it is a security for the same debt or part thereof, and so far as respects the personal chattels or part thereof comprised in the prior bill, be absolutely void, unless

Wallace, for the defendant.—The ring authorities were cited: *Wood-* v. *Godfrey* (2), *Ex parte Cooper; aum* (3), *Ex parte Carter; in re ppleton* (4), *Ex parte The National antile Bank* (5), *Hamlyn* v. *Betteley The Credit Company* v. *Pott* (7), *nons* v. *Mortimer* (8), *Smale* v. *Burr Ramsden* v. *Lupton* (10), *Ex parte is* (11).

IDLEY, J.—I am of opinion that this valid bill of sale. It is objected that consideration is untruly stated, be- it would be inferred that the 81*l.* 18*s.* paid at the same time; but anyone ersant with deeds would look for the pt, and finding none, would infer that 1*l.* 18*s.* was a past payment. It has urged that an ordinary person would now this, and would infer the sum was at the time; but I think an ordinary n would not infer anything: he would now when the 81*l.* 18*s.* was paid—the is silent as to the time of payment— e would have to find out. We are l to read the deed as though the pay- was stated to have been made now; do not see my way to such a construc- and I do not consider the observation the consideration is untruly stated well founded.

e other objection is that this bill of is successive, and therefore void r section 9. One must first see whe- ther this is a subsequent bill of sale within the meaning of that section. It has been argued that as the receipt by Blin of the 21st of November was a bill of sale—*Ex parte Cooper; re Baum* (3)—and ought to have been registered as such, therefore the subsequent bill of sale which was given as a security for the same debt is void. But to hold in accordance with this contention we should have to read section 9 as though the words "within or on the expiration of seven days" were "within or on or after the expiration of seven days," giving the section a construction which was not intended. If the second bill of sale is executed within or on the expiration of seven days, then it might be void, but not if executed after the expiration of the seven days. The reason for the introduction of this section into the Bills of Sale Act is obvious, when one recalls the old state of things, and the practice of executing a fresh bill of sale before the expiration of the time for registration of the first bill of sale, and continuing this scheme with successive bills of sale, so that the goods were always covered by an existing bill of sale, which, though unregistered, was valid—*Ramsden* v. *Lupton* (10). It was to alter this state of things that section 9 was introduced, but it was never intended to affect a subsequent bill of sale executed after the expiration of the time for registration; because, after the expiration of the seven days, the goods could not be protected from seizure by the unregistered bill of sale. In the present case the bill of sale was executed two months after the receipt of the 21st of November, and such a construction as the defendant desires would not be merely straining the words, but it would be enacting a new section.

For these reasons I am of opinion that the plaintiff's title under the bill of sale is valid as against the execution creditor.

LOPES, J.—The first objection raised against the bill of sale is, that the consideration is not truly stated within section 8 of the Bills of Sale Act, 1879, because it is not stated that the 81*l.* 18*s.* was paid at a different time to the 16*l.* 3*s.*, and we have been asked to say it would read as though the former sum appeared to be a present payment; but I cannot

roved to the satisfaction of the Court having ance of the case that the subsequent bill of as *bona fide* given for the purposes of cor- g some material error in the prior bill of id not for the purpose of evading this Act."
49 Law J. Rep. Exch. 1; Law Rep. 5 Ex. D.

48 Law J. Rep. Bankr. 40; Law Rep. 10 . 313.
Law Rep. 12 Ch. D. 908.
49 Law J. Rep. Bankr. 62; Law Rep. 15 . 42.
49 Law J. Rep. C.P. 465; Law Rep. 5 C.P. .
42 Law Times, 592; affirmed on appeal, w J. Rep. C.P. 106.
5 Term Rep. 139.
42 Law J. Rep. C.P. 20; Law Rep. 8 C.P.

43 Law J. Rep. Q.B. 17; Law Rep. 9 .7.
42 Law J. Rep. Bankr. 9; Law Rep. 8 . App. 48.

adopt that view. The bill of sale does not read to me as though it pretended to give any time for payment of this 81*l.* 18*s.*, but only as though this sum was part of the consideration; and in that view I think *The Credit Company* v. *Pott* (7) is an *a fortiori* case in favour of the validity of this bill of sale.

The other objection to the validity of the bill of sale founded on the construction of section 9 of the Bills of Sale Act, 1879, seems to me to be equally untenable. It is important to remember the circumstances under which this section was enacted. The common practice in granting bills of sale was to avoid registration by executing a fresh bill of sale on the day preceding the expiration of the period for registration, and so on with successive bills of sale, so that the property was always covered by a bill of sale, which was valid against execution creditors though unregistered. The object of section 9 was to put a stop to this state of things, and I am clearly of opinion that this section only applies to bills of sale executed within the period of registration, and that it cannot therefore apply to a case like the present.

Judgment for the claimant.

Solicitors—W. T. Manning, for plaintiff; W. Caister, for defendant.

[IN THE COURT OF APPEAL.]

(*Appeal from the Common Pleas Division.*)

1880. Nov. 20. } LUCAS *v.* DICKER.*

Bankruptcy—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 95—*Execution Creditor—Title of Trustee—Notice of Act of Bankruptcy.*

A judgment creditor, after seizure of the debtor's goods in execution, but before sale, received a letter from the debtor's solicitors giving notice that a petition in bankruptcy had been filed against the debtor in a County Court. The debtor having, on the hearing of the petition, been adjudged bankrupt,— Held (*affirming the judgment of the Common Pleas Division*), *that the letter was sufficient notice of an act of bankruptcy committed by the debtor within the meaning of section* 95 *of the Bankruptcy Act*, 1869, *so as to deprive the execution creditor of the protection of the section.*

Hocking *v.* Acraman (12 Mee. & W. 170; 13 Law J. Rep. Exch. 34) *commented on.*

Appeal of the defendant from a judgment of the Common Pleas Division in a Special Case.

The facts fully appear from the report of the case in the Court below, 49 Law J. Rep. C.P. 415.

Sir J. Holker and *Pitt Lewis*, for the defendant.

A. Wills and *W. Graham*, for the plaintiff.

The following authorities were referred to during the argument: *Ex parte Todhunter* (1), *Ex parte Schulte* (2), *Edwards* v. *Scarsbrook* (3), *Udall* v. *Walton* (4), *Hope* v. *Meek* (5), *Turner* v. *Hardcastle* (6), *Bird* v. *Bass* (7), *Hocking* v. *Acraman* (8), *Conway* v. *Nall* (9), *Evans* v. *Hallam* (10).

LORD SELBORNE, L.C.—We all think that this appeal must fail. The statute requires that the creditor should, if his title by execution is to be displaced, have notice that an act of bankruptcy has been committed. The notice is not required

* *Coram* Lord Selborne, L.C.; Baggallay, L.J.; and Brett, L.J.

(1) 39 Law J. Rep. Bankr. 17; Law Rep. 10 Eq. 425.
(2) Law Rep. 9 Ch. App. 409.
(3) 32 Law J. Rep. Q.B. 45.
(4) 12 Mee. & W. 254; 14 Law J. Rep. Exch. 262.
(5) 25 Law J. Rep. Exch. 11; Law Rep. 10 Exch. 829.
(6) 11 Com. B. Rep. (N.S.) 683; 31 Law J. Rep. C.P. 193.
(7) 6 Man. & G. 143.
(8) 12 Mee. & W. 170; 13 Law J. Rep. Exch. 34.
(9) 1 Com. B. Rep. 645; 14 Law J. Rep. C.P. 165.
(10) 40 Law J. Rep. Q.B. 229; Law Rep. 6 Q.B. 713.

to be given by any particular person or in any particular manner. It is enough that the notice reaches the creditor in any way. "Notice" in that context does not and cannot mean positive knowledge of the fact, proved to the satisfaction of the person to whom the notice is given. The case of *Hope* v. *Meek* (5) shews that notice does not mean so much as that. It is enough that there should be given to the creditor information such as, if true, shews the existence of an act of bankruptcy. That information is binding upon him in whatever way it comes—whether from his own enquiries, or from the relation of another, or communicated through several persons. The information no doubt must be such as the Act requires; and if it does not shew that an act of bankruptcy has been committed, it is not a sufficient notice. Here the information was that two petitions in bankruptcy had been filed in a County Court upon certain debts, and the hearing of the two petitions was fixed on certain dates. The real question seems to me to be whether the person receiving that information is to be treated as in substance having notice of the contents of this petition, so far as relates to matters which are the legal requisites of such a petition under the bankruptcy law. It appears to me that in reason he must be taken to be acquainted with the bankruptcy law of which he is claiming the benefit. Having knowledge of that law, he knows from section 6 of the Bankruptcy Act, 1869, that such a petition ought to contain certain definite allegations of one or more different acts of bankruptcy, to be stated in the required form on the face of the petition, and sworn to by affidavit. If in fact no act of bankruptcy has been committed, the execution creditor will not be damnified; but if there is such a petition on the file, knowledge of its existence is knowledge of the fact that the petitioner has knowledge of an act of bankruptcy. It is wholly unimportant whether the execution creditor is told by the petitioner himself or by some one else. If he had gone to the proper office and read the petition himself, he would have had the notice which the Act requires. The information that such a petition has been filed is information that it has been made in form to the proper Court by a person seeking to obtain an adjudication of bankruptcy against the debtor. Therefore the allegation that a petition has been filed necessarily involves the assertion that an act of bankruptcy has been committed. If the assertion proves incorrect the execution creditor will not be damnified. In my judgment, without fully discussing the decisions in *Ex parte Schulte* (2) and *Ex parte Todhunter* (1), there is nothing whatever in the statute to require that the information should reach the execution creditor in a form which would tell him what was the date of the act of bankruptcy. If it was prior to the seizure under the execution, as was the case here, no point arises. The only remaining question is, how far our decision is consistent with authority. It is consistent with every authority except that of *Hocking* v. *Acraman* (8). We do not desire to say positively it cannot be reconciled with that case. To do so would involve an enquiry into the precise nature of the legal documents in that case, and as we do not think it necessary to deliver a considered judgment, we cannot well enter into that enquiry. But if that case is inconsistent with our present decision, we must with reluctance dissent from it. No cases have been cited tending to shew that it has been recognised and acted upon in subsequent cases. We are bound to state our view of the law upon the question now, and therefore, even if *Hocking* v. *Acraman* (8) is inconsistent with our present decision, we must dismiss this appeal. I may add that, according to our present impression, *Hocking* v. *Acraman* (8) is inconsistent with our judgment.

BAGGALLAY, L.J., and BRETT, L.J., concurred.

Appeal dismissed.

Solicitors—T. A. G. Powell, for plaintiff; C. J. Allen, for defendant.

[IN THE COURT OF APPEAL.]

(*Appeal from the Exchequer Division.*)

1880. Dec. 14. THE ATTORNEY-GENERAL *v.* DOWLING.*

Revenue — Succession Duty — Mortgage of Base Fee—Resettlement.

E. B. being seised in fee, granted estates to trustees to the use of himself for life, with remainder to his sons successively in tail male, remainder to his daughters in tail general. The grantor died, leaving two sons, Edward (a lunatic) and Reginald, and one daughter, Frances. Reginald conveyed, subject to Edward's estate, to the use of himself in fee, and then mortgaged the base fee thus created to a bank for 124,000*l.*, *being more than the fee-simple value of the property. Frances married, having bound herself by ante-nuptial settlement to settle any real property which she should acquire in her own right during the marriage on herself for life, with remainder to her children. Subsequently, by an arrangement between all the persons interested, Reginald, Frances and her husband, with the consent of the Lord Chancellor, as protector of the settlement, conveyed the property to trustees in fee, subject to Edward's estate tail, discharged of the mortgage and Reginald's equity of redemption, upon trust, after the death of Edward, to raise* 37,000*l. by sale, and after paying off the mortgage to convey to the use of other trustees, in trust for Frances for life, with remainder to her husband for life, with remainder to their sons in succession in tail male, with remainders over. Edward died without issue. Frances and her husband died leaving the defendant their eldest son:*—Held (*affirming the judgment of the Exchequer Division*), *that the defendant, for the purposes of succession duty, derived his succession from his mother and not from Reginald.*

Appeal from a judgment of the Exchequer Division upon an information for succession duty.

The case in the Court below is reported and the facts fully set out, 49 Law J. Rep. Exch. 621.

* *Coram* Lord Selborne, L.C.; Baggallay, L.J.; and Brett, L.J.

W. W. Karslake (*Sir H. Giffard* with him), for the Crown, referred to *The Lord Advocate* v. *The Earl of Glasgow* (1), *Lord Braybrooke* v. *The Attorney-General* (2), and *Fryer* v. *Morland* (3).

H. Davey and *Jason Smith*, for the defendant, were not heard.

LORD SELBORNE, L.C.—The argument of Mr. Karslake is founded upon principles which are perfectly well settled and established, and have been so since *Lord Braybrooke's* case (2) in the House of Lords. I may state those principles thus: Where there is a family arrangement between a father, or other ancestor, tenant for life, and the tenant in tail next in remainder, by which arrangement there is a resettlement of the estate, the tenant for life taking back his life estate with the powers he had before, then everything else under the settlement must necessarily proceed from the estate of the tenant in tail, and therefore the succession must be derived from the tenant in tail. In such a case I agree it would be idle to say that because the father, as protector of the settlement, agreed to barring the entail, and because he makes a bargain with respect to his consent, he therefore becomes the purchaser of his son's interest, and is to be regarded as a predecessor under the Succession Duty Act. But the present case is wholly different in all its circumstances. Here the remainderman in tail had acquired a base fee; he had encumbered that base fee to much more than the whole value of the estate—at all events to much more than could possibly have been obtained for his interest whilst it was a base fee. The person who would have been the protector of the settlement was a lunatic, and therefore the Lord Chancellor was protector of the settlement. The next person who was entitled in remainder, namely, the person who had acquired the base fee and so charged it beyond its value, had no issue, and no immediate prospect of issue. The next person entitled in remainder was a

(1) 12 Scottish Law Rep. 215.

(2) 9 H.L. Cas. 150; 31 Law J. Rep. Exch. 177.

(3) 45 Law J. Rep. Chanc. 817; Law Rep. 3 Ch. D. 675.

married lady, who, before the marriage, being of full age, had bound herself by articles of ante-nuptial settlement, and had thereby, in equity, turned her remainder into a remainder for herself for life, with the inheritance to her children, whose succession is now in question. Under that marriage settlement, if the children are to be regarded (as I think they are) as taking under it, the mother and no one else is the predecessor. This appears to me perfectly clear, and the question then is, Are they to be regarded as taking under that marriage settlement? Now the facts are these: The Lord Chancellor, feeling that it was not right to use the power vested in him as a public officer for the destruction of the expectations of those whose vested interests were wholly in those expectations, would not allow the remainder expectant on the base fee to be barred, unless upon terms which substantially preserved intact the beneficial interest of the persons entitled under the marriage settlement. Under these circumstances a family arrangement took place. There were risks on both sides. If Reginald Blewitt, who had mortgaged his whole interest to the Monmouthshire Banking Company, had lost his wife and had issue afterwards, then, as long as that issue continued, the succession of Mrs. Dowling and her children would be kept out. That was one chance against which it was their interest to gain protection. Another chance was that Reginald Blewitt might have survived the lunatic tenant for life. If he had done so, no longer would the consent of the Lord Chancellor barring the remainder expectant on the base fee have been necessary; but I have no doubt that the creditors—the Monmouthshire Banking Company—might have required Reginald Blewitt, by virtue of the security he had given to them, at once to convert the base fee into a fee-simple. On the one hand there were substantial risks to Mrs. Dowling and her children. On the other there was the risk to Reginald Blewitt's creditors that he might die before his brother the lunatic without leaving issue, in which case they would not get a single shilling of their debt. It appears to me perfectly true—as the judgment of the Court below decided—that on both sides value was given for the arrangement that was made. The interests of both were reduced to a practical certainty. Reginald Blewitt's interest was valued between the parties at 35,000*l.* or 37,000*l.* I regard that as representing his interest, and if the question of succession duty had arisen on that sum, I should have said that he was liable to it. But that arrangement could never have been obtained without the consent of the other parties, and the Lord Chancellor never would have allowed it without that consent, and without being satisfied that their interests were being protected. And the terms on which he gave his consent were that, when that value put upon Reginald's estate should be raised out of the property by means of the disentailing assurance for the benefit of the creditors, the Dowlings should have safely secured to them that estate in remainder expectant upon Reginald's estate, which, under the circumstances then existing, was precarious. In my opinion the children after that arrangement continued to take under the marriage settlement exactly as they would have taken if Reginald Blewitt had died without having done anything to enlarge the base fee into a fee-simple, and I am convinced that the Lord Chancellor never would have consented to the disentailing assurance upon any other terms. I think therefore that the judgment of the Court below was perfectly correct and the appeal must be dismissed.

BAGGALLAY, L.J., and BRETT, L.J., concurred.

Judgment affirmed.

Solicitors—The Solicitor of Inland Revenue, for the Crown; R. S. Taylor & Son, for defendant.

[IN THE EXCHEQUER DIVISION.]

1880. } EATON *v.* BASKER AND
Dec. 14, 20. } OTHERS.

Corporation—Contract not under Seal—Corporation having had Benefit of Contract—Local Authority—Public Health Act, 1875, *s.* 174—"*Contract whereof the value or amount exceeds* 50*l.*"

An urban sanitary authority, upon an outbreak of scarlet fever in its district, agreed with a medical practitioner, without any contract under seal, to pay him for attending to the fever patients at the rate of 5*s.* 3*d. per day per tent in which the patients were received. He attended the patients under the agreement. There were at first two tents, and others were afterwards added. His charge amounted to considerably more than* 50*l. The sanitary authority denied its liability, relying upon the Public Health Act*, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 174:—Held (*upon the authority of* Hunt *v.* Wimbledon Local Board, 48 Law J. Rep. C.P. 207), *that the section was not merely directory, and also that it applied to contracts of whatever nature.* Held, *further, that the contract was, within the meaning of that section, a contract "whereof the value or amount exceeds* 50*l.*," *as soon as the amount due under it exceeded* 50*l.; that the fact of performance of the contract by the medical practitioner did not take the case out of the section, and that the sanitary authority was not liable.*

Further consideration. The facts and arguments are stated in the judgment.

Finlay (on Dec. 14), for the plaintiff.

J. O. Lawrance and *Lindsell*, for the defendants.

STEPHEN, J. (on Dec. 20).—This case was tried before me on the 22nd of November, and was argued on further consideration on the 14th inst.

The action was brought by the plaintiff against the defendants to recover fees for medical attendance upon a contract made under the following circumstances:—

In June, 1878, an outbreak of scarlet fever occurred in Grantham and the neighbourhood. There were at that time three urban sanitary authorities in the district, namely, the Town Council of the borough of Grantham, the Spittlegate Local Board, and the Gonerby Local Board.

Each of these three authorities nominated a committee of three persons, which were amalgamated into a single committee, for the purpose of providing hospitals to receive the fever patients.

The rural sanitary authority of the Grantham Union also nominated a committee of two persons to confer with the others, and to ascertain the relative populations of the districts round Grantham. The eleven defendants were members of these four committees, and were the only defendants on the original statement of claim.

Subsequently the three districts were amalgamated into the borough of Grantham as it now stands, and the corporation of Grantham became subject to the liabilities of each of the three districts.

In the amended statement of claim the corporation of Grantham were added as defendants, though the personal liability of the eleven committee men was still insisted on.

The committees were appointed under sections 200 and 201 of the Public Health Act in order to exercise the power conferred upon local authorities by section 131, which enables such authorities to provide hospitals or temporary places for the reception of the sick, and to combine with other local authorities for that purpose. Though it was not mentioned in the argument, I may observe that section 200 expressly provides that a committee of an urban authority shall in no case be authorised to enter into any contract. This restriction does not apply to committees of rural authorities; but it does not appear that the two defendants appointed by the rural authority of the Grantham Union were such a committee as is referred to in section 201, and the case was argued throughout without reference to them.

The committee thus formed resolved to erect tents for the reception of scarlet fever patients, and directed Mr. Ashby, the medical officer of the sanitary authorities, to apply to Mr. Eaton, the plaintiff, a medical man in Grantham, to attend the patients.

Mr. Eaton finally agreed to do so at the rate of 5*s.* 3*d.* per day per tent. This

was on the 27th of June. Mr. Eaton attended from June 29th to September 15th. There were at first two tents, and others were erected afterwards. At the rate of 5*s.* 3*d.* a tent per day his charge came to 97*l.* 7*s.* 9*d.*

In the beginning of 1879 some correspondence took place, in which Mr. Eaton claimed the amount mentioned. The defendants offered a smaller amount, and, at last, on being sued, pleaded that no contract was made, and that if any was made it was illegal, and contrary to the provisions of section 200 of the Public Health Act, 1875.

At the trial it was admitted that Mr. Ashby was the agent of the defendants, and it was also admitted that if there was any liability at all it was a liability for the amount claimed. The plaintiff swore that it was not only a fair, but a very moderate charge, and that he was induced to accept it because he was the only unmarried practitioner in the town. This was uncontradicted, and it is indeed obvious from the nature of the case that the work done must have involved loss of other practice, and some degree of personal risk. In short, Mr. Eaton undertook a dangerous public service.

Two questions of law arose upon the case. The first was, whether the defendants were personally liable. The other, whether the contract made with the committee was binding on the mayor and corporation of Grantham, as representing the local boards, notwithstanding the provisions of section 174 of the Public Health Act.

As to the first question, it is to me clear that the contract was made with the committee, not in their individual capacity, but in their capacity as a committee. This is obvious from the evidence of the plaintiff himself, which is to the effect that Mr. Ashby met Mr. Eaton's first proposal by saying that "the committee or council" would not agree to it, and that he asked Mr. Eaton to attend a meeting held that night, which he did. Now, the committee is expressly forbidden to contract by section 200 of the Public Health Act, and if it were capable of doing so I think that the contract would not bind the individual members for the reasons given in the somewhat similar case of *The Leicester Waterworks Company* v. *Barrow Union* (1). I think, however, that the committee may properly be regarded as the agents of the local boards now represented by the corporation of Grantham, and the question therefore comes to be, whether the corporation of Grantham is liable upon a contract made by them in their capacity of urban sanitary authority not under seal, nor in accordance with the provisions of section 174 of the Public Health Act.

Many cases were quoted as to the nature and extent of the common-law rule as to the necessity that contracts by a corporation should be under seal, but they do not appear to me to be relevant to the present question.

The contract in question is a contract under the Public Health Act, and made by a body which, though a corporation for other purposes, was, on this occasion, acting, or rather is on this occasion responsible, if at all, as an urban sanitary authority, which is itself the creature of a statute, and has no other powers than those which it derives from that statute. It seems to me to follow that its liability depends, not upon the common-law rule, but upon the construction to be put upon section 174 of the Public Health Act. That section enacts that, "with respect to contracts made by an urban authority under this Act, the following regulations shall be observed (namely)—

"1. Every such contract whereof the value or amount exceeds 50*l.* shall be in writing and sealed with the common seal of such authority."

Then other conditions are mentioned, of which it is enough to say that two of them relate exclusively to contracts for works, and the third exclusively to contracts of the value or amount of 100*l.* or upwards.

It was contended for the plaintiff that the section did not apply to contracts like the one with Mr. Eaton for personal services, but only to contracts for the execution of works, and much might be said for this view but for the case of *Hunt* v. *The Wimbledon Local Board* (2).

(1) 48 Law J. Rep. M.C. 41; Law Rep. 4 Q.B. D. 18.

(2) 48 Law J. Rep. C.P. 207; Law Rep. 4 C.P. D. 48.

In that case an architect made plans upon a verbal order from the surveyor of the Local Board, his charge for which exceeded 50*l.*, and it was held first by Mr. Justice Lindley, and afterwards by the Court of Appeal, that the board were not liable.

Both the judgments appear to me to proceed upon the principle that the language of the section is unqualified, and applies to contracts of every description whatever, if their amount or value is over 50*l.* It is true that much discussion is to be found in the judgments referred to as to the existence and extent of certain exceptions to the common-law rule as to the necessity of a seal in such contracts.

The first exception is where the contract is for a small amount and for an act of daily necessity. The Judges held that this exception did not apply to statutory contracts because the Legislature had drawn the line at 50*l.* The second exception is where the party sued has had the benefit of the contract, the other side having performed the whole of his part of it. As to this it was pointed out by all the Judges in the Court of Appeal that the extent of the exception and its very existence are obscure and doubtful matters, and they gave reasons for thinking that even if the exception did exist it would not apply to the particular case before them, but there is nothing in any of the judgments to indicate that this exception to the common-law rule does in fact apply to the enactment under consideration (whatever may be its nature or extent). The case appears to me to shew that section 174 lays down a positive general rule subject to no exceptions as to all contracts made by local boards of the amount or value of 50*l.*, and on that ground I am reluctantly obliged to come to the conclusion that as this contract was not under seal it cannot be enforced.

An attempt was made to shew that the contract was not one of which the value or amount exceeded 50*l.* when it was made, as it was a contract for 5*s.* 3*d.* per tent per day, but I think that it became a contract, the value or amount of which exceeded 50*l.*, as soon as the amount due to Mr. Eaton exceeded 50*l.*

It was also argued that it was a contract made upon an emergency, but I do not see that there is any reference in the Act to emergencies; nor am I satisfied that anything which can be called an emergency existed. It would have taken no time to speak of to write down the terms of the contract and to seal them, and Mr. Eaton might have required either payment or a written contract at any time before the amount of 50*l.* was due to him.

There will be judgment for the defendants with costs.

Judgment for the defendants.

Solicitors—Routh, Stacey & Castle, agents for Henry Thompson & Sons, Grantham, for plaintiff; Bolton & Co., agents for Henry Beaumont, Grantham, for defendants.

[IN THE COURT OF APPEAL.]

1880. Dec. 17, 18. } ROYLE *v.* BUSBY AND SONS.*

Sheriff — Fieri Facias — Execution — Sheriff's Fees—Sheriff's Officer, right of to recover Fees from Solicitor of Execution Creditor—1 *Vict. c.* 55.

A sheriff's officer, who has executed a writ of fieri facias, cannot maintain an action for his fees against the solicitor of the execution creditor, where the solicitor has done nothing more than deliver the writ to the sheriff for execution.

Mayberry *v.* Mansfield (9 Q.B. 754; 16 Law J. Rep. Q.B. 102) *followed, and* Brewer *v.* Jones (24 Law J. Rep. Exch. 143; 10 Exch. 655) *overruled.*

Appeal from a judgment of Bowen, J., after trial, without a jury.

The action was brought by an officer of the sheriff of Cheshire, against the defendants, who were solicitors of execution debtors, to recover a sum of 28*l.* 11*s.*, for the levy fee and possession money alleged to be due from the defendants to the plaintiff in respect of work done by the plaintiff in executing a warrant on a writ of *fi. fa.*

The action was tried at the Manchester Spring Assizes, 1880, when the following

* *Coram* Lord Selborne, L.C.; Baggallay, L.J.; and Brett, L.J.

facts were proved in evidence or admitted: On the 31st of July, 1879, the defendants lodged with the plaintiff a warrant on a writ of *fieri facias* issued on a judgment recovered in an action of *The Stavely Coal Company* (*Limited*) v. *W. & J. Garforth and Company* (*Limited*). The warrant was lodged with instructions to execute it in the usual way—no officer being selected or named by the defendants; and a levy on the debtors' goods was made by the plaintiff on the same day.

On the 26th of July a petition to wind up the Stavely Coal and Iron Company was presented in the Chancery Division. The plaintiff had no notice of this petition until it was advertised on the 5th of August. On the 7th of August the Exchequer Division made an order staying all proceedings in the action of *The Stavely Coal, &c., Company* v. *W. & J. Garforth* (*Limited*) until the winding-up petition was disposed of or withdrawn, and the plaintiff in the present action was served with a copy of this order on the 8th of August. On the 7th of November an order to wind up the company, W. & J. Garforth and Company (Limited), was made. A copy of this order was served upon the plaintiff on the 17th of November, and he thereupon withdrew from possession, and shortly after brought the present action. The defendants paid into Court a sum of 3*l.* in respect of the levy fee and possession-money up to the 8th of August, when the order for a stay of proceedings was served upon the plaintiff.

Bowen, J., upon these facts, gave judgment for the defendants, holding, on the authority of *Cole* v. *Terry* (1) and *Newman* v. *Merriman* (2), that, no benefit having resulted to the defendants through the seizure, the sheriff's officer was not entitled to recover.

The plaintiff appealed.

Bigham, for the plaintiff.—First, it is submitted that a sheriff's officer may recover from the solicitor of the execution creditor the fees and possession-money provided for by the 1 Vict. c. 55. In *Foster* v. *Blakelock* (3) and *Walbank* v. *Quarterman* (4) it was held that the solicitor was the proper person to be sued, although no doubt in both those cases there was a selection or retainer by the solicitor of a particular officer to execute the warrant. In *Maile* v. *Mann* (5) it was held that the action could not be brought against the execution creditor himself, and *Brewer* v. *Jones* (6) expressly decides that the sheriff's officer may recover his fees although he was not specially nominated by the solicitor. *Brewer* v. *Jones* (6) no doubt was decided on the assumed authority of *Walbank* v. *Quarterman* (4), but it is contended that where the warrant is lodged with the sheriff for execution the sheriff becomes the agent of the solicitor to select an officer.

Secondly, the ground upon which Bowen, J., decided the case was wrong. The learned Judge said that the plaintiff had performed no beneficial service for the defendant, and therefore that *Cole* v. *Terry* (1) and *Newman* v. *Merriman* (2) applied, and the action could not be maintained. Both those cases are distinguishable from the present, because in both the sheriff had seized the goods of the wrong person, and was in fact suing for costs incurred in committing a trespass, whilst in the present case the plaintiff was clearly "concerned in the execution of process" within the 1 Vict. c. 55. s. 2, and properly seized the debtor's goods. He did perform a beneficial service by holding the goods until the result of the petition for liquidation was ascertained. The execution was not void until the winding-up order was made (7). He also referred to *In re Bastow* (8), *Buckley on the Companies Acts* (9). *In re The Great Ship Company; Parry's Case* (10). *In re Traders' North Staffordshire Carrying Company* (11).

(1) 5 Law Times Rep. 347.
(2) 26 ibid. 397.
(3) 5 B. & C. 328.
(4) 3 Com. B. Rep. 94.
(5) 2 Exch. Rep. 608; 17 Law J. Rep. Exch. 336.
(6) 24 Law J. Rep. Exch. 143; Law Rep. 10 Exch. 655.
(7) The Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 85, 87, 163.
(8) 36 Law J. Rep. Chanc. 899; Law Rep. 4 Eq. 681.
(9) 3rd ed. pp. 185 and 188.
(10) 4 De Gex, J. & S. 63; 33 Law J. Rep. Chanc. 245.
(11) 44 Law J. Rep. Chanc. 172; Law Rep. 19 Eq. 60.

R. Henn Collins, for the defendants.—Assuming there was any possible benefit to the defendants through the plaintiff keeping in possession, the defendants are still not liable. No liability to pay the sheriff's fees can in the absence of a special contract be implied either on the part of the creditor or his solicitor. *Bilke* v. *Havelock* (12); *Mayberry* v. *Mansfield* (13); and *Seal* v. *Hudson* (14) are direct authorities that, in the absence of any special contract the solicitor cannot be sued. *Brewer* v. *Jones* (6) is the only authority to the contrary, but that was decided upon an erroneous view of the decisions in *Foster* v. *Blakelock* (3) and *Walbank* v. *Quarterman* (4).

Bigham replied.

LORD SELBORNE, L.C.—This appeal raises the question whether a sheriff's officer can maintain an action for his fees and possession-money against the solicitor of an execution creditor, where the solicitor has done nothing more than deliver a writ of *fieri facias* to the sheriff for execution.

It is not contended that the law, apart from contract (express or implied), casts any such liability upon the solicitor. The sheriff is an officer of the law with subordinate officers, of his own appointment, for whose acts and defaults he is responsible. He and his officers are, by statute, entitled to certain fees; but the statute does not say that the solicitor of the execution creditor is to pay them; and, whatever the remedy for them may be, when the fruits of an execution are insufficient, there is no reasonable ground on which it can be implied that the solicitor, who, in the proper and ordinary course of his duty to his client, simply delivers a writ to the sheriff for execution, thereby enters into a personal contract to pay such fees.

It was held, in several cases which preceded *Brewer* v. *Jones* (6), that a request by the solicitor that a particular bailiff might be employed to execute the writ was evidence of a contract by him to pay that bailiff's fees and possession-money; and in one of those cases—*Foster* v. *Blakelock* (3)—the distinction was expressly pointed out, by Mr. Justice Bayley, between such a state of circumstances and that which exists when the solicitor merely delivers the writ for execution to the sheriff. *Mayberry* v. *Mansfield* (13) and *Seal* v. *Hudson* (14) were cases in which there was in fact nothing more than the delivery of the writ to the sheriff; and in both these cases it was held that there was no evidence of any contract, and that the solicitor was not liable. In *Brewer* v. *Jones* (6) the Court of Exchequer arrived at an opposite conclusion upon the authority (as it considered) of *Walbank* v. *Quarterman* (4), and it is remarkable that the Judges who pronounced that decision themselves regarded it as at variance with sound principle, and only justified it by that (supposed) precedent. *Walbank* v. *Quarterman* (4), however, was decided upon the authority of *Foster* v. *Blakelock* (3), in which the distinction above noticed was pointed out, and it was determined upon a state of facts similar to that which existed in *Foster* v. *Blakelock* (3). It is, therefore, no precedent at all, for *Brewer* v. *Jones* (6), which thus stands self-condemned as against sound principle, and is opposed to the judgment of a Court of co-ordinate jurisdiction, and of equal authority, in *Mayberry* v. *Mansfield* (13). We have no hesitation in following *Mayberry* v. *Mansfield* (13) in preference to *Brewer* v. *Jones* (6).

This point (which on account of the state of authority was not argued before Mr. Justice Bowen) is sufficient to dispose of the present appeal against the appellant. But it would not be right to pass over without notice the ground on which the judgment of that learned Judge proceeded, which was founded upon the opinions expressed by Barons Bramwell and Martin in *Newman* v. *Merriman* (2), to the effect that a sheriff's officer cannot recover his fees from a solicitor when the execution has proved practically abortive and unfruitful. These opinions were expressed in a case in which the goods seized were not the property of the judgment debtor, and I think it would be an error (on the assumption of a contract by the solicitor to pay the sheriff's officer what he was lawfully entitled to receive)

(12) 3 Campb. 374.

(13) 9 Q.B. Rep. 754; 16 Law J. Rep. Q.B. 102.

(14) 4 Dowl. & L. 760.

to extend them to any case of a different kind. In the present case the judgment debtor was a joint-stock company, against which there was pending, when the execution was issued, a petition to wind up, on which a winding-up order was afterwards made. The effect of that winding-up order was to defeat the execution by the operation of section 163 of the Companies Act of 1862. But I am not at all satisfied that it was the duty, or that it would have been consistent with the duty of the sheriff's officer to withdraw from possession without instructions from the execution creditor until it was certain that such an order, whereby the title of the judgment debtor to the goods might be displaced, would be made, or that, under such circumstances, he would lose his right to receive his lawful fees from any person, solicitor or not, who might have contracted to pay them. The first point is sufficient for our decision; as to the second it is possible that my learned brothers are not prepared to express any opinion upon it.

BAGGALLAY, L.J.—I agree with the Lord Chancellor's judgment on the first point. With regard to the second, I am not prepared to say that I should have drawn the same conclusion as Mr. Justice Bowen.

BRETT, L.J.—I express no opinion upon the second point. I agree entirely with the Lord Chancellor's judgment on the first point, which is sufficient to dispose of the case.

Judgment for the defendants.

Solicitors—Chester, Mayhew, Holden & Browne, for plaintiff; Palmer & Bull, for defendants.

[IN THE COMMON PLEAS DIVISION.]

1880. Dec. 6. } GOVERNMENT SECURITY INVESTMENT COMPANY *v.* DEMPSEY.

Company — Counter-claim — Companies Act, 1862—*Calls*—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 24. *sub-ss.* 3 *and* 7.

A person who has been duly settled on the list of contributories of a company, and on whom calls have been duly made, cannot (even in the case of a voluntary liquidation) in an action for calls by the liquidators of the company counter-claim for a debt or damages due to him from the company.

The defendant, a newspaper proprietor, agreed to take fully paid-up shares in payment of advertisements inserted in his newspaper by the company, and duly performed his part of the contract, but the company omitted to register the contract. The company went into voluntary liquidation, and the defendant was settled on the list of contributories as the holder of shares not paid for in cash. Calls were duly made, and the defendant sought, in answer to an action by the liquidator for money due on calls, to counter-claim the price of the advertisements or damages for neglect to register the agreement to give him fully paid shares.

Held (*on appeal from chambers*), *that no such set-off or counter-claim could be pleaded.*

Mudford's Case (49 Law J. Rep. Chanc. 452; Law Rep. 14 Ch. D. 643) *followed.*

This was an action by the liquidator of a company in voluntary liquidation to enforce calls for the sum of 171*l.* 10*s.* duly made on the defendant, whose name had been settled on the list of contributories.

The defendant, a newspaper proprietor, sought to set-off or counter-claim against the plaintiff a sum equal to the amount of the calls made, on the ground that the company had contracted to pay for advertisements inserted by them in his newspaper with fully paid-up shares, and in the alternative damages for the non-registration by the company of the alleged contract.

The defendant obtained an order of Master Francis giving him leave to defend on payment of the amount claimed into Court, from which order he appealed to Hawkins, J., who gave him unconditional leave to defend.

From this order the plaintiff appealed, and moved for leave to enter judgment for the plaintiff.

Glenn, for the appellant.—The position of the defendant was exactly the same as that of Mudford in *Mudford's Case* (1).

(1) 49 Law J. Rep. Chanc. 452; Law Rep. 14 Ch. D. 643.

There the company had agreed to give Mudford fully paid-up shares in discharge of his account for advertisements, and had allotted shares to him purporting to be fully paid up, but had not registered the agreement. It was held that under these circumstances the holder must be settled on the list of contributories, but that he had a right to prove against the company for the amount of the calls made or which might be made upon him. He also cited *Brighton Arcade Company* v. *Dowling* (2), *Grissell's Case* (3), *Mudford's Case* (1), *White's Case* (4), *Black's Case* (5), The Companies Act, 1862 (6), *Buckley on the Companies Act* (7), as showing that a shareholder cannot set off a debt due against calls, but must first pay the calls, whether the liquidation be voluntary or not, and then come in with the other creditors.

Sims, for the respondent.—All these cases were decided before the Judicature Act. Under the Companies Act, 1862 (6), the plaintiff should resort to the simple method of obtaining an order to pay the calls. This is not a mere case of set-off, it is a counter-claim, and refers to matters in controversy within the meaning of section 24, sub-section 7 of the Judicature Act, 1873. Counter-claim is entirely a creature of that Act.

The notice of motion does not cover an application for leave to sign judgment for the plaintiff.

Glenn, in reply.—*In re Whitehouse* (8) was decided long after the Judicature Act. The plaintiff was obliged to resort to this mode of procedure as the liquidation is voluntary.

DENMAN, J.—Though it is true that there is no express decision on this point, yet the case contended for is more than covered by the cases cited by counsel for the appellant. If set-off is not allowed, as is shown by those cases, an unliquidated claim such as that set up by the defendant cannot be allowed. *Mudford's Case* (1) is strictly in point, and there the Vice-Chancellor virtually held that a counter-claim is no answer to a claim for calls. *Grissell's Case* (3) is one of set-off, but the argument is stronger in a case of a counter-claim. The Companies Act intended that before anything could be done by a shareholder to obtain his rights against a company he should pay his calls. The original application before the Master was in its entirety before the Judge, and therefore the whole matter is before us. If, therefore, we see that there is no defence, we can allow judgment to be signed. The order must be discharged and judgment signed for the whole amount for the plaintiff.

LINDLEY, J.—It has never been suggested till now that the defendant had any defence as distinguished from counter-claim. None appears on the affidavit. There has been no dispute about the calls, the liability of the defendant, &c.—all that has been tacitly conceded. It has been decided that there is no right of set-off, and, if that be so, *a fortiori* there can be no claim for damages allowed. If we assume that sooner or later the defendant succeeds, is this case to go on to enable him to do so? There is every objection to his doing so. It is not a case for a cross action; and if it were, there is nothing gained by the defendant raising his case as regards the subject of the counter-claim as defendant rather than as plaintiff. And there are no circumstances making it more desirable that he should do so. I am, therefore, of opinion that this order should be discharged with costs, and judgment entered for the plaintiff.

Order discharged. Judgment for plaintiff.

(2) 37 Law J. Rep. C.P. 125; Law Rep. 3 C.P. 175.
(3) 35 Law J. Rep. Chanc. 752; Law Rep. 1 Chanc. App. 528.
(4) 48 Law J. Rep. Chanc. 236 (App.) 820; Law Rep. 12 Ch. D. 511.
(5) 42 Law J. Rep. Chanc. 404; Law Rep. 8 Chanc. App. 254.
(6) 25 & 26 Vict. c. 89. s. 101.
(7) 3rd ed. p. 226.
(8) 47 Law J. Rep. Chanc. 801; Law Rep. 9 h. D. 595.

Solicitors—Elborough & Dean, for appellant; Nathaniel White, for respondent.

[IN THE COURT OF APPEAL.]
(*Appeal from the Queen's Bench Division.*)

1880. Nov. 5, 6, 8. 1881. Feb. 5.

THE SOUTH EASTERN RAILWAY COMPANY *v.* THE RAILWAY COMMISSIONERS AND THE MAYOR AND CORPORATION OF HASTINGS.

Railway Commissioners, Jurisdiction of —Regulation of Railways Act (36 & 37 *Vict. c.* 48)—*Railway Company—Duty of, under Railway and Canal Traffic Act* (17 & 18 *Vict. c.* 31)—*Prohibition—Demurrer.*

The 2nd section of the Railway and Canal Traffic Act (17 & 18 *Vict. c.* 31) *requires every railway and canal company to afford, according to their respective powers, all reasonable facilities for the receiving, forwarding and delivering of traffic upon and from their railways and canals. Section* 3 *empowers any company or person complaining of anything done or any omission made in violation or contravention of the Act by such companies, to apply for relief to the Court of Common Pleas.*

The Regulation of Railways Act, 1873 (36 & 37 *Vict. c.* 48), *transferred to the Railway Commissioners all the jurisdiction of the Court of Common Pleas in the above-mentioned matters.*

A complaint was made to the Railway Commissioners pursuant to the provisions of these Acts by the Corporation of H. as to the condition of the stations of the S. E. Railway Company at H. and L., and application was made for an order requiring the railway company to enlarge the station at H., to provide better booking-office, waiting-room, refreshment-room, and general accommodation therein; to alter the existing platforms and to provide new ones; to improve the warehouse and cattle accommodation; and at L. to enlarge the platform and to provide a new road of approach. The commissioners delivered a judgment setting out the order which they proposed to make. This order, the operation of which was suspended for a named time, required the railway company to extend the platform accommodation at H. according to a specified plan, to cover over the platforms and part of the carriage yard, to add four waiting-rooms of a specified size, to reserve a portion of the station for refreshments, to increase the accommodation for the delivery of tickets, and to increase and improve the accommodation for cattle.

With respect to the station at L. the order required the company to increase and improve the platform and waiting-room accommodation, to cover over the bridge, to make fresh openings into and to widen the road of approach to that station. The railway company declared generally in prohibition on the ground that the commissioners had no jurisdiction to hear the application or any part thereof. The commissioners demurred generally to the whole of the declaration:—

Held (*reversing the judgment of the Queen's Bench Division*), *that the subject-matter of the complaint and application was not beyond the scope of the jurisdiction of the commissioners, but that the commissioners had no power peremptorily to order particular works to be executed according to a specified plan.* (*By* LORD SELBORNE, L.C., *and* LORD COLERIDGE, C.J.), *that the orders with respect to the platforms and goods yard at H., and the approach road at L., were in excess of jurisdiction; that the orders as to refreshment accommodation and the covering over of platforms, carriage yard and bridge, were not "facilities" within the statute; but that the orders as to booking-office, waiting-room and cattle accommodation were such facilities, and that the demurrer ought to be allowed generally.* (*By* BRETT, L.J.), *that all the orders except those relating to the cattle accommodation and the delivery of tickets at the booking-office, were in excess of jurisdiction, that the judgment on the demurrer should be distributive, and that the demurrer should be overruled as to all the orders except two.*

Appeal by the Railway Commissioners from the Queen's Bench Division.

The case is reported 49 Law J. Rep. Q.B. 273.

The Corporation of Hastings applied to the Railway Commissioners for an order enjoining the South Eastern Railway Company—first, to enlarge the Hastings station and to provide better booking-office, waiting-room, refreshment-room and general accommodation therein; second, to lengthen and deepen the existing platforms of the said station, and to provide additional platforms; third, to

provide better warehouse accommodation for goods at the said station; fourth, to provide cattle pens at the said station, and additional sidings for cattle trucks; fifth, to enlarge the platform of the St. Leonards station, and to provide the said station with a new approach by a direct route. On the hearing of this application the South Eastern Railway Company protested that the Railway Commissioners "had no jurisdiction to hear or determine the said application or any part thereof." The commissioners, nevertheless, heard the case and gave judgment thereon, requiring the railway company to provide with respect to the station at Hastings a new platform, to lengthen the two existing platforms, to make a substantial addition to the area of covered platform, to arrange the yard so as to enable carriages to set down and take up under cover, to provide two general and two first-class waiting-rooms, each at least twice as large as the largest of the existing rooms, to reserve part of the building for refreshment purposes, to deliver tickets at more than one window in the booking-office, and to put up cattle pens in a portion of the yard.

With respect to the station at St. Leonards, the commissioners required the railway company to widen the platforms, to cover over the bridge, to add four waiting-rooms, to consent to entrances being made into a certain road of approach, and to the widening of that road. The judgment of the commissioners ended with the following words:—

"With regard to the order to be drawn up, as the carrying into effect of this decision involves a considerable amount of co-operation between the company and the applicants, we suspend the issue of the order for two months, with liberty to either party to apply to us in the interval as they may be advised."

The railway company declared in prohibition, praying that a writ of prohibition might be directed to the commissioners "to prohibit them and every of them from further proceeding in any way touching the premises aforesaid before them," on the ground that the commissioners had "no jurisdiction to grant the relief prayed for or any part thereof."

To this declaration the Railway Commissioners and the Corporation of Hastings demurred, on the ground that it did not appear that the Railway Commissioners had not jurisdiction over the subject-matter of the application.

The Queen's Bench Division (*dissentiente* Lush, J.) overruled the demurrer.

The Railway Commissioners appealed.

Sir H. Giffard and *A. L. Smith*, for the appellants.—The demurrer of the commissioners raises the question whether they have jurisdiction to order any works whatever to be done by a railway company, or whether their jurisdiction is confined to traffic arrangements. The authority given to the Court of Common Pleas was derived from the Railway and Canal Traffic Act, 1854 (1); that authority is now vested in the commissioners (2). By the interpretation clause (1) a large meaning is given to the word "traffic." Section 2 (1) makes it the duty of railway companies to give greater facilities than they had been wont to afford.

(1) 17 & 18 Vict. c. 31. s. 1 provides that "the word 'traffic' shall include not only passengers and their luggage and goods, animals and other things conveyed by any railway company, . . . but also carriages, waggons, trucks, boats and vehicles of every description. . . .

"The word 'railway' shall include every station of or belonging to such railway used for the purposes of public traffic."

Section 2: "Every railway company, canal company and railway and canal company shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats and other vehicles; and no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic in any respect whatsoever. . . ."

Section 3: "It shall be lawful for any company or person complaining against any such companies or company of anything done or of any omission made in violation or contravention of this Act, to apply in a summary way by motion or summons in England to Her Majesty's Court of Common Pleas. . . ."

(2) 36 & 37 Vict. c. 48. s. 6 transfers to the Railway Commissioners appointed by that Act all the jurisdiction conferred by section 3 of the Railway and Canal Traffic Act, 1854.

It is submitted that the commissioners have jurisdiction to order the railway company to make structural alterations in their stations, in order to "afford all reasonable facilities for the receiving and forwarding" of passengers.

[SELBORNE, L.C.—Do you say that the commissioners could order the company to build a station where none was before?]

Possibly not, because railway companies are carriers between defined points, and the jurisdiction of the commissioners is as to facilities, &c., between the points of carriage only. Nor could they order the railway company to lay down a new line of rails, because that would be creating a new railway. The existing railway is the principal subject-matter to which the jurisdiction of the commissioners applies, and what the Act empowers the commissioners to order are the necessary accessories. It was a reasonable thing for the Legislature to intend that, as the whole carrying power had practically come into the hands of the railway companies in 1854, the powers of regulation here contended for should be given to the commissioners. The 2nd section (1) comprises three cases: it "provides for the receiving, the forwarding and the delivering of traffic," and over each of these the commissioners have jurisdiction. In 1853 it was for the first time held that it was optional in a railway company to proceed with and complete a railway for which it had obtained powers. The Legislature in 1854, in view of that state of the law, passed the Act now under consideration. Reading the word "passengers" instead of "traffic" in the section, it is clear there was jurisdiction.

[SELBORNE, L.C.—Was not the intention of the Legislature to provide against partiality only?]

That is dealt with separately. The first part of the section applies to a single railway company. In the latter part the language is different, and applies to a different subject-matter—that is, to other companies working in harmony with the single railway company.

Re The Caterham Railway (3) the rule *nisi* was moved for with respect to the undue preference part of the section, but the opinion of Willes, J., is of value as to the main question, whether the Act gives power to order any structural improvements. In *Oxlade* v. *The North Eastern Railway Company* (4) the Court assumed that structural alterations could, if necessary, be ordered. The Act cannot be construed by reference to a debate in Parliament.

[SELBORNE, L.C.—That is so. It has been regretted in the House of Lords that the Court of Appeal had allowed such a reference to be made in *The Queen* v. *The Bishop of Oxford* (5).]

The Act of 1854 was passed for the benefit of the public. The words "reasonable facilities" apply both to traffic on a company's own line and to traffic coming on to its line from other lines. There was no power for any public body to bring complaints of this nature until section 13 of the Act of 1873 enabled commissioners, corporations and boards to do so, and this will account for the want of authority on the subject.

Littler and *Willis* (with them *Bremner*), for the South Eastern Railway Company.—It is necessary to consider whether the railway commissioners can be prohibited, inasmuch as their jurisdiction was transferred to them from a Court which could not be prohibited.

[COLERIDGE, C.J.—The Act of 1854 gave certain jurisdiction to a superior Court, and to that Court no prohibition would lie. The Act of 1873 transferred that jurisdiction to the Railway Commissioners: does it not follow that appeal is the only way of questioning the jurisdiction of the commissioners?]

The commissioners in a certain sense possess the jurisdiction which the Court of Common Pleas formerly had, but they do not completely take the place of that Court; they are an inferior Court and not an inferior Court of record, for power has been expressly given to them by section 25, clause *e*, to punish contempt "in like manner as if they were a Court of record;" they are obliged by section 26,

(3) 1 Com. B. Rep. N.S. 410; 26 Law J. Rep. C.P. 16.

(4) 1 Com. B. Rep. N.S. 454; 26 Law J. Rep. C.P. 129.

(5) 48 Law J. Rep. Q.B. 609, at p. 634; Law Rep. 4 Q.B. D. 525, at p. 535.

in certain cases, to state a case for the opinion of a superior Court—*The Central Wales Railway Company* v. *The Great Western Railway Company* (6). The commissioners have jurisdiction over the same subject-matter as the Court of Common Pleas had; but it is not exactly the same jurisdiction, so that there is a different way of questioning it. If during the course of a case within their jurisdiction a question of law arises the proper way is to request them to state a case; but if the initial question is whether they have jurisdiction over the matter at all, then it is necessary to move for prohibition. *The Greenock Railway Company* v. *The Caledonian Company* (7) shews that the Scotch Courts consider that the commissioners can be prohibited.

[SELBORNE, L.C.—We are of opinion that the Court can prohibit the Railway Commissioners.]

The object of the Act of 1854 was to prevent preference or prejudice as regards traffic, whether beginning on or coming on to the line of a railway company. Section 2 of that Act (1) refers to the case of persons on a railway company's own line, then to the case of convenient interchange of traffic, and, lastly, to the case of the receipt of traffic from other lines; and this provision was intended to be in substitution for the advantages presumed to be derived from the fact that every railway is theoretically a highway. *Barrett* v. *The Great Northern Railway Company and The Midland Railway Company* (8); *Oxlade* v. *The North Eastern Railway Company* (4). A railway company is only bound to carry according to its profession and according as it has conveniences—*Johnson* v. *The Midland Railway Company* (9). A railway company is not bound to complete its line of railway, nor is it bound to add to it—*The Queen* v. *The York and North Midland Railway Company* (10). The commissioners are empowered to see that the railway companies give due facilities, regard being had to the existing line, and the existing accommodation afforded by its stations and their adjuncts.

[SELBORNE, L.C.—It may be that the commissioners ought not to define the precise form in which the alterations are to be made; but if an alteration is required, is an order that reasonable facilities be given bad because obedience to such an order necessitates structural alterations?]

The only case in which structural alterations were ordered during some twenty-five years was *The Caterham Case* (3), and that case was not argued fully, as the company there fell in with an intimation given by the Court on the motion for the rule *nisi*. When the Legislature has thought that extra facilities were required, or when it was desired to impose fresh obligations on railway companies, this was effected by express legislation, as in the case of smoking carriages and communication with the guard. The Court had and the commissioners have no power to order structural alterations, to take the contract of the line out of the company's hands, to define certain adaptations of station accommodation according to a particular plan, to compel a company to enter on new works, to seek for fresh powers, to raise further capital, or to dictate to a company in what way it can best serve the public. The case of *Bennett* v. *The Manchester, Sheffield and Lincolnshire Railway Company* (11) does not warrant the inference drawn by Lush, J., in the Court below (12), for section 17 of the Act of 1873 does not apply to canal companies generally but only to railway companies owning canals; and further, Grimsby Dock is not a canal.

If the order of the commissioners is in part bad and in part good, then the railway company is entitled to a prohibition as to those portions which are in excess of jurisdiction. There are orders as to severable and distinct matters, and prohibition may go as to any one of those.

[SELBORNE, L.C.—If the declaration in prohibition be too wide, must not the demurrer be allowed?]

(6) 2 Nev. & Mac. 191.
(7) 2 Nev. & Mac. 227; 5 Sc. Sess. Cas. 955.
(8) 1 Com. B. Rep. N.S. 423; 26 Law J. Rep. C.P. 83.
(9) 4 Exch. Rep. 367; 18 Law J. Rep. Exch. 366.
(10) 1 E. & B. 858; 22 Law J. Rep. Q.B. 41.
(11) 6 Com. B. Rep. N.S. 707.
(12) 49 Law J. Rep. Q.B. 283; Law Rep. 5 Q.B. D. 248.

No; for the judgment may be distributed.

[COLERIDGE, C.J.—There is as yet no order: is not the question whether the commissioners had any jurisdiction over the complaint? SELBORNE, L.C.—The proceedings of the commissioners were interrupted by the declaration in prohibition.]

It was thought convenient that the matter should be treated as though the order had been made.

Sir H. Giffard, in reply.

Cur. adv. vult.

The following judgments were (on Feb. 5) read:—

LORD SELBORNE, L.C.—The order of the Queen's Bench Division which is appealed from in this case, by overruling generally the demurrer of the Railway Commissioners to the declaration in prohibition of the South Eastern Railway Company, has affirmed the incompetency, in point of law, of the commissioners to order the company (upon an application by the Corporation of Hastings) to execute certain improvements of or connected with their stations at Hastings and St. Leonards.

If the commissioners have authority to order those improvements or any of them to be made, it must be derived from the 3rd section of the Act 17 & 18 Vict. c. 31, which empowered the Court of Common Pleas (or any Judge of that Court), upon complaint made against any railway company of anything done or of any omission made in violation or contravention of that Act, to hear and determine the matter of such complaint, and, on being satisfied (after due enquiry) of its truth, to issue a "writ of injunction restraining such company from further continuing such contravention or violation of this Act, and enjoining obedience to the same." Obedience to any such injunction was to be enforced by attachment and by other penalties. By a later Act (36 & 37 Vict. c. 48) the power thus given was transferred to the Railway Commissioners.

The first observation which arises upon this enactment is, that it does not enable the commissioners to impose upon a railway company any new duties or obligations depending upon any mere exercise of the commissioners' own judgment. Their authority is only to enquire into and to prevent violations or contraventions of the statute. For this purpose alone they may issue a writ of injunction, the form of which (according to the 5th rule made under the Act by the Court of Common Pleas) was to be prohibitory if the statute were contravened by any positive act, and mandatory if it were contravened by any mere omission or non-feasance. (See 15 Com. B. Rep. p. 472.) In both cases alike the obligation to be enforced by the writ must have been already created by the statute. The question into which the Court was to enquire was not one of expediency but of fact. Such an authority was in harmony with the general functions of a Court of law, although its exercise might require special powers (such as those to conduct enquiries by engineers or others), and although it was given in a very peremptory form, all appeal (in the proper sense of that word), even from the decision of a single Judge, being excluded. A discretionary power to dictate to a company what structural works it should or should not execute for the purposes of its undertaking, would have been evidently much more suitable to a practical and scientific than to a legal tribunal.

What, then, are the obligations imposed upon railway companies by this statute? They are contained in the second section, and are (substantially) three in number: First, a positive obligation to afford, according to their respective powers, all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats and other vehicles. "Traffic" (according to the interpretation clause, section 1) includes "passengers and their luggage, and goods, animals, and other things conveyed by any railway company." "Railway" includes "every station of or belonging to such railway used for the purposes of such traffic." The second obligation is to give no undue preferences; the third, to do whatever

may be necessary to enable the company's own line and any other line connected with or having a terminus near it, to be used by the public as continuous lines of communication.

It is unnecessary to state more particularly the terms in which the second and third obligations are created—the first alone being material to the present question. I notice only to set it aside the argument of the respondents that this has no reference to any traffic of which a company is itself the original carrier upon its own line. There is nothing either in the words or in the reason of the thing to warrant any such restrictive construction. A company may carry or not upon its own line as it thinks fit; and, if it does so, may undertake that business under various conditions and limitations. But, if and so far as it does undertake so to carry either passenger or goods traffic, it comes, in my opinion, under the obligation to afford, for the purposes of that traffic, the facilities required by the first branch of the 2nd section of the Act.

With respect to stations, there is no obligation to establish them at any particular places or place, unless the company thinks fit to do so. The railway (as interpreted by the Act) only includes existing stations used for the purposes of public traffic. But when the company has in fact opened a station at a particular place, and actually uses it for the purposes of public traffic, and invites the public to resort to it for the purpose of being received or delivered as passengers to or from trains announced as starting from or stopping at that station, or of having their goods received there for carriage or delivered there after carriage, it is, in my opinion, bound by the Act to afford at that station (to the extent of its powers) all reasonable facilities for "receiving," "forwarding" and "delivering" such passengers and goods. It may not in all cases be a very easy thing to determine whether that obligation has been fulfilled or not. Nothing less than reasonable proof that it has not been fulfilled can authorise the commissioners to interfere with the discretion of the company as to the arrangements or management of any of its stations; and even then the Act does not appear to contemplate an order for the execution of any particular works if it can be obeyed without them. But I cannot assent to the argument that, according to the true construction of this second section, the obligation to afford all reasonable facilities, &c., is circumscribed by the precise extent, capacity and structural arrangements of the buildings—booking-offices, platforms, &c.—*de facto* provided at the time of complaint by the company, if these are insufficient for the ordinary traffic of the station, and if, by alterations or other improvements, which the company has adequate power to make, all necessary facilities might be afforded. The words "according to their respective powers," as well as the general scope of the enactment, seem to me to be very much opposed to so limited a construction. I am, therefore, of opinion that a company does violate and contravene the Act if (having sufficient powers) it keeps its platforms, booking-offices, and other structures at any station in such a condition as to space and other arrangements as to cause dangerous or obstructive confusion, delay or other impediment to the proper reception, transmission or delivery of the ordinary traffic of that station, whether consisting of passengers or of goods.

Being of that opinion, I am unable to hold, upon the terms of the complaint itself, that the matter of it, which I regard as summed up in the 7th and 14th paragraphs (13), was beyond the scope of the commissioners' jurisdiction. The prayer with which that complaint concluded may have been improper either in form or in substance; but if the matter

(13) The 7th and 14th paragraphs of complaint were as follows:—

"7. The South Eastern Railway Company has for a long time neglected to afford, and still neglects to afford, reasonable facilities for receiving, forwarding and delivering traffic at and from Hastings station, in manner appearing from the 8th, 9th, 10th, 11th, 12th and 13th paragraphs of this application.

"14. The South Eastern Company have long neglected to afford, and still neglect to afford, reasonable facilities for receiving, forwarding and delivering traffic at and from the St. Leonards station, in manner appearing from the 15th, 16th and 17th paragraphs of this application."

itself was within the jurisdiction of the commissioners, I conceive there is so far no ground for a prohibition.

The matter, indeed, does not now remain exactly in that state. The commissioners proceeded to deliver what is called their judgment, and although no writ of injunction was issued (indeed, I find it difficult to collect from the judgment in what precise form the commissioners intended it to issue), still it is plain to me from the points noted for argument before the Queen's Bench Division, on the part of the commissioners, that all parties thought it convenient practically to treat that judgment as embodying the substance of an order which if not prohibited they would have made. It is proper, therefore (if not necessary), that we should explain the view we take of the several matters and things which for this purpose appear to have been treated as "if they had been ordered;" as the effect of our decision might otherwise be misunderstood.

One of these matters is an extension of the platform accommodation at the Hastings station, according to a plan prepared by the chief engineer and approved by the directors of the company.

The insufficiency of the platform accommodation appears to have been admitted by the company; and it may be that if the plan proposed had been altogether within its powers, and had been at the company's instance or by its consent embodied in an order of the commissioners, it would not have been open to the same objection as if it had been dictated by the commissioners to the company.

But this plan appears by the judgment to be dependent for its practicability upon the enlargement of a certain bridge, which the company at the time of the complaint had not power so to enlarge; and although it has since entered into an agreement with the owners of the land requisite for that purpose, the performance of that agreement involves (among other things) a money contribution by those owners towards the intended works. It appears to me to be impossible to hold that any particular improvements dependent upon the execution of such a plan could have been obligatory under the statute, the statutory obligation being limited by the company's powers. The company, therefore, had not in this respect "violated" or "contravened" the Act, and the commissioners could not order it to execute these particular works.

An objection similar in principle applies to the suggestions (if meant to be imperative) contained in the judgment on two other subjects—the goods yard at Hastings and the approach to the St. Leonards station. It is, therefore, superfluous to enquire (though on this point I certainly do not differ from Lord Justice Brett) whether, if the works contemplated by those particular suggestions had been within the company's powers, they could have been regarded as necessary to afford reasonable facilities for the purposes specified in the Act.

That question, however, arises as to some other things which the commissioners have also proposed to order, and which (so far as appears) the company might have power to do. Of these the reservation of part of the station buildings at Hastings for refreshment purposes, and the covering over of certain parts of the platform, &c., at both stations, on account of the exposure of the site and the resort of invalids to St. Leonards and Hastings, seem to me to be clearly not necessary as facilities for the receiving, forwarding or delivering traffic upon the railway, however desirable they may be for the comfort or convenience of passengers.

The enlargement in some reasonable way (whether by platform or by waiting-room accommodation) of a space insufficient for the proper reception of ordinary passenger traffic, and some proper provision for the delivery of cattle from the company's waggons, without those risks which seem now to attend their passage through the station yard, are things which approach more nearly to my conception of facilities which the commissioners in the due exercise of their jurisdiction might hold to be necessary and required by the Act.

I am by no means prepared to say that there is no form of mandatory injunction which they can properly issue for these purposes. It does not, however, follow

that they can order a certain number of waiting-rooms to be provided, or dictate their classification, position or dimensions, or enjoin the company to make cattle pens upon a particular piece of ground now used for other purposes. It may well be that by the execution of such works as these, or some of them, the obligation imposed upon the company by the statute might be fulfilled; nor should I be disposed to impute any excess of their jurisdiction to the commissioners if they were merely to indicate for the consideration of the company these or any other convenient means by which in their opinion that obligation may be fulfilled. But between any such reasonable suggestions and a peremptory order for the execution of these particular works there is a wide difference. I can find no warrant in the statute for the assumption by the commissioners of a general control in matters of this kind over the discretion of the company as to the best means (when there is a choice of means) of fulfilling their statutory obligations.

There remains the point as to booking-office accommodation at both stations. The commissioners proposed to order that this should be increased in a manner as to which I consider them to have had jurisdiction to make such an order as I conceive them to have intended.

The result is, that the commissioners had, in my opinion, jurisdiction over the general matter of the complaint as summed up in paragraphs 7 and 14 (13), and had also jurisdiction to order some at least of the things contemplated by their judgment, provided they did so in a proper manner and form; but that as to other things which they apparently intended to order they had no jurisdiction, partly because these things were beyond the company's powers, partly because they were not facilities reasonably necessary for the particular purposes mentioned in the Act and partly because they would have required particular structural works to be executed which are not prescribed by the Act and which cannot be supposed to be the only possible means of affording the facilities which the Act does require.

Taking this view, I should have been prepared to allow the demurrer in part, and to overrule it in part if I had thought either that this conclusion was rendered technically necessary by the statements and prayer of the declaration in prohibition, or that upon the whole facts appearing by the declaration and admitted by the demurrer it was a course open to the Court and practically convenient for the purposes of justice. But the declaration, according to its true construction, seems to me to challenge altogether the jurisdiction of the railway commissioners to take any cognisance of the complaint of the Corporation of Hastings. It begins by saying that the commissioners "wrongfully assumed jurisdiction" to hear and determine the application, notwithstanding the protest of the railway company that they "had no jurisdiction to hear or determine the said application or any part thereof"; and after stating *in extenso* the "judgment" pronounced by the commissioners on the 18th of May, 1878, and the application itself and the company's answer to it, it concludes by asking for a writ to prohibit the commissioners and every of them "from further proceeding in any way touching the premises aforesaid before them."

I do not think that this form of declaration makes it technically necessary for the Court on a general demurrer by the defendants in prohibition to do more than say that the commissioners either have or have not jurisdiction over the matter brought before them by the complaint of the Corporation of Hastings. If, on the face of the complaint, they had no jurisdiction over any part of that matter, the demurrer must of course be overruled. If there were some matters in that complaint over which they had, and others over which they had not, jurisdiction, the demurrer ought to be partly allowed and partly overruled. But if (which is my own view) they had jurisdiction over the whole matter of the complaint, as summed up in the 7th and 14th paragraphs (13), then I think that they ought to be permitted to deal with that whole matter by making some order upon it which (as yet) they have not

done, and that it cannot be technically wrong upon such a record to allow the demurrer generally.

It is indeed true that among the facts stated in the declaration and admitted by the demurrer is the long and elaborate judgment of the commissioners, declaring their intention to deal with the complaint of the corporation in a way which, as to some matters, would, according to the view of this Court, be in excess of their jurisdiction; so raising the question whether it may not be competent for us in that state of the commissioners' proceedings (as shewn by the record) partly to allow and partly to disallow the demurrer, just as if a prohibition had been asked, not against any further proceeding whatever on the complaint of the corporation, but against an order framed on the terms of the commissioners' judgment. I assume that this might have been a proper and a convenient course if it had been really possible to collect with reasonable certainty what the exact nature and form of the order to be drawn up upon the commissioners' judgment would have been. This, however, I am myself unable to collect from the record. I can see clearly enough, as to some particular matters, that the commissioners did intend to make an order which I should have thought beyond their jurisdiction. I am by no means equally sure whether as to any part of the matters before them they contemplated making an order which I should have thought, in form as well as substance, right. As to several matters of great consequence, it seems to me to be quite uncertain whether they saw their own way to making any order at all unless the parties relieved them from the necessity of doing anything by coming to some agreement. The judgment concludes with these words: "With regard to the order to be drawn up, as the carrying into effect of this decision involves a considerable amount of co-operation between the company and the applicants, we suspend the issue of the order for two months, with liberty for either party to apply to us in the interval as they may be advised." I do not think it would tend to the more convenient administration of justice in this case if this Court were to endeavour in the order to be now made upon the demurrer to draw a line between the good, the bad and the ambiguous parts of that judgment. It appears to me to be technically not wrong, and practically to be most convenient, to allow the demurrer generally without prejudice to any new application for a prohibition, if the commissioners should make any order or issue any writ not authorised by the statute. I feel confident that the commissioners having our opinions before them will not now make such an order as they probably might have made if no proceedings had been taken in prohibition. Those proceedings, therefore, will not have been fruitless, and as neither party has been wholly right or wholly wrong, I think there ought to be no costs on either side. The Lord Chief Justice agrees in this view, and the judgment of the Court will therefore be to reverse the order of the Queen's Bench Division and allow the demurrer of the railway commissioners without costs, and without prejudice to any new application which the company may be advised to make for a prohibition after any writ of injunction or other order upon the complaint of the Corporation of Hastings shall have been issued by the commissioners.

LORD COLERIDGE, C.J.—I concur.

BRETT, L.J.—In this case the plaintiffs in prohibition originally moved for a writ of prohibition—first, on the ground that the complaint preferred by the Corporation of Hastings ought not to have been entertained by the defendants in prohibition; secondly, on the alleged ground that the defendants were about to make an order which in several suggested particulars would exceed their jurisdiction. As to the first, it seems to me impossible to say that the commissioners had not jurisdiction to entertain the complaint which prays for redress of a grievance described in the exact words of the statute; but as to the second, if the alleged order would exceed jurisdiction, and the intention to make it is proved or not denied, such intention is

sufficient cause for prohibition. The Divisional Court being of opinion that the subject-matter raised questions too important to be determined on mere motion, directed according to received practice the plaintiffs to declare in prohibition, so that the grounds on which the prohibition was claimed might appear upon the record. The plaintiffs accordingly declared, setting out the complaint which they alleged the defendants had entertained, and the order which they alleged the defendants intended to make. The defendants pleaded a general demurrer to the whole declaration. That admits that the defendants had entertained the complaint, and did intend to make an order, and that it would be an order in the terms alleged in the declaration. A question upon the demurrer then is, whether it is within the jurisdiction of the defendants to make all or any part of that order. This raises, first, the question, What would cause such an order, or part of it, to be beyond jurisdiction as distinguished from being merely erroneous? If no part of the order could legally be made under any circumstances, in any form, the whole is beyond jurisdiction. If there are separate parts which could under no circumstances, in any form, be legally made, those parts are beyond jurisdiction. But if the whole or any part could under some circumstances be properly made, though they would be improperly made under the circumstances of the particular case, that would be error and not an excess of jurisdiction. The jurisdiction of the defendants, given to them by the statute 36 & 37 Vict. c. 48, is that which was given to the Court of Common Pleas by the statute 17 & 18 Vict. c. 31. That jurisdiction is to hear and determine the matter of any complaint made by any company or person against a railway or canal company of anything done or any omission made in violation or contravention of this Act; and, if it should be made to appear that anything has been done or omission made in violation or contravention of this Act, to issue a writ of injunction restraining the company from further continuing such violation or contravention of this Act, or enjoining obedience to the same (section 3). The matter material in this case, which is enjoined by the Act, is, that every railway company shall, according to its powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the railway belonging to or worked by such company (section 2). "This word 'railway' shall include every station of or belonging to the railway used for the purposes of public traffic." From these enactments the following propositions are to be deduced: that the only question which the commissioners have jurisdiction to entertain on any complaint is, whether what is complained of is something done or omitted to be done in violation or contravention of the Act; that any order which they may make can only properly be an order restraining the company from further continuing to do certain things which are in violation or contravention of the Act, or directing the company to obey the Act as to certain matters omitted to be done by the company in violation or contravention of the Act. Applying these propositions to the present dispute, it follows that the defendants had jurisdiction only to hear and determine and order in respect of facilities to be afforded upon or from the railway or the stations used by the company for the purposes of public traffic. This description of the railway and stations, namely, that they are used by the company, confines their jurisdiction to a dealing with the existing railway and the existing stations, and prevents them from ordering the making of any new railway or any new station. Their jurisdiction was further confined to this, that they could only properly deal with matters which might facilitate or impede the receiving, forwarding or delivering of passengers or goods upon or from the existing railway or stations; they had no jurisdiction to entertain or deal with matters otherwise affecting passengers or goods. The power to make an order being instituted by a statute which describes the kind of order it enables the tribunal to issue, the jurisdiction of the commissioners is also confined to making such an order as is described in the statute and formulated in the rules.

(See 15 Com. B. Rep. 473.) The order, therefore, can only legally be made with regard to matters which the commissioners may properly entertain; that is to say, with regard to matters which by their omission or commission may affect facility in receiving, forwarding or delivering traffic. The order may direct the discontinuance of the acts complained of if they are done in violation or contravention of such facility; or may order that certain omissions complained of shall be supplied if they are in violation or contravention of the same facilities. To form an opinion whether the omissions complained of are omissions of reasonable facilities, it may be right, and even necessary, that the commissioners should receive and consider evidence of specified schemes or methods for supplying the alleged omission; but the order can only direct that the omission must be supplied either wholly or to a declared reasonable extent. If the omission can be supplied in more than one way, the commissioners have no jurisdiction to declare which way is to be preferred. The discretion as to such a matter rests with the company. The commissioners, therefore, in this case might properly receive evidence of specified methods of supplying the alleged omissions of reasonable facilities for the receiving, forwarding and delivery of passengers or goods, and might properly consider whether the nature and expense of such specific methods of supplying facilities made the omission of such facilities reasonable or unreasonable; but the commissioners had no jurisdiction to order that the omissions which they determined ought to be supplied should be supplied by any specified works to be constructed in any specified form or in any specified locality. The obligations dealt with by the statute which are material to be considered in the present judgment are confined to facilities for the receiving, forwarding and delivering of traffic upon and from the railway belonging to or worked by the company, or upon and from stations used by the company. This confines the jurisdiction to make any order to a power to make it with regard to the existing railway or the existing stations. It is necessary, however, to determine what is the legal limitation of the terms so used. It was urged that such terms prevented the commissioners from making any order in any form which would necessitate the making by the company of any structural alteration or addition whatever. But the terms "railway" and "railway station" are not mere legal terms; they are the descriptions in ordinary phraseology of well-understood things of an ordinary kind. The terms as used in the statute are therefore to be construed as such descriptions. If there is an omission of some reasonable facility within the Act in the working of the railway, which omission can be reasonably supplied without altering the railway, using the term "railway" as a description of that which is ordinarily understood by people of ordinary sense to be a railway, there is nothing in the Act which says that it would be an answer on the part of the company to an order to supply the omission that it could not be supplied without some structural alteration or addition. For instance, if additional points or sidings were requisite for safety at an existing junction, no ordinary person would say that the addition of a set of points or the laying of a siding rail would make a new railway; they would term it an adaptation or improvement of the existing railway; though an order to make a single line railway from A to B into a double line railway would be considered by all ordinary persons of intelligence to be an order to construct a substantial new line of railway or new railway. So, as to a "station," the term is not in ordinary sense used as a description merely of the actual existing structures at a station; but as the description of a space actually set apart for, and generally used as, a resting-place for traffic, or a place for dealing with it in a particular way, although every part of the space is not covered with structures or used for passing along or for deposit. An order, therefore, to supply the omission of reasonable facilities at a given station would not be beyond jurisdiction because such omission could not be supplied without some structural alteration or addition

made at such station, used as describing such space; but it would be beyond jurisdiction if it required and insisted upon the supplying of an alleged omission which could not be obeyed, and which it might be admitted could not be obeyed without what every ordinary person would reasonably say was the making a new station or adding to the existing station, so as to make it a different station, the distinction, as before, being between adaptations or improvements of existing works or an existing station, and the execution of substantially new works or the making of a substantially different station.

Applying the above rules to the different matters included in the proposed order, the direction to extend the limits of the existing station is not an order which can be obeyed by improving or adapting the existing station, but only by substantially making a station different from the existing station, and is, therefore, beyond jurisdiction. An order in any form to do this would be beyond jurisdiction. So as to enlarging the bridge. The order to extend the platform accommodation is an order dealing with a matter within the jurisdiction of the commissioners if there was some legal evidence of a want of reasonable accommodation in that respect for receiving or forwarding the average number of passengers. If there was evidence before the commissioners that the platform accommodation for getting into or out of or waiting for trains was not reasonably sufficient for the passenger traffic, and that further accommodation in that respect could be reasonably given within the limits of what might reasonably be treated as above defined of the existing station, the commissioners might legally have declared that there was an omission of reasonable facilities in respect of platform accommodation, and might have enjoined the company to supply further platform accommodation to a specified extent—as to twice the existing extent, or so as to accommodate so many more passengers; and the commissioners might properly have received evidence of specific schemes of improvement, so as to determine what amount of further accommodation it would be reasonable to require; but the commissioners exceeded their jurisdiction by ordering the platform to be extended according to the plan of the engineer; that is to say, in one way only. If they could make an order in such a form, their order would be disobeyed, though an equal accommodation could be given in some other way. They have no power under any circumstances to make an order in any form to such effect.

Therefore the order so framed is an excess of jurisdiction. The order as to further protection from weather would have been within their jurisdiction if it had been made with regard to passengers, as such; but it exceeds, because it is made in order to protect persons visiting Hastings as invalids, although it may protect with quite reasonably sufficient effect passengers, as such. The order as to additional waiting-rooms would have been correct if upon some legal evidence the commissioners had determined that there was a want of reasonable accommodation in that respect, which want could be supplied by reasonable alterations of or additions within the existing station, although such alterations or additions involved structural alterations or additions, and had ordered further waiting-room accommodation to a specified extent to be given; but the order is in excess of jurisdiction, because it directs absolutely certain specified work to be done. The order as to refreshment accommodation is further beyond jurisdiction, because it does not come within the terms of facilities for receiving or forwarding passengers. The order as to the delivering of tickets is right in every respect. The order as to the goods shed and siding would have been right if it had been confined to ordering an extension within the existing station; but the order to seek for powers to enlarge the goods station is in excess. The order as to cattle pens seems to be right, though the order to restore the raised platform to its original use is in excess. The order as to the approach to the station is in excess in every respect. In the result, therefore, the greater part of the proposed order is in excess of jurisdiction, either because it deals with matters with which the commissioners had

no authority to deal, by way of order, at all, or because it deals with matters, with which the commissioners might legally have dealt with by some orders, by orders which are in terms in which they have no authority to make an order under any circumstances. Nevertheless, there are two separate orders made unobjectionably with regard to two matters of complaint, as to which the commissioners might legally make order. And, although those orders are unimportant as compared with the others, yet they are substantial enough to require consideration. And the declaration proposes prohibition against entertaining at all the original complaint. There arises, therefore, a question of pleading, which is, whether, as the demurrer is pleaded to the whole declaration, it is not too large, and whether in consequence it ought not to be wholly overruled.

This question may be considered in two forms—first, as it is a demurrer to a declaration in prohibition; secondly, as if it were a demurrer to an ordinary pleading. As to the first, it is within the statute 1 Will. 4. c. 21. s. 1, which enacts that "to a declaration in prohibition the party defendant may demur, and conclude by praying that such writ may not issue, and judgment shall be given that the writ of prohibition do or do not issue as justice may require." But this does not seem to me to give a power to distribute a judgment upon a demurrer, if it could not be done on a similar demurrer in ordinary pleadings. We must therefore consider the question in the second aspect. That where an inferior Court acts within its jurisdiction as to part, but exceeds as to part, a prohibition, though moved for as to the whole, may issue as to the part in excess, seems to have been early decided. (See *Comyn's Digest*, "Prohibition," p. 17, *Lush* v. *Webb* (14) and *Buller's Nisi Prius*, p. 218*b*.) It seems to follow that, after declaration in prohibition and traverse and trial, the judgment might be to prohibit as to part, and to award a consultation or otherwise give judgment for the defendant in prohibition as to the rest.

This being so, the question is raised as to what is the proper judgment on a demurrer to the whole of a declaration in prohibition. If the demurrer is to the whole declaration, and part of the declaration be good and part bad, should the judgment on demurrer be absolutely in favour of the plaintiff, or for the plaintiff as to the good and for the defendant as to the bad. There has been a difference of judicial opinion. The origin of the dispute is described with the usual learning by Mr. Serjeant Manning in the note to *Hinde* v. *Gray* (15), and it is there suggested that the doctrine of overruling on demurrer as too large, and thereupon giving judgment absolutely in favour of a pleading admitted to be good as to one separate part of it, was a novel doctrine and contrary to the older decisions. This note, written in 1840, changed the opinion of Mr. Baron Parke as expressed by him in 1838 in *Boydell* v. *Jones* (16); for in 1842, in *Briscoe* v. *Hill* (17), he said, "With respect to the subject of a demurrer being too large, there is a very learned note of my brother Manning which, in my opinion, is entitled to considerable weight. The question is," he says, after describing the practice, "Is that practice right or not, or ought not the Court on such demurrer to give judgment on the whole record according to the truth? I think the observations in that note are entitled to considerable weight, and I am inclined to think the practice has been wrong, and that judgment on demurrer should be given on the whole record according to the truth." In 1845, in *Slade* v. *Hawley* (18), he said, "There is an able note of my brother Manning to the case of *Hinde* v. *Gray* (15) which tends strongly to shew that the practice of overruling demurrers as being too large is incorrect, and that the Court ought to give judgment on the whole record according to the truth." And in *Dawson* v. *Wrench* (19) he said, "Formerly, if a demurrer was too large the Court gave judgment generally against the party demurring. That rule was imported from Courts

(14) 1 Sid. 251.

(15) 1 Man. & G. 195, at p. 201.
(16) 4 Mee. & W. 446, at p. 451.
(17) 10 ibid. 735, at p. 740.
(18) 13 ibid. 757, at p. 761.
(19) 3 Exch. Rep. 359, at p. 365.

of equity, but is incorrect with respect to Courts of law, as pointed out by my brother Manning in a note to the case of *Hinde* v. *Gray* (15)." The higher justice of this later view of Mr. Baron Parke seems obvious. The futility of the intermediate practice cannot be better exemplified than by the description of the result of it given by Mr. Baron Parke in *Boydell* v. *Jones* (16). The later view of Mr. Baron Parke is shewn in the note by Mr. Serjeant Manning to be in accordance with the ancient decisions of the common law Courts. I am of opinion that the later view of Mr. Baron Parke is correct, and that upon a demurrer to the whole of a pleading which contains allegations capable of being separated, some of which allegations are correct and some incorrect, the judgment on the demurrer should be distributive, and should be in favour of the good and against the evil pleading. The judgment on demurrer in the present case should, therefore, be against the demurrer as to all the different orders but two, and in favour of the demurrer as to entertaining the complaint and as to two. This judgment does not preclude the commissioners from making, in future, upon fresh complaint of a continuing omission as to certain of the points which have been discussed in this case, such an order as has been pointed out would have been legal. Comparing the relative importance of the two correct parts of the order of the commissioners with the many held to be illegal, I should have been of opinion that the appeal had so far failed, that the defendants in prohibition should pay the costs of the appeal, but on the question of costs I do not venture finally to differ.

Judgment reversed. Demurrer allowed.

Solicitors—W. R. Stevens, for the South Eastern Railway Company; Hare & Foll, the Treasury Solicitors, for the Railway Commissioners.

[IN THE COMMON PLEAS DIVISION AND COURT OF APPEAL.]

1880. Dec. 7, 17. MILLINGTON *v.* LORING.

Practice — Pleading — Embarrassing Statement of Claim—Breach of Promise of Marriage—Rules of Court, Orders XIX. rule 4, *and XXVII. rule* 1.

The statement of claim in an action for breach of promise of marriage stated the promise and breach, and alleged that "the plaintiff, relying on the said agreement, permitted the defendant to debauch and carnally know her, whereby the defendant infected the plaintiff with a venereal disease":— Held (*by the Common Pleas Division*), *that this allegation must be struck out, as tending to prejudice and embarrass the fair trial of the action.* Held (*by the Court of Appeal, reversing the decision of the Common Pleas Division*), *that the allegation could properly be pleaded under Order XIX. rule* 4, *and ought not to be struck out under Order XXVII. rule* 1.

Appeal from chambers.

The statement of claim in an action for breach of promise of marriage, after stating that the defendant promised to marry the plaintiff, alleged as follows:—

Paragraph 4. The plaintiff, relying on the said agreement, permitted the defendant to debauch and carnally know her, whereby the defendant infected the plaintiff with a venereal disease.

Paragraph 5 alleged a breach of promise of marriage.

Paragraph 6. By reason of the premises the plaintiff has been greatly injured in her health, feelings, credit and reputation, and has lost the benefit which would have accrued to her from the said marriage.

The defendant applied at chambers for an order to strike out paragraph 4 of the statement of claim. The Master made no order. On appeal, Hawkins, J., ordered the paragraph to be struck out, saying that the facts stated therein might be given in evidence at the trial.

Against this order the plaintiff now appealed.

Somervell, for the plaintiff.—The facts alleged in paragraph 4 are matters which

the jury can take into their consideration in aggravation of damage—*Berry* v. *Da Costa* (1). Matters of aggravation ought to be set out in the pleadings—*Newman* v. *Smith* (2), *Bracegirdle* v. *Orford* (3); and in *Berry* v. *Da Costa* (1) matters of aggravation similar to the present were stated in the declaration—see the report in the *Weekly Reporter*. They are in the nature of special damages, and therefore ought to be pleaded, in order to give notice to the defendant of the nature and extent of the claim made against him, and of the particular facts by which it is to be supported, so as to enable him to come to trial prepared with evidence to meet it (4). This rule no doubt would apply more particularly to actions of tort; but the action for breach of promise to marry, though founded on contract, resembles an action of tort. The broad principle to be followed is, that matters of aggravation ought in fairness to be pleaded, so that the opposite party may have notice to rebut them if he can.

F. O. Crump, for the defendant.—The fallacy of the plaintiff's argument consists in failing to recognise the distinction between matters which may be given in evidence at the trial and matters which must be pleaded. The Court is not bound by the fact that the matters stated in paragraph 4 were pleaded in *Berry* v. *Da Costa* (1). The point of that case is not one of pleading, but what the Judge might leave to the jury. It is clear these matters can be given in evidence at the trial. In *Smith* v. *Woodfine* (5) Willes, J., says, "Where it appears that the promise was made by the defendant with a view to seduce the plaintiff, this will be allowed to go to the jury in aggravation." The infection with a venereal disease would not be actionable because arising *ex turpi causa*—*Hegarty* v. *Shine* (6). The plaintiff has raised an issue which, if allowed, will have to be replied to and go to the jury, and thus a bye issue will be raised. It is also embarrassing pleading, and it would prejudice the defendant at the trial.

Somervell, in reply.

DENMAN, J.—I am of opinion that the order of Mr. Justice Hawkins was right. I am disposed to think that the allegations contained in paragraph 4 ought to be struck out by virtue of Order XIX. rule 4, which states that "every pleading shall contain a statement of the material facts on which the party pleading relies, but not the evidence by which they are to be proved;" because I doubt whether the facts stated in paragraph 4 are more than mere evidence of facts, and therefore not material facts within the meaning of that order, which *prima facie* is intended to restrict the pleadings to facts which are material. If the action is one which has to be supported by special damage, then those facts which allege special damage are material, and may be set out in the pleadings; but I think that *prima facie* the order is not intended to permit statements of facts relating to the amount of damage, which can be brought in evidence at the trial, without previous statement, to be set out in the pleading. The case of *Berry* v. *Da Costa* (1) certainly goes the length of deciding that evidence of the facts set out in paragraph 4 may be given at the trial; but then these allegations appear to me to be evidence merely, and consequently it is unnecessary to state them in an action for breach of promise of marriage. There are cases of trespass which no doubt decide that where the character of the trespass can be altered by the surrounding circumstances, then matters of aggravation may be stated in the pleadings; and it may be—though there is no authority to the effect—that owing to its peculiar nature the same principle would apply to actions for breach of promise of marriage, though I question whether the allegations do not violate the rules of pleading, because not concise and not confined to the material facts, and therefore objectionable under Order XIX. rule 4. But it is not necessary to decide the point on that ground, because the allegations of paragraph 4, even if not scandalous, would, in my opinion, lead to

(1) 35 Law J. Rep. C.P. 191; Law Rep. 1 C.P. 331.
(2) 2 Salk. tit. "Trespass."
(3) 2 M. & S. 77.
(4) *Bullen and Leake on Pleading*, p. 13, 3rd ed.
(5) 1 Com. B. Rep. N.S. 660.
(6) 14 Cox, Crown Cases, 124.

prejudice and embarrass the defendant in the fair trial of the action. They import into this action a statement of seduction to which the plaintiff admits she was a party, and propose to follow up that allegation by one of vile consequences—thrusting, in fact, at the defendant two actions instead of one, and compelling him, under colour of an action for breach of promise of marriage, to meet an action of seduction which in reality could not thus be brought against him.

In the course of the trial it may be that these matters of aggravation will be insisted on, but it often happens that ultimately such allegations are not brought forward, because it is thought that by shewing herself to have behaved in an immoral way the plaintiff may diminish her chances of obtaining damages. I think that the allegations contained in paragraph 4 would so tend to prejudice the defendant in the eyes of the jury in the reading of the pleadings and the course of the case that they ought not to be allowed. I am therefore of opinion that the order of Mr. Justice Hawkins was right, and should be affirmed.

LINDLEY, J.—I am of the same opinion. My reason for holding that opinion is because this action is one of an anomalous kind. As a general principle, it seems to me right that each side should give the other notice of matters on which they intend to rely; and in some actions—for example, trespass—it has been decided that notice should be given of matters on which the party intends to rely and which have a tendency to aggravate the damages. Supposing this were an action of seduction brought by the father of the plaintiff, I doubt whether any Judge would strike out paragraph 4; but this is a totally different kind of action. As a Judge I know well the extreme difficulty caused by the introduction of such allegations, and of preventing the jury from confounding the two matters. Were we to allow them to be stated in the pleadings, we should increase the difficulty tenfold; and though it sometimes is fair to the defendant to give him notice they will be brought forward, yet on the present occasion he does not desire it—it would cause him embarrassment; and on that ground alone I think they should be struck out.

Mr. Somervell says that it is only fair to let the defendant know what is to be proved so as not to spring it upon him at the trial. I feel that, and the question is how to deal with it. One way is to give him notice beforehand that the plaintiff intends to prove the fact of the seduction at the trial. If no such notice were given, it is possible that the learned Judge might adjourn the case. Something of course ought to be done to avoid taking the defendant by surprise. Under ordinary circumstances I think this would be the right course, but this action is entirely anomalous, and, under the circumstances, I am of opinion that the paragraph ought to be struck out.

The plaintiff appealed.

Dec. 18.—*Somervell*, for the plaintiff.
F. O. Crump, for the defendant.

LORD SELBORNE, L.C.—In this case we have the misfortune to differ from the judgment of the two learned Judges in the Court below. The first question is, whether the matters alleged in the fourth paragraph of the statement of claim can be properly pleaded under Order XIX. rule 4. Order XIX. rule 4 is this: "Every pleading shall contain, as concisely as may be, a statement of the material facts on which the party pleading relies, but not the evidence by which they are to be proved." The matters pleaded here are concisely stated, and there is not a statement of the evidence by which the cause of action is to be proved either as regards the promise or the breach. If the words of the rule are to be construed as confined to facts material to the cause of action as distinct from the consequences in the action of that cause, I think the appellant's contention would be right. But the words of the rule seem studiously to omit such a limitation, and if the facts mentioned in the rule are facts material to anything which the plaintiff must prove by evidence, then I think the matters in question here are not excluded, but rather permitted, by the rule. Is not the plaintiff to prove at the trial both the facts

constituting his cause of action and the consequences to him arising from that cause of action for which he seeks to recover damages? In other words, Are not the facts in question here material to shew how the plaintiff has been affected by the cause of action? That they are so seems manifest from the fact that they may be given in evidence at the trial. Nothing irrelevant or immaterial can be given in evidence, and that these matters might be given in evidence is manifest from the judgment in *Berry* v. *Da Costa* (1) cited in argument to-day. It is perhaps not necessary to go further than this; but going further, and looking at Order XXVII. rule 1, we must see whether any of the grounds mentioned there for striking out averments in pleading apply to this case. [His Lordship here read the rule.] The allegations here would be certainly scandalous if they were irrelevant; but nothing can be better settled than that, if relevant, allegations cannot be struck out as scandalous. Then, are the allegations embarrassing? It is suggested that the jury at the trial may suppose that what is alleged is alleged as a distinct cause of action. I think the jury are not likely to apply their minds to the pleadings in any technical way whatever. They listen to pleadings only to hear the facts, and take the law from the Judge. They cannot be prejudiced by hearing the facts from the pleadings any more than from hearing them (as they certainly would do) from the lips of counsel in opening the case. It is said that embarrassment may arise from the necessity of the defendants taking distinct issue upon these matters. I can hardly follow the meaning of that argument. If the statement of claim is divided into a number of different paragraphs alleging different facts for different material purposes, the defendant may admit, deny or leave them alone as he thinks fit. He is in no danger if he fairly says whether he admits or denies these matters, but is in just the same position as if they were given in evidence without being stated in the pleadings. But there is one difference which results from their being put into the pleadings, and that difference, as it seems to me, does not tell against the defendant, but in his favour. It is this: The defendant is not taken by surprise; he knows the sort of case he has to meet, and he will not leave the case undefended if he thinks these matters are material as affecting the damages the jury may give against him. If what is alleged here really happened, of course the defendant would not be taken by surprise. If it did not, nothing could take him more by surprise than to go to trial and have to meet those allegations, as to which he had had no notice that they were to be part of the case against him. Substantially it is in justice to the defendant that these matters appear in the pleadings, and that consideration tells in favour of keeping them there. As to the latter and most disagreeable part of the fourth paragraph, I have had some doubt whether there is not a difference with regard to it, but I think substantially it stands upon the same footing as the other part.

BAGGALLAY, L.J.—I am of the same opinion. The case of *Berry* v. *Da Costa* (1), from which I do not dissent, but rather desire to express my assent to the judgment of Mr. Justice Willes, is an authority to the effect that in an action for breach of promise of marriage, the fact of seduction having taken place may be given in evidence as being of importance with respect to damages. I therefore think that the allegation in paragraph 4 is of a material fact, which under Order XIX. rule 4 might be properly introduced into the statement of claim. It must be concisely stated; it is not right to set out, even in outline, the evidence by which the fact is to be proved. I also think the second allegation in paragraph 4 comes within the same rule. I also agree entirely with the Lord Chancellor's remarks on the construction of the first rule of Order XXVII.

BRETT, L.J.—I am of opinion that both matters stated as facts in paragraph 4 might be properly given in evidence at the trial, as shewing the particular mode in which the defendant acted with respect to the promise and the breach; that the injury to the plaintiff was more

grievous by reason of the defendant's mode of acting; and that the promise was broken in an aggravated manner which entitles the jury to consider his conduct in giving damages. Where a man promises marriage and seduces the woman, the seduction makes it the more incumbent upon him to marry her; and with regard to the second part of the allegation in paragraph 4 of the statement of claim, when the man has inflicted such an injury as is there described, it is still more incumbent upon him to marry her. These circumstances make the breach more damaging to the plaintiff. I adopt the language of Mr. Justice Willes in *Berry* v. *Da Costa* (1), where he points out the consequences of seduction in a case like this, and says that they are matters which the jury might legitimately take into consideration. I agree absolutely that the matters in question here were proper for the jury to act upon.

We have to consider, first, whether since the Judicature Acts these facts can be properly pleaded. It is clear that they could not before the Judicature Acts. They are facts which went to increase the damages, and were not pertinent to the cause of action, which could be as well made out whether they were pleaded or not. The question is, whether such facts, under Order XIX. rule 4, may be properly pleaded, not being material to the cause of action, with respect to the defence in the action, but being material to the question of damages. In my opinion they may be pleaded now, though they could not before the Judicature Acts. Rule 4 says that the statement must be "of the material facts on which the party relies," not "facts on which the party relies material to the issue." The plaintiff here "relies" on the facts alleged in paragraph 4. Therefore they are properly pleaded, though not necessary to the liability of the defendant. It is said that the defendant is put into a difficulty as to traversing or admitting them. But he is not bound to traverse them. Though they are properly stated in the claim, yet, inasmuch as they are not facts material to the cause of action, the mere fact of not traversing them would not be an admission of them. Therefore he is not called upon to traverse them, though I do not see how he would be injured if he were. If they were not properly pleaded under rule 4 of Order XIX., I think the defendant would fail in shewing that the Court ought to strike them out upon any of the grounds mentioned in rule 1, Order XXVII. They cannot be struck out unless brought within that rule, even if they are not properly pleaded under rule 4 of Order XIX. If they are to be struck out it must be by reason of their being scandalous, or tending to prejudice or embarrass the fair trial of the action. I have already stated that they may be properly given in evidence at the trial. It seems to me that the mere fact of stating them in the pleadings cannot tend to embarrass or prejudice the fair trial of the action; on the contrary, they are necessary for the fair trial of the action. If so, it is impossible to say that because they state a scandalous fact they are therefore "scandalous" within the meaning of the rule.

I am clearly of opinion that these matters could be properly pleaded within rule 4 of Order XIX., and that, if improperly pleaded, they cannot be struck out as being within the grounds stated in rule 1 of Order XXVII.

Appeal allowed.

Solicitors—T. J. Robinson, for plaintiff; **Lewis & Lewis**, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1880. Dec. 1.

WALLINGTON (*appellant*) *v.* HOSKINS (*respondent*).
STONE AND OTHERS *v.* SAME.
PICTOR AND OTHERS *v.* SAME.

Highways—Highways and Locomotives Amendment Act, 1878 (41 *&* 42 *Vict. c.* 77), *s.* 23—*Excessive Weight and Extraordinary Traffic—Industry of Neighbourhood—Stone Quarries.*

[For the report of the above case, see 50 Law J. Rep. M.C. 19.]

[IN THE COMMON PLEAS DIVISION.]

1880. March 4. Dec. 11, 18, 21. } BURGESS AND ANOTHER *v.* THE NORTHWICH LOCAL BOARD.

Public Health Act, 1875, *ss.* 149 *and* 308 *—Urban Sanitary Authority—Street, subsidence of, raising of—Rights of Owner of Premises abutting.*

The plaintiffs were owners of houses abutting on the High Street in the town of Northwich. Northwich is situate on a bed of rock salt, and, in consequence of the exhaustion of the salt by natural and other causes, the surface of the ground from time to time subsides to a considerable extent. In 1870 *the surface of High Street had subsided; it was then raised to what was estimated to have been its former level, and the plaintiffs' houses were built at the same time. In* 1876 *the surface of the High Street, together with the plaintiffs' houses, had again subsided. The defendants, a local board, acting under the Public Health Act*, 1875, *restored the road to the level it was in* 1870*—a height which was found, having regard to the obstruction caused by occasional floods, to be reasonably necessary for the ordinary traffic, but putting floods out of the question, and having regard only to the inconvenience caused to the ordinary traffic in times other than the times of flood, was not necessary to so great an extent. The plaintiffs raised their houses to the same level by means of expensive machinery, and sought by arbitration proceedings under sections* 179 *and* 180 *of the Public Health Act*, 1875, *to recover from the defendants the expenses thereby incurred:*—Held, *that the plaintiffs could not recover from the defendants, for that they possessed no rights which the defendants had infringed; nor had the plaintiffs any right to compensation under section* 308 *of the Public Health Act*, 1875, *for that the acts done by the defendants were not "an exercise of any of the powers of the Act," but a fulfilment of their duty as surveyors of highways conferred on them by section* 144.

This was an action brought by the plaintiffs to recover certain compensation and costs awarded as hereinafter mentioned; and by order of Master Bennett, dated the 4th of June, 1878, it was ordered that a Special Case should be stated for the opinion of the Court.

CASE.

1. The plaintiffs are owners of houses and shops abutting on the High Street in the town of Northwich in Cheshire.

2. The defendants are a local board acting under the Public Health Act, 1875, and other Acts incorporated therewith, and having, *inter alia*, in respect of a district within which the said High Street is situate, the powers conferred by the said Act on urban sanitary authorities, including those of surveyors of highways.

3. The town of Northwich is situate above a bed of rock salt. This salt is gradually eaten away by fresh water and so forms brine. The brine flows under the town of Northwich at a depth which is estimated from 100 to 200 feet. It is pumped up at several works in the neighbourhood of the town, where salt is manufactured. There is no pumping of the brine within half a mile of the town of Northwich. It is, however, to be taken as a fact for the purpose of this case, that the pumping of the brine at some of the above-mentioned works by abstracting the salt lying under the town of Northwich causes from time to time a subsidence of the surface of the ground upon which the houses and street in the 1st paragraph mentioned are situate. It is admitted for the purpose of this case that it is not in the power of the plaintiffs or the defendants to prevent the pumping of the brine or the consequent subsidence of the ground.

4. The plaintiffs' present houses were rebuilt in 1870 on the site of two houses which had become dilapidated owing to the subsidence of the ground caused as before mentioned. The street mentioned in the 1st paragraph was at the same time repaired and restored to what was estimated to have been its former level. The plaintiffs' houses were rebuilt upon a plan to admit of their being raised from time to time as occasion might require by means of screw jacks. The houses were made to rest upon a foundation of timber bolted and tied together firmly, so that the whole fabric might be raised in one mass by powerful screws at a compara-

tively small expense, and so as to avoid the necessity of the said houses having to be rebuilt in case it should become necessary to raise them. They were so raised in 1873, the ground and houses having subsided from the above-mentioned causes, and the road was at the same time repaired and restored.

5. By the month of October, 1876, the surface of the High Street at the part on which the said houses of the plaintiffs abutted, for some distance on either side, together with the houses abutting on it, had again subsided considerably, and to a depth of five or six feet, or thereabouts, in the lowest spot. The street and houses on either side of that spot subsided in a gradual slope towards it, the houses leaning slightly on one side. The houses were at the same height above the surface of the roadway as they had been before the subsidence, and there were the same facilities for ingress and egress as before, but the whole was at a lower level, gradually declining towards the spot above mentioned, where the subsidence was greatest. The surface of the roadway remained continuous, so that traffic could pass along it as before, but the roadway was in a curved hollow, and at the level to which it had subsided was liable to be flooded, and, in fact, was flooded, at times so as to render traffic impossible.

6. Salt has been manufactured from brine in the neighbourhood of Northwich, in the manner described in the 3rd paragraph, ever since the 16th century. In consequence of the working of salt the land in the whole neighbourhood of the town of Northwich has been sinking for at least 150 years now last past, and the piece of roadway mentioned in paragraph 5 of this case has from time to time during that period been a source of expense to the township, often requiring repairing and filling up, sometimes to the extent of many feet at a time, and this has been absolutely necessary to keep it above water in time of flood. In the year 1858 the surveyor of the highway repaired and restored the said street. In the years 1863, 1864 and 1871 it was also again repaired and restored by the then local board. On the occasion of the works in 1871, the houses, now the plaintiffs', were rebuilt as mentioned in paragraph 4. On each of these occasions the works done were similar to those hereinafter mentioned. No compensation has ever yet been paid in respect of such repairing and restoring.

7. In the months of October and November, 1876, the defendants did certain work to the said roadway of the High Street, which the plaintiffs contend to have been a raising of the street within the meaning of section 149 of the Public Health Act, 1875, and an exercise by them of the powers conferred on them by that section, but which the defendants contend to have been a repairing and restoring of the roadway, and merely a fulfilment of their duty as "surveyor of highways."

8. The following extracts from minute books kept by the defendants shew the proceedings of the defendants in reference to the said work, and the resolution in pursuance of which it was carried out:—

"1876. June 19. That the surveyor be directed to prepare an estimate of raising High Street from Mr. Bratt's shop to the county stone, Castle Street; from Mr. Cookson's to Mr. Williams's surgery and Wilton Street, opposite Dr. Joynson.

"That the pavement and letts from Mr. Bratt's to the county stone in High Street be at once taken up, and the street gradually raised.

"Aug. 24. A deputation having waited on the committee for the purpose of discussing the raising of the High Street, and particularly the height necessary to raise it—

"It is resolved that the committee recommend to the board that the street be raised four feet at the lowest point.

"Aug. 30. That the recommendation of the committee to raise High Street four feet at the lowest point be amended by inserting the word 'three' instead of 'four.'

"Nov. 3. A deputation, consisting of owners of property in High Street, attended the meeting, and stated that they were of opinion that the surveyor proposed raising the street three feet six inches, instead of three feet as agreed by the board and committee, having fully discussed the matter—

"It was resolved that the committee inspect the road at two p.m. to-morrow.

"Nov. 6. That the recommendation of the board to raise High Street four feet be adhered to. That, if possible, the parapet opposite the shop occupied by Messrs. Burgess be kept sufficiently high to render a step unnecessary.

"Nov. 8. That the surveyor be instructed to macadamise High Street, making no further alteration in the level of the ballast than is necessary for the formation of the street."

9. The works done were as follows: Materials were put on the surface of the roadway so as to make the surface immediately above the point of the lowest subsidence about four feet three inches higher than it was at the time of the commencement of the work. The defendants in determining the height at which they would leave the surface of the roadway had not regard to the depth of the then last subsidence, but were guided by their view of what would best meet the requirements of the district and make the most efficient roadway.

10. The works were done without the consent of the owners of the houses abutting on the street.

11. The defendants upon beginning the said works gave notice to the plaintiffs and the other owners of the houses adjoining that they were about to execute them, and the plaintiffs then commenced to raise their houses, and they were raised simultaneously with the execution of the works to the roadway, and their houses were so raised by means of the mechanical contrivance described in paragraph 4 of this case. The execution of the said works by the defendants necessitated the raising of the plaintiffs' houses.

12. After the works had been completed, the plaintiffs claimed from the defendants compensation for the damage which they alleged to have been done them by the raising of the street, and they rested their claim to such compensation on section 308 of the Public Health Act, 1875. The defendants denied and still deny their liability to make the plaintiffs any compensation.

13. The plaintiffs nominated William Wynne Foulkes, Esq., a Judge of County Courts, to be arbitrator in their behalf, and they claimed to do so pursuant to sections 179 and 180 of the Public Health Act, 1875. The defendants within fourteen days after such nomination denied that they were liable to make compensation, and disclaimed the jurisdiction of the said William Wynne Foulkes, Esq., and took no part in any proceedings had or done by him as arbitrator on the ground that he had no jurisdiction. They declined to appoint or acquiesce in the appointment of an arbitrator, and after the expiration of fourteen days after the nomination of the said arbitrator he sat and took evidence, at the instance of the plaintiffs, for the purpose of ascertaining whether damage had been done to the plaintiffs by the works done to the street, and the amount of such damage (if any). The plaintiffs claimed as such damage the amount of the expense they had incurred by raising their houses as mentioned in paragraph 11 of this case, and gave evidence of such amount. The defendants did not attend and took no part in the proceedings before the said arbitrator.

14. The arbitrator made his award, by which he awarded to the plaintiffs the sum of 130*l.*, and directed that the defendants should pay that sum and the costs of the reference.

15. The plaintiffs have demanded payment of the said sums of 130*l.* and 31*l.* 3*s.* 10*d.*, and the defendants have denied their liability to pay the same or either of them.

The question for the opinion of the Court is, whether, upon the facts hereinbefore stated, the plaintiffs are entitled to recover the said sums of 130*l.* and 31*l.* 3*s.* 10*d.*, or either of them.

The Common Pleas Division of the High Court of Justice having remitted the Special Case to the arbitrator with the following question:—

"Was the raising of the road reasonably necessary to put it in a proper state for traffic?—or, in other words, could the road have been put permanently into a proper state for traffic as economically and efficiently without being raised to nearly its old level as by being so raised?—

and evidence having been adduced by both parties,—

It was contended before the arbitrator by the counsel for the plaintiffs that the true meaning of the above question was, whether or not it was reasonably necessary for the defendants to execute the works referred to in the 9th paragraph of the Special Case in discharge of a duty imposed upon them by law so as to prevent the road remaining at the time of the commencement of the said works, or becoming, within a period which could then reasonably be foreseen, in a condition which would render the parish liable to an indictment for non-repair. This construction of the question was not assented to by the learned counsel for the defendants.

Under these circumstances the following findings of fact were stated by the arbitrator:—

Before and at the commencement of the works in the 9th paragraph of the case mentioned, the road was sinking gradually. The sinking was progressing most rapidly at or near the same spot, so that the lowest part of the depression already existing would have gradually deepened and the inclination of the roadway on each side would have become steeper. The deepest part of the depression, which was near a sharp curve in the street, was already before the commencement of the works mentioned in the case a source of inconvenience to the traffic at times other than times of flood, which inconvenience would have increased as the depression deepened. Moreover, the gradual deepening of the hollow rendered the roadway more and more liable to be flooded in times of excessive rains, causing, during the continuance of the flood, serious inconvenience to and occasionally the complete obstruction of the ordinary traffic. If the road had been raised to a less height than that mentioned in the 9th paragraph of the case, having regard to the continuing depression above mentioned, the road would have required to have been raised again after the lapse of a shorter time than will be required under the existing circumstances, and thus a greater expense would have been incurred.

As the result of the facts above stated, and assuming the construction put by the learned counsel for the plaintiffs upon the above-mentioned question to be correct, the arbitrator found that, having regard to the obstruction to traffic caused by the floodings of the road during their continuance, the raising of the road was reasonably necessary to put it in a proper state for traffic, and that the said road could not have been put permanently into a proper state for traffic as economically or as efficiently without having been raised to the extent and in the manner described in the Special Case.

On the other hand, on the above-mentioned assumption, if the consideration of the liability of the road to occasional flooding be excluded, and having regard only to the inconvenience caused to the ordinary traffic in times other than times of flood by the continuing depression above mentioned, the arbitrator found that though the raising of the road to the extent and in the manner described in the Special Case was a reasonable and prudent act on the part of the defendants, yet such raising was not necessary to put the road in a proper state for traffic.

The case was argued on the 4th of March, 1880. It was then remitted to the arbitrator with the above question, and was re-argued on the 11th and 18th of December, 1880.

Channell, for the plaintiffs.—The defendants have raised the road, and this was done by them in exercise of the powers of the Public Health Act, 1875 (38 & 39 Vict. c. 55 (1); as by reason of this the plaintiffs sustained damage, they are entitled by section 308 (2) to have compensation

(1) The Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 149: "All streets being or which at any time become highways repairable by the inhabitants at large . . . . shall vest in the urban authority. The urban authority shall from time to time cause all such streets to be levelled, metalled, flagged, channelled, altered and repaired as occasion may require; they may from time to time cause the soil of any such street to be raised, lowered or altered as they may think fit."

(2) The Public Health Act, 1875 (38 & 39 Vict. c. 54), s. 308: "Where any person sustains any damage by reason of the exercise of any of the powers of this Act, in relation to any matter as to which he is not himself in default, full compensation shall be made to such person by the local authority exercising such powers; and any dispute as to the fact of damage or amount of

made to them by the defendants—*Nutter* v. *The Accrington Local Board of Health* (3) shews that because a street is also a turnpike road the party injured is not deprived of his right to compensation under the Act. What the defendants did in the present case was not simply to repair the road after its subsidence, but to make an alteration and improvement, which they had no power to do except under the powers given to them by the Act. The owner of property abutting on a highway has distinct rights: he has frontage rights, and the right of ingress and egress at any period. The injury to the plaintiff's estate is one of a permanent character, for which he would be entitled to maintain an action—*Beckett* v. *The Midland Railway Company* (4), *The Metropolitan Board of Works* v. *McCarthy* (5).

McIntyre (*Horace Brown* with him), for the defendants.—To entitle the plaintiffs to compensation under section 308, there must have been an injury committed by the defendants which would have been actionable but for the statute—*Rickett* v. *The Metropolitan Railway Company* (6). The damage was caused by the subsidence, and this subsidence was not from any act of the defendants, but from the pumping of the brine by persons over whom the defendants had no control, and for whose acts they were not answerable. The defendants have, in fact, only restored the road to its level before the subsidence. Had they altered the position of the road from the level at which the plaintiffs had a right of ingress and egress, no doubt the plaintiffs would have had a cause of action, but they have merely restored the road to the original level, which was the level at which the plaintiffs' houses were built.

What the defendants have done was not done by them in exercise of any power given by the Act, but in performance of their duty as surveyors of highways under section 144, by which "every urban authority shall, within their district, exclusively of any other person, execute the office of and be surveyor of highways." This being a road repairable by the inhabitants they were bound to keep it in the best condition for traffic. The reinstating the road is the duty of the surveyor of highways or of the inhabitants of the parish, unless it was absolutely destroyed—*The Queen* v. *Greenhow* (7). Before the defendants can be made liable it must be shewn that what they did was in exercise of powers conferred by section 149.

Channell, in reply.—The defendants are under no common-law liability to restore the road. A parish cannot be convicted for not rebuilding a sea wall washed away by the sea, over the top of which the alleged way passed. *The Queen* v. *The Inhabitants of Paul* (8). In *Lyon* v. *The Fishmongers' Company* (9) Lord Cairns says, "It would be the height of absurdity to say that a private right is not interfered with when a man who has been accustomed to enter his house from a highway finds his door made impassable, so that he no longer has access to his house from the public highway." It is found that the defendants' means of access has been interfered with by raising the road to what was reasonably necessary to put it in a proper state for traffic, and this, it is submitted, was an exercise of the powers conferred by section 149 of the Public Health Act, 1875.

Cur. adv. vult.

LINDLEY, J. (on Dec. 21.)—In order that the plaintiff may succeed in this action he must shew, first, that he had some right which the defendants have infringed; secondly, that he has sustained damage by reason of the exercise by the defendants of some of the powers conferred upon them by the Public Health

compensation shall be settled by arbitration in manner provided by this Act."

(3) 47 Law J. Rep. Q.B. 521; Law Rep. 4 Q.B. D. 375.

(4) 37 Law J. Rep. C.P. 11; Law Rep. 3 C.P. 82.

(5) 43 Law J. Rep. C.P. 385; Law Rep. 7 E. & I. App. 243.

(6) 36 Law J. Rep. Q.B. 205; Law Rep. 2 E. & I. App. 175.

(7) 45 Law J. Rep. M.C. 141; Law Rep. 1 Q.B. D. 703.

(8) 2 Moo. & R. 307.

(9) 46 Law J. Rep. H.L. 68; Law Rep. 1 App. Cas. 662.

Act, 1875 (38 & 39 Vict. c. 55). It is necessary for him to shew that he has some right which the defendants have infringed, for it is now a well-settled principle that a person is not entitled to compensation for damage done to him by a public authority acting under the powers of an Act of Parliament unless he could have maintained an action for such damage if the statute had not authorised the acts causing the damage—*Rickett* v. *The Metropolitan Railway Company* (6). I proceed, therefore, to enquire what rights the plaintiff had in respect of his house and the road in question.

The plaintiff does not allege that he had any prescriptive rights—*e.g.* to light—which have been infringed by the defendants. He does not allege that before the passing of the Public Health Act, 1875, he was the owner of the soil over which the road runs. But as *prima facie* such soil or some part of it would belong to him as adjoining owner, and as at common law the owner of land over which a highway runs may maintain trespass for anything unlawfully put on such highway — see *Lade* v. *Shepherd* (10), *St. Mary, Newington* v. *Jacobs* (11)—it may be as well to shew that the plaintiff cannot maintain this action in his character of owner of the road.

By section 149 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), the highway in question was vested in the local board, and vested in them so as to confer upon them the property in and possession of the surface of the soil even as against the former owner thereof—see *Coverdale* v. *Charlton* (12) and *Rolls* v. *The Vestry of Southwark* (13), where the effect of the above section and the sense in which the soil is vested in the local board are discussed and determined. It follows that the owner of the land adjoining the highway cannot as owner of the soil of the highway itself maintain an action against the local board for putting materials on the highway in excess of what might be required for merely rendering it fit for traffic. In other words, if the old forms of action were still in use the plaintiff, even if owner of the soil under the highway, could not maintain an action of trespass against the local board for putting on his land more materials than a surveyor of highways could justify. They are the owners of the surface, and even if they have overloaded that surface no injury has been done to the plaintiff by such overloading; moreover, the plaintiff's inability to maintain such an action is the consequence of section 149, which changes the ownership of the soil. It is not the consequence of any exercise of any of the powers conferred on the local board, and the plaintiff cannot claim compensation on the footing of any trespass to his property. Nor does he in truth put forward his claim on that ground. The plaintiff relies, and is driven to rely, on the injury done to his house in raising the road in front of it. But in order to establish any right of action or to compensation for this injury he must shew that he is entitled to have the road kept at the level at which it was after it subsided. No right short of this will avail him. The right alleged to have been infringed is the plaintiff's right to pass and repass from his house to the road, and from the road to his house. The right of a person who has a house or land abutting on a highway to pass and repass from one to the other is incontestable, and must be conceded to the plaintiff—*Lyon* v. *The Fishmongers' Company* (9); but where, as in this case, he is not the owner of the soil of the highway, his right so to pass and repass is a consequence of the dedication of the highway to the public; and if the plaintiff could shew that the highway had been dedicated to the public at the level to which it accidentally sunk, he would have had a right of access at that level, and a right of action if the level was altered to his detriment. The plaintiff's right of access to the road when it was sunk is not open to controversy, but I can find neither principle nor authority for saying that he had a right to have the road which had recently accidentally sunk maintained at the level to which it had

(10) 2 Str. 1004.
(11) 41 Law J. Rep. M.C. 72; Law Rep. 7 Q.B. 47.
(12) 48 Law J. Rep. Q.B. 128; Law Rep. 4 Q.B. D. 104.
(13) 49 Law J. Rep. Chanc. 691; Law Rep. 14 Ch. D. 785.

so sunk. Unless, however, he had such a right he is not in a position to maintain that any right of his is infringed if the road is raised to the height at which it was before it subsided.

Even, therefore, if the defendants in this case have done more than was necessary or proper for repairing the road and keeping it in repair, I am of opinion that the plaintiff has failed to establish any infringement by them of any right of his. In other words, in my opinion the plaintiff had no cause of action and no right to compensation.

I proceed next to enquire into the question whether the defendants raised the road under the powers conferred upon them by the Public Health Act, or whether they did so under the powers which all highway surveyors, as such, can exercise. In one sense everything the defendants did was in exercise of the powers conferred by the Public Health Act; but by the expression, "exercise of any of the powers of this Act," in section 308, I understand new powers created by the Act (namely, by section 149), and not powers simply transferred by the Act from the highway surveyor to the local board (namely, by section 144).

The duty of highway surveyors is to repair and keep in repair (5 & 6 Will. 4. c. 50. s. 6), which means, I apprehend, to keep the road as dedicated to the public in such a state as to be safe and fit for ordinary traffic. An occasional flooding, even if it temporarily renders a highway impassable, is not sufficient to sustain an indictment for non-repair; and it may be, and I think is, true, that, even if the road had not been raised, it might nevertheless have been made safe and fit for traffic, so as to have rendered an indictment unsustainable. But, considering that the road had only recently sunk, and what was done was in substance to restore it to the state in which it was before it sunk, I am of opinion that what the defendants did was not in exercise of any of the powers conferred upon them by the Public Health Act, but was done by them, if not strictly in performance of their duty as surveyors of highways, at all events in exercise of such powers as surveyors have. The defendants, it is true, raised the level of the road as it existed after the accident, but they did not raise the road higher than it was before the accident, nor higher than it was when dedicated to the public, or when vested in the defendants. If, indeed, the old road had been at the level to which this road sunk, and had been raised from that level, the plaintiff would, in my opinion, have been entitled to compensation, for in that case his right of access would have been infringed, and the defendants could only have justified their acts by reason of their exercise of powers created and conferred upon them by the statute. But under the peculiar circumstances of this case, I am of opinion that the plaintiff is entitled to no compensation, first, because no right of his has been infringed; and, secondly, because the defendants have acted under powers transferred to them as surveyors, and not under powers created by the statute.

In my opinion, therefore, judgment should be entered for the defendants.

LOPES, J.—The question is, whether the defendants, in the circumstances stated in the Special Case, have exercised a power conferred upon them by the Public Health Act, 1875, and thereby caused damage to the plaintiffs, or whether they have merely performed a duty as "surveyor of highways."

In order to maintain this action upon the award and to recover compensation from the defendants, the plaintiffs must establish that the defendants have done an act for which they (the plaintiffs) might have brought an action, unless the Legislature had authorised it, and substituted for an action a remedy by compensation. It is essential to consider what, as found by the arbitrator, the defendants have done. They have restored the level of the road to about what it was in 1870, which raising the arbitrator finds, having regard to the obstruction to traffic caused by floods, was prudent and reasonably necessary to put the road into an efficient and permanent state for traffic, but, putting floods out of the question, and having regard only to the inconvenience caused to the ordinary traffic in times other than the times of flood, was not necessary to the extent stated in the case. I believe

this to be the result of what the arbitrator has found.

Some raising, therefore, was absolutely necessary, independently of any floods, for the purposes of ordinary traffic; this it would be the duty of the "surveyor of highways" to do, and of this the plaintiffs could not complain. So far as the ratepayers are concerned, the "surveyor of highways" would have been entitled to do more than this, and to have raised it to the extent stated in the case, and neither the plaintiffs nor anyone else could have complained unless some private right of theirs was infringed. The plaintiffs must shew, therefore, that the raising, so far as it was unnecessary for the ordinary traffic, was an infringement of some right they possessed to their injury.

The plaintiffs, owners of houses abutting on a highway, would have a right of access to that highway, but at what level? Not, I apprehend, at the particular level to which by a pure accident and by some convulsions of nature the road had been reduced, through no fault of the defendants—in fact, by some means for which the defendants were in no way responsible. Could the plaintiffs be heard to say, We are entitled to have the road at that level to which by some accident it has been reduced, or, at any rate, at the level required by the mere exigencies of the traffic; and if you raise it an inch beyond that level we have a cause of action against you? I do not think such an action would be maintainable, and if not maintainable, the plaintiffs are not entitled to compensation.

Suppose the houses had sunk and the highway remained as it was at the old level, there would have been no cause of action. Suppose the road had sunk and the houses remained at the old level, the plaintiffs might have with some reason complained if the defendants did not raise the road. They might have said, By raising the road in 1870 you led us to believe that would be its level for the future, and we were induced thereby to apply expensive machinery in order to be able to keep our houses in the same level with your road. They complain now because the houses and road have sunk *pari passu*, and they are compelled to call in aid the machinery they erected in 1870 in anticipation of the event which has now occurred. But this is a very exceptional case, and must be looked at with regard to its exceptional circumstances. I am inclined to think that in determining what is the duty of "surveyor of highways," the floods cannot be regarded. I think, having regard to the circumstances stated in the case, the defendants were doing nothing more than their duty when they restored the road to the level at which it was placed in 1870. I do not think in so raising it they were acting under the words of section 149 of the Public Health Act, 1875, "may from time to time cause the soil of any such street to be raised, lowered or altered as they may think fit," but were acting under the words, "shall from time to time cause such streets to be repaired as occasion may require." I think, in fact, they were performing a duty as "surveyor of highways," and not exercising a power as the "Local Board of Northwich." They raised the road to the level at which it was placed in 1870, thinking the "occasion" so "required."

Judgment for the defendants, with costs.

Solicitors—Allen & Son, agents for W. S. Bradburne, Northwich, for plaintiffs; Sharpe, Parkers & Co., agents for Green & Dixon, Northwich, for defendants.

[IN THE QUEEN'S BENCH DIVISION.]

1880. Dec. 1. DEBENHAM (*appellant*) *v.* THE METROPOLITAN BOARD OF WORKS (*respondents*).

Metropolitan Building Act, 1855 (18 & 19 *Vict. c.* 122), *ss.* 72, 73, 97—*Dangerous Structure—Party Wall—Expenses of securing Dangerous Structure, how estimated—Liability of One Owner of Party Wall.*

[For the report of the above case, see 50 Law J. Rep. M.C. 29.]

[IN THE COURT OF APPEAL.]

1880. Dec. 15. } HARMON (*petitioner*) *v.* PARK AND ANOTHER (*respondents*).*

Practice—Municipal Election Petition—Interlocutory Order—Appeal—Mayor—Respondent—Conduct of Returning Officer—35 & 36 Vict. c. 60. ss. 2 and 13., sub-s. 6.

An appeal lies from an order of a Divisional Court on an interlocutory question with regard to a municipal election petition.

By the Corrupt Practices (Municipal Elections) Act, 1872 (35 & 36 *Vict. c.* 60), *s.* 2, "*Returning officer means a person under whatever designation presiding at an election.*"

By section 13. *sub-section* 6, "*Where a petition complains of the conduct of a returning officer he shall be deemed to be a respondent.*"

The mayor of a borough, divided into wards, decided, under 38 & 39 *Vict. c.* 40. *s.* 1. *sub-s.* 3, *that one of two candidates for the office of town councillor for one of the wards was disqualified, and the other was declared to be elected. The defeated candidate petitioned, making the mayor a respondent.*

On application to strike out the mayor's name,—

Held (*by* LORD SELBORNE, L.C., *and* BRETT, L.J.), *that the mayor was not returning officer.* (BAGGALLAY, L.J., *doubting.*) Held (*by the whole Court*), *that, if the mayor were returning officer, the petition questioning his decision did not complain of his conduct within section* 13, *sub-section* 6, *and therefore he was wrongly made respondent.*

Decision of the Common Pleas Division reversed.

Appeal from the judgment of Denman, J., and Lindley, J.

An extraordinary vacancy having occurred in the office of councillor for West Ward, one of the wards of the borough of Sunderland, the petitioner, being a duly qualified candidate, was nominated in writing by his right name of Mark Harmon by two, and seconded by eight other, enrolled burgesses of the said borough. The name of the petitioner appeared, however, on the burgess roll as Mark Harmond. On the 7th of October, 1880, the mayor allowed an objection made by the only other candidate, the respondent Robert Park, to the nomination of the petitioner on the ground that his name did not appear on the burgess roll.

Pursuant to notice issued by the town clerk on the 8th of October, 1880, the alderman of the West Ward attended at the town hall or corporation buildings on the 15th of October, 1880, and declared the respondent Robert Park the only other candidate nominated for the vacancy, to have been duly elected. Mark Harmon petitioned against the election, and joined the mayor, Samuel Storey, as a respondent.

On the 22nd of November, 1880, Stephen, J., ordered that the mayor should be dismissed from the petition, on the ground that he was improperly joined, not being the returning officer within the meaning of the Corrupt Practices (Municipal Elections) Act, 1872 (35 & 36 Vict. c. 65), s. 2.

The petitioner appealed to the Common Pleas Division, and the Court (Denman, J., and Lindley, J.) reversed the order of Stephen, J. (1).

The Mayor appealed from the decision of the Divisional Court.

Gainsford Bruce, for the petitioner, took a preliminary objection to the hearing of the appeal. The decision of the Election Court, and that of the Superior Court on a Special Case stated in the matter of a municipal election petition, are expressly made final by the Corrupt Practices (Municipal Elections) Act, 1872 (35 & 36 Vict. c. 60), s. 15. sub-ss. 4 and 6, and therefore no appeal will lie on any interlocutory matter with regard to such a petition.

Ridley, contra.—The provisions cited do not apply to this order. Section 20 of the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), does not govern the

* *Coram* Lord Selborne, L.C.; Baggallay, L.J.; Brett, L.J.

(1) *Ante*, C.P. 185.

case, but section 19 of the Judicature Act, 1873 (36 & 37 Vict. c. 66), does, and therefore an appeal lies.

LORD SELBORNE, L.C.—I am of opinion that we ought to hear this appeal. The Judicature Act of 1873, which came into operation after the Corrupt Practices (Municipal Elections) Act, 1872, by section 16 transfers to the High Court of Justice the jurisdiction previously vested in the Court of Common Pleas, and the same section authorises the Judges to do what they could previously have done under any special Act. Then by section 19 an appeal is given "from any judgment or order, save as hereinafter mentioned, of Her Majesty's High Court of Justice, or of any Judges or Judge thereof." It follows that in any particular case, whoever says there is no appeal must show that the case is excepted from this provision. If the Corrupt Practices Act had said that the decision should be final, then section 20 of the Appellate Jurisdiction Act, 1876, would be a conclusive answer to any contention in favour of the existence of an appeal, but it is admitted that no such express provision can be found, and consequently, unless we are satisfied that by implication it is provided that the decision is to be final, we must hold that an appeal lies. The question came before a Judge who is not a Judge of the Common Pleas Division, under rule 44 of the General Rules for the Effectual Execution of the Corrupt Practices (Municipal Elections) Act, 1872, which were made in pursuance of the authority given by section 21 of that Act. That rule provides for the disposal of interlocutory questions arising in proceedings under the Act by any Judge at chambers, and although this is a special statutory jurisdiction the questions are to be dealt with by the Judge as if they belonged to the ordinary jurisdiction which he exercises when sitting at chambers, and I cannot infer that orders made under that rule are taken out of the express provisions of section 19 of the Judicature Act. Moreover, the Corrupt Practices Act contains express provisions as to what decisions are to be final, the determination of the Court trying a petition, and the decision of the Superior Court on a Special Case (section 15, subsections 4 and 6).

BAGGALLAY, L.J., concurred.

BRETT, L.J.—This is not a question in the petition, but a question as to whether the petition is properly instituted, which under rule 44, referred to by the Lord Chancellor, any Judge, though he is not a Judge of the Common Pleas Division, may decide. Therefore the Judge was acting as a Judge of the High Court, and the order comes within the express words of the Judicature Act, 1873, s. 19, and is an order from which an appeal lies.

Ridley, in support of the appeal.—The mayor cannot legally be made a respondent. First, he is not a returning officer within the definition given in 35 & 36 Vict. c. 60. s. 2; the returning officer is the alderman of the ward—see 5 & 6 Will. 4. c. 76. s. 43; 22 Vict. c. 35. s. 8; secondly, if the mayor is the returning officer, the petition does not complain of his conduct within the meaning of 35 & 36 Vict. c. 60. s. 13. sub-s. 6.

Gainsford Bruce, for the petitioner, *contra*.—The mayor presided at the nomination, which is in fact the election—*The Queen* v. *Parkinson* (2), and therefore is the returning officer. There may be more than one returning officer, for the mayor, the alderman of the ward, and the town clerk, may all be returning officers for different purposes. The petition complains of the act of the mayor in disqualifying the petitioner; that is a complaint of his conduct, and he ought to have the opportunity of being heard. The mayor was made respondent in *Mather* v. *Brown* (3) and *Gothard* v. *Clarke* (4).

Ridley, in reply, was stopped by the Court.

LORD SELBORNE, L.C.—The first question is, whether the petition complains of the conduct of the returning officer

(2) 37 Law J. Rep. Q.B. 52; Law Rep. 3 Q.B. 11.

(3) 45 Law J. Rep. C.P. 547; Law Rep. C.P. D. 596.

(4) 49 Law J. Rep. C.P. 474; Law Rep. C.P. D. 253.

within the meaning of 35 & 36 Vict. c. 60. s. 13. sub-s. 6, assuming the mayor to be the returning officer. I understand misconduct to be meant in that clause, and I cannot easily see what acts there could be which would not come within section 11 of the Ballot Act, 1872 (35 & 36 Vict. c. 33), and yet would be such misconduct. I think it quite clear that a complaint of an erroneous decision *bona fide* pronounced is not a complaint of misconduct, and therefore that the complaint in this petition is not a complaint of the conduct of the returning officer. It is not optional to make the returning officer a respondent or not, but the section says "he shall be deemed to be a respondent," because justice requires that he should have an opportunity of answering when charges are made against him. I think it would be mischievous, where his decision is called in question and no misconduct alleged, to make him a respondent; and although in some cases this has been done, the point does not appear to have been taken, nor does it appear to have been taken in the present case in the Court below.

As to the other point perhaps we are not quite agreed, and my own opinion has fluctuated, but I have come to the conclusion that the mayor is not the returning officer. There are several Acts on the subject. In the first place, by 5 & 6 Will. 4. c. 76. s. 43, the alderman of each ward has the same powers as the mayor has for the borough where there are no wards, and therefore the alderman of the ward is *prima facie* returning officer. In 22 Vict. c. 35 the same law seems to be adhered to; section 8 deals with all four possible cases, as to the number of persons nominated. In the first case nothing is said as to any duty to act as returning officer, so that is plainly left under the Act of Will. 4; but in the three other cases the result is regulated by providing that the mayor or alderman, as the case may be, shall act. The day of election there spoken of is not a day appointed for the nomination, but for what may be called the return, for the Act speaks of a publication of the names of those elected on a day subsequent to the nomination day. The words "returning officer" are used in many parts of the Ballot Act, 1872 (35 & 36 Vict. c. 33), and the rules under it, in a way applying only to the town clerk. Section 20 of that Act defines "returning officer" as "the mayor or other officer who under the law relating to municipal elections presides at such elections," manifestly referring to the previous law. One remarkable circumstance is, that while various duties are cast on the mayor, it is not said anywhere that he shall be deemed to be the returning officer in such a case as the present. In 38 & 39 Vict. c. 40. s. 3, extending to municipal elections the power and duty of the mayor, under section 20 of the Ballot Act, as to appointment of officers, &c., the appointment of the alderman as returning officer for any ward is expressly excepted. I cannot find anything in any of the Acts to make the mayor returning officer in a ward where an alderman presides. It is said on behalf of the petitioner that the term "returning officer" has several meanings, and means anyone who presides at any part of any election; section 20 of the Ballot Act defines the term as meaning "the mayor or other officer who under the law relating to municipal elections presides at such elections," meaning, I think, not whoever happens to preside at any step, but the person who is designated and appointed by law to preside at the election. It is also said that the nomination is in substance the election, but I do not adopt that construction. Therefore, there is no ground for holding that the mayor presides at the election. I am, therefore, of opinion that the mayor was not the returning officer at this election; and that, even if he were, there is no complaint as to his conduct, and the decision must be reversed.

BAGGALLAY, L.J.—If I thought it necessary to decide whether the mayor could be held to be the returning officer, I should wish to take time to consider; but I think that even if he were the returning officer there is no complaint of his conduct within the meaning of 35 & 36 Vict. c. 60. s. 13. sub-s. 6. The Ballot Act has, I think, no bearing on the point, because

by the last paragraph of section 20 a municipal election is to be conducted as if that Act had not passed "except in so far as relates to the taking of the poll in the event of its being contested." There was no contest resulting in a poll at this election, and therefore that Act can have no application. The question is, whether the definition of returning officer given by 35 & 36 Vict. c. 60. s. 2—"a person under whatever designation presiding at an election"—would include the mayor in the present case. Looking at the various Acts on the subject, I doubt whether he can be excluded from the definition. 39 & 40 Vict. c. 40. s. 1 imposes on the mayor the duty of deciding objections to nomination papers; practically the mayor is then a presiding officer. This is not a conclusive opinion, and is hastily formed, but it does not affect the question which we have to decide, for I think the conduct of the mayor is not complained of, but that it is only an error in judgment or opinion that the petition attributes to him. I agree, therefore, that the decision ought to be reversed.

BRETT, L.J.—The question for our decision is, whether on this petition the mayor is properly made a respondent. The only persons who can be respondents are the candidates, or the returning officer, when complaint is made as to his conduct.

The first question is, whether, supposing the mayor is returning officer, there is such complaint as brings this case within the Act. Before the Act the law provided no means of complaint except by action, so there could be no complaint except for wilful and malicious misconduct. It seems to me that it would be wrong to hold that any misconduct can be called in aid to make the mayor a respondent, which would not make him liable to an action. Suppose his decision to be wrong, it would be solely an error of judgment on a point which by law he was bound to hear and determine. I think, therefore, that no misconduct is alleged, and the mayor is not properly made a respondent.

The other question is, whether he is a returning officer at all within the meaning of the interpretation clause in section 2 of the Corrupt Practices (Municipal Elections) Act, 1872. Before that Act no one ever heard of two or more separate and distinct returning officers at one election; and therefore, if the petitioner fails to bring the case within the interpretation clause, it cannot be pretended that the mayor is returning officer. This borough is divided into wards, and where that is the case, by 5 & 6 Will. 4. c. 76. s. 43 the alderman and assessors are to preside for the ward. That section is not done away with, and it seems to me, therefore, that the alderman is still the presiding officer in the ward. It was urged for the petitioner that everyone would be a returning officer within the interpretation clause who presided at any part of the business of an election; if that were so, every presiding officer in every polling-booth would be a returning officer. There are some cases where the mayor is returning officer, but they are where there are no wards, or where the mayor is the alderman of the ward, or where the ward is vacant; but to my mind it seems that where there is a ward and an alderman, the only returning officer for the ward is the alderman, and therefore in the present case the mayor is not returning officer.

For one particular purpose the town clerk is to be deemed to be a returning officer, by 38 & 39 Vict. c. 40. s. 1. sub-s. 4, referring to the 3rd section of the Ballot Act, but that is not for the purpose of a petition, but only with reference to an indictment.

For both reasons I think the appeal ought to be allowed.

Judgment reversed.

Solicitors—Bell, Brodrick & Gray, agents for W. Snowball, Sunderland, for petitioner; Brownlow & Howe, agents for Ritson, Sunderland, for respondents.

[IN THE COMMON PLEAS DIVISION.]

1881. Feb. 25. } STEVENS AND ANOTHER *v.* WOODWARD AND ANOTHER.

Master and Servant—Negligence—Scope of Authority.

The plaintiffs, booksellers, occupied the basement of a house, and the defendants, a firm of solicitors, occupied the floor above. Water overflowing from a lavatory in the private room of one of the defendants, escaped through the floor to the basement below, injuring the plaintiffs' stock-in-trade. The overflow was caused by a clerk of the defendants', who, after the defendant W. had left for the day, had gone into the private room to use the lavatory, and had left the tap open. The clerk had no right to use the lavatory, and no business to go into the private room after the defendant W. had left, and the defendant W. had given orders to this effect:—Held, *that the defendants were not liable, for that the act of the clerk was not incidental to his employment, and he was not acting within the scope of his authority.*

Action to recover damages for injury to the plaintiffs' goods caused by the alleged negligence of the defendants.

The plaintiffs were law publishers and booksellers, carrying on business on the basement of a house, 120 Chancery Lane, and the defendants were a firm of solicitors, occupying the first floor of the same house. On the morning of the 13th of August, 1880, the housekeeper in charge of the premises discovered that water was pouring through the ceiling of the basement. It was further discovered that the tap of a lavatory in the private room of one of the defendants was open, and that the water flowing in had overflowed the basin and escaped through the floor into the basement, causing damage to the plaintiffs' stock-in-trade. The plaintiffs brought an action in the Lord Mayor's Court, and proved the above facts. For the defence Hadden Woodward, one of the defendants, gave the following evidence: "The lavatory is in my room and is for my own use exclusively; and my orders are that no clerk should come into my room after I have left. I left the office on the 12th of August, at 5.45 p.m., after washing my hands and turning off the tap."

Thomas Woodward, clerk to the defendants deposed: "On Thursday evening, the 12th of August, I went into the room of the last witness (Hadden Woodward) to wash my hands. I turned the tap and the water did not flow and then I went out." He also said that he was acting contrary to orders in going into the room. It was further shewn that there was a lavatory in another room for the use of the clerks, and that, finding no water there, the clerk had gone to the private room.

The Recorder left the case to the jury, who found a verdict for the plaintiffs, for 15*l*. Leave was reserved to the defendants to move for a nonsuit or verdict. The defendants having moved accordingly, and obtained a rule *nisi* calling on the plaintiff to shew cause why the verdict should not be set aside and a nonsuit be entered, or why a verdict should not be entered for the defendants,—

Candy shewed cause.—The case turns upon the question whether the clerk was engaged on his master's business or on some independent business of his own. In *Whatman* v. *Pearson* (1), where, contrary to orders, a carter left his horse and cart unattended while he went home to dinner, and the horse ran away and caused damage, it was held the jury were justified in finding that the carter was acting within the scope of his employment; while in *Storey* v. *Ashton* (2), where the carman drove on business of his master's, and before the completion of his orders drove off on business of his own, and while thus driving caused an accident, it was held the master was not liable, because at the time the carman was not acting within the scope of his employment. The employer is liable if there was any evidence to shew the servant was engaged on his master's business.

[GROVE, J.—But the act must be one which is incidental to his employment.]

(1) 37 Law J. Rep. C.P. 156; Law Rep. 3 C.P. 422.

(2) 38 Law J. Rep. Q.B. 223; Law Rep. 4 Q.B. 476.

The evidence is sufficient to shew that the clerk was doing an act which was incidental to his employment, and, if so, the express prohibition of the master is not relevant.

[GROVE, J.—If a housemaid, whose duty it was to clean the lavatory left the tap open, though she had express orders not to leave the tap open, I should say there was evidence for the jury that she was acting within the scope of her authority.]

Clerks are expected to go into their master's room, and the jury were entitled to find he was generally in his master's office. The position of a clerk is unique: he is much more than a mere servant, whose work is specific; by the usages of solicitor's offices a clerk is entitled to do his master's business as well as his own. There was evidence to make it a fair question of fact to be left to the jury.

Petheram (*Witt* with him), in support. —In *Whatman* v. *Pearson* (1) the carter was, no doubt, disobeying orders, but he was still acting within the scope of his employment. The evidence to shew that the clerk was acting independently and not within the scope of his authority was uncontradicted, and there was no case to leave to the jury. The argument of the plaintiffs goes the length of saying that a solicitor's clerk can do nothing from the moment he enters until he leaves the office which is not connected directly or indirectly with his master's business.

GROVE, J.—I am of opinion that the verdict ought to be entered for the defendants. Nice questions of law are sure to arise in this class of case, and consequently many cases are to be found near the line of the master's liability. In the present case the facts are simple: the clerk went into his master's room after his master had gone, and contrary to his master's orders. The clerk could not go in without permission, though I agree with the plaintiffs' counsel that if the act was incidental to the employment, then, notwithstanding the prohibition, the master would be liable, for the question would be for the jury. I do not know that I could better illustrate my meaning than by the instance I put during the argument of the case of a housemaid whose duty it was to clean a lavatory leaving the tap running, though she had strict orders never to leave the tap open. Then, notwithstanding the prohibition, I think the master would be liable, because the act of leaving the tap open would be incidental to her duty. The expression "incidental" seems to me to be not inappropriate; the act must be something incidental to that duty for which the servant is hired and which it is his duty to perform.

In *Storey* v. *Ashton* (2) the servant was employed to carry out certain orders of his master; afterwards he goes off on his own business, and the master was held to be not liable, because the servant was not acting in the course of his employment, whereas had he merely been making a *détour* while proceeding on his master's business, the master would have been held liable—see *per* Parke, B., in *Joel* v. *Morrison* (3). Even had there been no express prohibition I should have come to the same conclusion, for what possible part of the clerk's employment could it be to go into his master's room and use his lavatory? It was not incidental to his duty. He was a voluntary trespasser on his master's portion of the house. I do not mean to say there was anything particularly wrong in his conduct in going into the room, but he had no business to go there. In doing that which he was in no way authorised to do he occasioned the mischief. In my opinion, therefore, he was not acting within the scope of his authority or the normal duties of his employment.

It was further argued that the question was for the jury, and that we were bound to accept their verdict; and there would be considerable force in that contention had there been a conflict of evidence. The plaintiffs' evidence was of a general character, shewing that in all probability the mischief occurred from the open tap, and no doubt that was *prima facie* evidence of the defendants' liability, but it was contradicted by the positive evidence produced by the defendants, evidence tantamount to shewing that it was the act of a stranger who had come into the room and

(3) 4 B. & Ald. 590.

left the tap open. The case is free from any conflict of evidence. For these reasons I am of opinion the verdict should be entered for the defendants.

LINDLEY, J.—I agree with my brother Grove, and for the same reasons, and I will only add that I do not see how a man is to be held responsible for the act of another who, as a trespasser, comes into his room during his absence and leaves a tap running.

Judgment for defendants with costs (4).

Solicitors—E. W. Owles, for plaintiffs; John Knight, for defendants.

[IN THE COURT OF APPEAL.]

1881. Feb. 16. } *In re* COPP.*

Costs—Taxation between Solicitor and Client—County Court Act, 1856 (19 & 20 *Vict. c.* 108), *s.* 36. — *Action in High Court.*

Section 36 *of the County Court Act*, 1856, *which limits the amount of costs payable to a solicitor by his client in any action where not more than* 20*l. is claimed, does not apply to actions in the High Court.*

Judgment of the Common Pleas Division reversed.

Mr. A. E. Copp, the appellant, a solicitor, was instructed by the respondent, Mrs. Drew, to take proceedings to recover a debt of 13*l.* 3*s.* 9*d.*, which was due to her. He commenced an action in the High Court of Justice, and judgment was recovered for the amount of the debt, but, as the amount recovered did not exceed 20*l.*, and no certificate was obtained under 30 & 31 Vict. c. 142. s. 5, no costs were recovered. Mr. Copp stated in an affidavit that the action was brought in the High Court in consequence of Mrs. Drew's instructions. The costs to be paid to Mr. Copp by Mrs. Drew were taxed by the Master, who refused to allow more than the County Court scale, being of opinion that the case was within section 36 of the County Court Act, 1856 (19 & 20 Vict. c. 108), by which, "Where in any action the debt or damage claimed shall not exceed 20*l.*, an attorney shall not be entitled to recover from his client any further costs or charges in the conduct of such suit than those mentioned in 9 & 10 Vict. c. 95. s. 91, unless upon taxation of costs the Registrar be satisfied, by writing under the hand of the client, that he has agreed to pay further costs or charges; and in such case the Registrar may allow any costs or charges not exceeding the amount which may have been so agreed to be paid."

A summons having been taken out for an order directing a review of the taxation, Pollock, B., made the following indorsement on the summons: "I have some doubt as to the construction of the section, but I incline to think the view taken by the Master is right. Apart, however, from the section, the solicitor, in my judgment, is not entitled to higher costs than those given by the County Court scale."

The Divisional Court (Grove, J., and Lopes, J.) affirmed the decision of Pollock, B., and Mr. Copp appealed to this Court.

R. O. B. Lane, for the appellant.—The 36th section of the County Court Act, 1856, does not apply to actions in the High Court. That section and section 35 refer to taxation by the Registrar, who has no power to tax costs in actions in the High Court.

Francis Turner, for the respondent.—The words of the section are "in any action," and where the Act is intended to apply only to proceedings in County Courts this is expressly provided, as in sections 33, 34, 35.

BRAMWELL, L.J.—I cannot agree with the judgment of the Divisional Court. The Attorneys and Solicitors Act of 1870, passed fourteen years after the County Court Act, 1856, does not apply, and the earlier Act must be construed as it would

(4) See *Williams* v. *Jones*, 3 Hurl. & C. 256; 33 Law J. Rep. Exch. 297.

* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Brett, L.J.

have been the day it passed. Section 35 provides for taxation of costs between solicitor and client in County Courts, and section 36 fixes the charges which the solicitor may claim. I am clearly of opinion that this section cannot apply to an action in a Superior Court, for its provisions are not sensible if applied to a Superior Court. The costs are to be taxed by the Registrar, who has no power to tax costs in the Superior Court, and therefore the actions to which the section refers must be actions over which the Registrar has authority. I think, therefore, that the section is only applicable where there is a case, as between solicitor and client, of taxation of costs in proceedings in a County Court, and the charges must be referred back to the Master.

BAGGALLAY, L.J.—In my opinion there has been no taxation on any proper principle, and the decision appealed from proceeds on a wrong view. I think section 36 applies only to actions in the County Court, as is shewn by the title, the preamble and the preceding clauses of the Act.

BRETT, L.J.—It is contended for the respondent that the Master was bound by section 36 to tax these costs on the County Court scale. This depends on whether the section applies to proceedings in a Superior Court, and I am clearly of opinion that it does not so apply. It was argued that the words "any action" must include actions in Superior Courts as well as in County Courts; but clearly the latter part of the section applies to the same "action" as is referred to in the first part. The costs are to be taxed by the Registrar, who is an officer of the County Court, and it follows that the word "action" in the first part of the section means an action brought in the County Court, and the section leaves untouched claims in the Superior Courts.

Appeal allowed.

Solicitors—A. E. Copp, appellant; in person; Peckham, Maitland & Peckham, for respondent.

[IN THE QUEEN'S BENCH DIVISION AND THE COURT OF APPEAL.]

1880. Dec. 6, 7, 8, 9, 10, 13. 1881. Jan. 11, 12, 13, 14, 15, 29.

In re THE REV. T. P. DALE. THE QUEEN *v.* LORD PENZANCE. *In re* THE REV. R. W. ENRAGHT. THE QUEEN *v.* LORD PENZANCE.*

Public Worship Regulation Act, 1874 (37 & 38 *Vict. c.* 85), *ss.* 7, 9, 13, 15, 16, 19—*Disobedience to Inhibition—Power to signify for Contempt—Jurisdiction of Court of Arches—Form of Requisition, Monition and Inhibition—Authority of Forms given by Rules and Orders of* 1875 *and* 1879 — *Official Principal appointed by Public Worship Regulation Act, not bound by* 127*th Canon — Writ de Contumace Capiendo*—5 *Eliz. c.* 23. *s.* 2—53 *Geo.* 3. *c.* 127. *s.* 1—12 & 13 *Vict. c.* 109. *s.* 27—38 & 39 *Vict. c.* 66—42 & 43 *Vict. c.* 59—*Costs.*

A representation under the Public Worship Regulation Act, 1874, *having been made by the churchwardens against the incumbent of a parish to the Bishop of the diocese, as the Bishop and the Archbishop of the province were both interested in the patronage of the living, another Bishop, namely, the Bishop of E., was appointed by sign manual to act for the Bishop and Archbishop in the matter of the representation under section* 16. *The Bishop of E. having considered the representation and communicated with the parties in accordance with section* 9, *sent a requisition to the Judge to hear the case in London or Westminster, or within the diocese. The requisition, with the exception of an alteration, rendered necessary by the double patronage, followed the form given by the Rules and Orders of* 1875. *Though reciting that the parties had failed within the prescribed time to state their willingness to submit to the Bishop's directions, it did not allege that a copy of the representation had been sent to the incumbent, or that he had been required to state whether he would submit to the Bishop's directions in the matter of the representation*:—Held, *on objection to the requisition as conferring no jurisdiction on*

* *Coram* James, L.J.; Brett, L.J.; and Cotton, L.J.

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the Judge, that it was valid; because, first, the Bishop of E. was properly appointed within the meaning of section 16 *to act for both Archbishop and Bishop; second, the requisition sufficiently shewed that all preliminaries had been complied with; third, the incumbent could not object to the form of the requisition if the facts essential to the jurisdiction existed; fourth, the requisition need not name the particular place of hearing, only the limits within which the hearing is to be.*

The Rules, Orders and Forms issued by Her Majesty in Council, with the advice of certain persons, under section 19 *of the Public Worship Regulation Act,* 1874, *for regulating the procedure under the Act, being sanctioned by Parliament, are of statutory authority, and proceedings which follow such Rules and Orders and the forms thereby prescribed cannot be impeached.*

Lord Penzance, when appointed under section 7 *of that Act as "the Judge of the Provincial Courts of Canterbury and York," became, on the occurrence of a vacancy, ex officio Official Principal of those Courts, and was therefore under no obligation to take the oath or subscribe the articles as required of every "chancellor, commissary and official" by the* 127*th of the canons of* 1603–4.

Such Judge on becoming Official Principal of the Provincial Court of Canterbury (the Court of Arches) was not thereby constituted a new Court with a new jurisdiction, but succeeded to and his Court was merged in the old Court of Arches, with all the jurisdiction and authorities inherent in that Court, and with such additional jurisdiction as is conferred by the Act.

A monition, commanding an incumbent to abstain from certain specified unlawful practices, and other practices and matters of a like nature, is good in form; and on proceedings taken against the incumbent for disregarding the monition in respect of matters alleged to be of a like nature with those specifically named, it is a question of fact, to be determined by the Judge or Bishop who issued the monition, whether the matters complained of are of a like nature, and from his finding an appeal will lie.

The Petty Bag Office and Enrolment Amendment Act, 1849 (12 *&* 13 *Vict. c.* 109), *s.* 26, *repeals so much of the* 5 *Eliz. c.* 23. *s.* 3, *and* 53 *Geo.* 3. *c.* 127. *s.* 1, *as requires the writ de contumace capiendo to be issued in term time, but does not repeal so much of the same Acts as requires that writ to be brought into Court and opened in the presence of the Justices.*

By the 13*th section of the Public Worship Regulation Act,* 1874, *obedience to a monition under the Act is to be enforced by an order of inhibition, and in certain events the living is to become void, but the section does not point out how obedience to the inhibition is to be enforced.*

An incumbent having disregarded an order of inhibition issued against him under the 13*th section of the Act, the Judge issued a significavit against the incumbent for contempt, and a writ de contumace capiendo was issued under which the incumbent was arrested and imprisoned. The writ was issued and made returnable, and was enrolled and delivered of record in the Crown Office out of term, and was not brought into or opened in Court. On writ of habeas corpus by the incumbent to be discharged from custody on the ground (amongst others) that the Judge had no power to signify, and that the formalities required by* 5 *Eliz. c.* 23, *and* 53 *Geo.* 3. *c.* 127, *had not been complied with,—*

Held, *that the Judge in the exercise of his general jurisdiction had power to signify, and that the writ had been properly issued; but* Held, *that as the writ had not been brought into Court and opened in the presence of the Justices, the arrest thereunder was bad, and that the incumbent was entitled to his discharge.* Held *also, that the proceedings in respect of which the incumbent was arrested being civil and not criminal, he was entitled to his costs under the writ of habeas corpus.*

These were two appeals from the Queen's Bench Division, which raised substantially the same points, and were therefore heard together.

The history of the proceedings in Mr. Dale's case is shortly as follows; and for the earlier proceedings therein reference may be made to the report of *Sergeant* v. *Dale* (1).

Mr. Dale being the incumbent of the

(1) 46 Law J. Rep. Q.B. 781.

united parishes of St. Vedast (otherwise Foster) and St. Michael-le-Querne, in the city and diocese of London, on the 12th July, 1878, a representation under the Public Worship Regulation Act was made to the Bishop of London by the churchwardens of the parish complaining that he had offended against the laws ecclesiastical in various matters therein specified falling within those enumerated in section 8, being unlawful practices in the conduct of divine worship.

As the Bishop of London and the Archbishop of Canterbury were patrons of the living, having each an alternate right of presentation, the Bishop of Exeter was appointed by sign manual to act in the place of the Bishop of London and the Archbishop of Canterbury, and of each or either of them, in all matters thereafter arising in relation to the said representation.

The Bishop of Exeter, in accordance with section 9, transmitted a copy of the representation to Mr. Dale, and required him to state whether he was willing to submit to the directions of the Bishop touching the matter of the representation within twenty-one days; and as Mr. Dale did not state his willingness to submit to the directions of the Bishop within the time aforesaid, the Bishop of Exeter on the 13th of September issued a requisition to Lord Penzance to hear the matter of the representation at any place within the diocese, or in London or Westminster.

The requisition was as follows :—

"Frederick, by divine permission Bishop of Exeter, acting in the place of Archibald Campbell, by divine permission Archbishop of Canterbury, to the Right Honourable James Plaisted Baron Penzance, a Judge of the Provincial Court of Canterbury, greeting: Whereas a representation has been made to the Right Reverend Father in God John, Lord Bishop of London, by John Clifford Sergeant, Robert George Morley, James Horwood and George Robert Bengough, in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Rev. Thomas Pelham Dale, clerk, rector of the united parishes of St. Vedast (otherwise Foster) and St. Michael-le-Querne, in the city and diocese of London, is the person complained of; and such representation has been transmitted to the said Archbishop. And whereas, in pursuance of the provisions of the said Act, we, Frederick, Lord Bishop of Exeter, were, by an instrument bearing date the 24th day of July, 1878, under the sign manual of Her Most Gracious Majesty Queen Victoria, appointed to act in the place of the said John, Lord Bishop of London, and the said Archibald Campbell, Lord Archbishop of Canterbury, and each or either of them, in all matters thereafter arising in relation to the said representation. And whereas the said John Clifford Sergeant, Robert George Morley, James Horwood, George Robert Bengough and Thomas Pelham Dale have not within the time prescribed by the said Act stated their willingness to submit to our direction touching the matter of the said representation, and we have signified such failure to the said Archbishop. Now we, Frederick, Bishop of Exeter, acting in the place of the said Archbishop aforesaid, do hereby require you, the Judge aforesaid, to hear and determine the matter of the said representation, at any place in London or Westminster, or within the said diocese of London, as you may think fit."

Due notice, as required by the Act, was given of the time and place at which the Judge would proceed to hear, and the hearing took place on the 10th of January, 1879. Mr. Dale did not appear. On the 8th of February, 1879, Lord Penzance pronounced judgment against Mr. Dale. On the 21st of February, 1879, a monition was issued by Lord Penzance, admonishing Mr. Dale from a repetition of the practices in respect of which he had been condemned.

The monition was sealed with the seal of the Arches Court of Canterbury, and followed the form of monition given by the rules and orders issued under the Public Worship Regulation Act, 1874, and approved by Order in Council dated the 28th of June, 1875, with the exception that Lord Penzance was described as "Official Principal of the Arches Court of Canterbury," instead of a "Judge of the Provincial Court of Canterbury."

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Since the framing of the Rules (2), namely, in October, 1875, the contingency contemplated by section 7 of the Public Worship Regulation Act, 1874, had occurred. Sir Robert Phillimore, the then Official Principal, resigned the office, and Lord Penzance having been appointed Judge previously under the Act, became, by virtue of that section, Official Principal.

The monition, after the recital in the words of the form, stated the judgment to have been pronounced against Mr. Dale in respect of eleven out of twelve allegations made by the promoters (specifying them), and commanded him to abstain from the matters in which he had so offended (specifying them), and from all practices, acts, matters and things of the same or the like nature to those thereinbefore particularly set forth, or any of them.

Mr. Dale paid no attention to the monition, and so, on the 19th of March, 1880, Lord Penzance issued an order inhibiting him for such his disobedience from performing any service of the Church, or otherwise exercising the cure of souls within the diocese, for three months, and thereafter, until he should signify his compliance with the monition, and the inhibition should have been duly relaxed.

The inhibition was sealed with the seal of the Arches Court of Canterbury, and described Lord Penzance as Official Principal of that Court. It recited that, in the matter of the representation made by John Clifford Sergeant, &c., churchwardens, &c., a monition had been issued and duly served on Mr. Dale, setting out the tenor of the monition, and that Mr. Dale had failed to pay due obedience to the said monition in regard to certain matters specified.

The inhibition followed the form given by the amended Rules and Orders under the Public Worship Regulation Act, approved by Order in Council on the 22nd of February, 1879 (3).

The inhibition was duly served on Mr. Dale, but being wholly disregarded, notice was, on the 10th of August, 1880, given to Mr. Dale by the promoters that request would be made to Lord Penzance to signify his contempt to the Court of Chancery.

On the 28th of October, 1880, Lord Penzance did signify to Her Majesty in Chancery the disobedience and contempt of Mr. Dale in the form provided by the Act 53 Geo. 3. c. 127. sched. A.

On the 29th of October, 1880, a writ *de contumace capiendo* was made in the Chancery Division, and was taken on the 30th of October to the office of the Queen's Bench Division, when a memorandum was placed upon it in the Crown Office; and on the same day Mr. Dale was arrested under it and lodged in Holloway prison.

The indorsement was as follows: "This writ is allowed, enrolled and delivered of record before our Lady the Queen, in the Queen's Bench Division of the High Court of Justice at Westminster, on Saturday, the 30th day of October, 1880, in the 44th year of the reign of our Sovereign Lady, Queen Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, according to the form of the Statute in such case made and provided. F. Cockburn, Crown Office."

Mr. Dale then moved for and obtained a writ of *habeas corpus*, to be discharged from custody; and also obtained rules *nisi* for a writ of prohibition, directed to Lord Penzance, to restrain all further proceedings in the matter of Mr. Dale; for a writ of *certiorari* to bring up and quash the requisition to Lord Penzance from the Bishop of Exeter to hear the case, and the monition and inhibition issued by Lord Penzance after such hearing; and for a writ of *supersedeas* to suspend the writ *de contumace capiendo*, on the ground that the monition, inhibition and *significavit* were issued by Lord Penzance without jurisdiction.

The questions on the rules *nisi* and the writ of *habeas corpus* were argued on the 6th, 7th, 8th, 9th, 10th and 13th of December, 1880.

It was shewn by affidavits verifying extracts from the records of the Arches Court that Lord Penzance on becoming Official Principal, upon the resignation of Sir Robert Phillimore, had not taken the oaths or subscribed the Thirty-nine

(2) See Rules, Law Rep. 1 P. D. 1.
(3) See Rules and Orders, 49 Law J. Rep. P., D. & A. 7; Law Rep. 4 P. D. 250.

Articles as required by the 127th of the canons of 1603–4, and that all previous Official Principals for 100 years past had done so.

It was admitted that Mr. Dale had had due notice of every step in the proceedings, and had purposely omitted to appear throughout.

A. Charles, Poland and *W. G. F. Phillimore*, for Mr. Dale.

The Attorney-General, the Solicitor-General and *Danckwerts*, for Lord Penzance.

A. Wills and *Jeune*, for the promoters.

Instead of the counsel for Lord Penzance and the promoters shewing cause against the rules *nisi* obtained by Mr. Charles, and leaving the latter then to move for Mr. Dale's discharge from custody, upon the return of the gaoler to the writ of *habeas corpus* bringing Mr. Dale into Court, it was agreed as a matter of convenience that the questions involved in the rules and on the return should be argued first by counsel for Mr. Dale, and then answered by the other side, who thus consented to forego their right of shewing cause.

A. Charles, Poland and *Phillimore*.—The points to be urged on behalf of Mr. Dale are—

1. That there was no power of signifying contempt for disobedience to the inhibition and monition, because inhibition is a final sentence.

2. Assuming that there was power to issue the *significavit*, yet the proceedings must be quashed as bad on the face of them, because—(*a*) the requisition signed by the Bishop of Exeter was bad; (*b*) the monition issued by the Judge was bad; (*c*) the inhibition issued by the Judge was bad.

3. There was no jurisdiction in Lord Penzance to act as Official Principal, because he had not complied with the preliminaries necessary to enable him to execute that office; and therefore he had no authority to issue the documents.

4. The writ *de contumace capiendo* was bad on the face of it and insufficient, and was not issued in accordance with the provisions of the 53 Eliz. c. 23, and 53 Geo. 3. c. 127. It was issued out of term time, and not brought into and opened in Court.

First, then, the only way of enforcing obedience to a monition issued under the Public Worship Regulation Act is by the process described in section 13. That being followed, the living becomes *ipso facto* void after three years' disregard of the inhibition. The Act does not in terms authorise imprisonment, and therefore nothing can be looked at outside the Act for the purpose of enforcing a monition under the Act.

[Lord Coleridge, C.J.—You must not take it for granted that the Judge when clothed with the authority of both the Chancellors of Canterbury and York has not all the powers of those officials.]

No; but in exercising a special statutory authority he is limited to the powers conferred by the Act.

[Lord Coleridge, C.J.—Section 7 says that after becoming Official Principal, all proceedings taken before the Judge shall be deemed to be taken in the Arches Court.]

That does not enlarge the statutory jurisdiction conferred by this Act. The point was decided in *Hudson* v. *Tooth* (4).

[Lord Coleridge, C.J.—The particular words were not discussed there. It was enough that the conditions had not been fulfilled to enable the Judge to sit at Lambeth, that place having been excluded by the requisition.]

If the proceedings were in the Arches Court and not regulated by section 7, there was nothing to argue, for Lord Penzance could have sat anywhere. And if these words confer all the coercive power of the Court of Arches, then the Judge could suspend or deprive for disobedience to the monition. Section 13, however, shews that he cannot; obedience can only be enforced in the particular manner.

[Lord Coleridge, C.J.—If the Judge after he became Dean of the Arches is nothing more than he was before, your argument is an easy one; but what force do you give to the words "deemed to be in the Arches Court"?]

The proceedings will all appear on the records of the Court.

(4) 47 Law J. Rep. Q.B. 18.

In re Rev. T. P. Dale (App.), Q.B.

Secondly, the requisition signed by the Bishop of Exeter was bad, because he could not act in the place of both the Bishop and Archbishop. They have different duties to perform under the Act: the Bishop has to transmit the representation to the Archbishop, so there are two separate persons and functions, and the functions are judicial, not merely ministerial.

[MANISTY, J.—In the case of the Bishop being patron, the Archbishop is empowered to act alone and discharge both functions.]

Then the requisition does not shew on the face of it the preliminaries and conditions necessary to give jurisdiction. There is no statement that the representation had been sent to the party complained of, or that he had had the twenty-one days for consideration, or that he had declined to submit to the Bishop, or that the Bishop had fixed the place of hearing; and the Bishop only named three dioceses, not some place—which is what the Act means when it says the Archbishop is to fix any place within certain limits. This being an inferior Court, and one with a special limited statutory jurisdiction, the proceedings must shew on the face of them that the statute had been complied with. Nothing can be intended in favour of jurisdiction. He cited *Harrison* v. *Wright* (5), *Christie* v. *Unwin* (6), *Howard* v. *Gossett* (7), *Muskett* v. *Drummond* (8).

Next, the monition and inhibition are bad. They are under the seal of the Court of Arches, and not signed by the Judge. It does not appear that Lord Penzance, as Official Principal, was the proper person to issue it. The only person who could issue it was the Judge acting under the Public Worship Regulation Act, and it is necessary to go outside these documents to see that Lord Penzance was such Judge. He had no power *qua* Official Principal. Nor is there any recital to shew the various steps which gave him jurisdiction. The receipt of the requisition from the Bishop is the foundation of the jurisdiction, and that does not appear. There is in the inhibition no allegation that it was made after notice to Mr. Dale—*The King* v. *Bagshawe* (9).

The writ *de contumace capiendo* does recite all the other matters which it is submitted ought to have been in the monition and inhibition, but it is defective in not shewing that Mr. Dale had the opportunity of submitting to the Bishop.

The next objection is, that Lord Penzance had no authority as Dean of the Arches, not having taken the oaths as prescribed by the 127th canon. Previously, all Officials Principal for the last hundred years have taken the oath, and in the case of a surrogate, the omission to do so was held fatal—*The King* v. *Verelst* (10).

[FIELD, J.—Here Lord Penzance became Official Principal by express enactment.]

But although the first part of the canon is dispensed with by the Public Worship Regulation Act as to the qualification of the individual, yet the conditions precedent to his acting remain in force, and the canon is law so far as ecclesiastical Judges are concerned.

The next point is, that the writ *de contumace capiendo* was improperly issued. It was issued under the Acts of 5 Eliz. c. 23 and 53 Geo. 3. c. 127. Although the writ *de contumace* was substituted for that *de excommunicato capiendo*, yet the provisions of the Act of Elizabeth had to be complied with. The writ must be made in term time, returnable in the Court of Queen's Bench, and must be brought into Court and opened in the presence of the Judges and delivered to the sheriff. This was not done here. The writ was issued in vacation, and never brought into Court at all. It was allowed by the Queen's coroner at the Crown Office; it is therefore void—*Parker's Case* (11); *Lucy* v. *The Bishop of St.*

(5) 13 Mee. & W. 816; 14 Law J. Rep. Exch. 196.
(6) 11 Ad. & E. 373; 9 Law J. Rep. Q.B. 47.
(7) 10 Q.B. Rep. 359; 16 Law J. Rep. Q.B. 345.
(8) 10 B. & C. 153.
(9) 7 Term Rep. 363.
(10) 3 Campb. 431.
(11) Cro. Car. 582.

Davids (12); where Holt, C.J., gives the reason of the practice. He then cited *Watson's Case* (13), *In re Baines* (14), *The Queen* v. *Thoroughgood* (15), *The Queen* v. *Jones* (16), *The King* v. *Ricketts* (17), *The Queen* v. *Ricketts* (18); *The King* v. *Hewitt* (19), *The King* v. *Blake* (20). The Petty Bag Act which authorised the Court of Chancery to issue writs in vacation has been repealed by 42 & 43 Vict. c. 59, and the practice was invariable of bringing the writ into Court until the passing of the Petty Bag Act—Cf. *Hopwood* v. *Watts* (21), which shews that no practice that may have grown up in the office can justify a disregard of the plain words of the earlier statutes.

The Attorney-General, *The Solicitor-General* and *Danckwerts*, for Lord Penzance. — The first objection to Lord Penzance on account of his not having taken the oaths prescribed by the Canons is capable of four answers:—

First, the Official Principal is not within the canon at all, which does not mention him, and he is not included in the words, the "chancellor and commissary or official." He is a far higher officer, as is seen by the fact that he could deprive, notwithstanding the words of canon 122—*Saunders* v. *Davies* (22), *Oliver* v. *Hogarth* (23).

[LORD COLERIDGE, C.J.—There was a special privilege as to this one man by ancient usage, because he was the representative of the Archbishop of Canterbury: and all those cases shew is that the privilege could not be taken away without express words.]

The second answer is, that if within the words of the canon Lord Penzance as a layman is not bound by the Canons, they do not bind the laity at all, and only morally the clergy—Lord Hardwicke's judgment in *Croft* v. *Middleton* (24).

[LORD COLERIDGE, C.J., referred to *Marshall* v. *The Bishop of Exeter* (25), where all the authorities are set out.]

Then again the Official Principal is a King's Judge sitting in a King's Court—*Caudrey's Case* (26).

The third answer is, that Lord Penzance holds his office by virtue of the express provisions of the Public Worship Regulation Act, 1874. Section 7 requires certain qualifications for the Judge. Those being fulfilled, he, being Judge, becomes Official Principal on certain contingencies happening, which have happened. Lord Penzance has fulfilled all the obligations of the statute.

The fourth answer is, that if the canons do apply, the omission to take the oath does not invalidate any acts done previously—*The Margate Pier Company* v. *Hannam* (27).

The next objection arises on the requisition from the Bishop of Exeter, who, it is said, could not act for both the Bishop and Archbishop. But if the Bishop be patron he has no judicial functions at all to perform; he merely sends on—not transmits in any legal sense—the representation to the Archbishop, who would then act alone. But if he be patron also, the Bishop, appointed by the sign manual, stands exactly in his place, and can act alone. Next, it is said that the requisition is deficient in not setting out that notice was given to the clerk of the exact place of hearing, but this objection cannot be taken by the defendant; and, further, the statute does not even say that the requisition need be in writing. The words are only "shall require." And then the form given in the Rules and Orders have been followed, as nearly as the circumstances of the case allowed, and that is enough.

The same may be said as to the monition and inhibition. The forms were provided on purpose to shorten these documents. The power to make rules and orders includes forms — *e.g.* under the

(12) 7 Mod. 56.
(13) Ld. Raym. 817.
(14) 1 Cr. & Ph. 31.
(15) 12 Ad. & E. 183; 9 Law J. Rep. Q.B. 211.
(16) 10 ibid. 576.
(17) 6 ibid. 537; 6 Law J. Rep. K.B. 172.
(18) 8 ibid. 951; 8 Law J. Rep. Q.B. 44.
(19) 6 ibid. 547; 6 Law J. Rep. K.B. 235.
(20) 2 B. & Ad. 139.
(21) 5 ibid. 1056.
(22) 1 Add. 29.
(23) 1 Hag. Ec. 47.
(24) 2 Atk. 680.
(25) 3 E. & I. App. 97.
(26) 3 Coke Rep. part v. i.
(27) 3 B. & Ald. 266.

Church Discipline Act, where a decree following the form was held good on objection—*Simpson* v. *Flamank* (28), *The Attorney-General* v. *Sillem* (29).

Lastly, when the monition and inhibition were disregarded Lord Penzance had power to signify. Even before the resignation of Sir R. Phillimore he was a Judge of an Ecclesiastical Court, and so had the power under 53 Geo. 3. c. 127; but, anyhow, after he became Dean of Arches he had all the power of that office.

It does not make any difference whether the proceedings get into the Court of Arches by means of the Church Discipline Act or the Public Worship Regulation Act.

So far from the Legislature thinking that clergy would necessarily obey, and so leaving the Judge without any power of enforcing his order, the Act was framed to deal with persons who disobey.

[LORD COLERIDGE, C.J.—May it not be said that the whole subject-matter is such that the Legislature never intended that a man should go to prison for disobedience?]

It is disobedience to the law, and it is essential that there should be some mode of enforcing obedience. The Act, which was intended to simplify and make the proceedings shorter, did not touch the old means of enforcing orders, and they therefore still exist. There would be no remedy during three years but for this power. The Act against brawling would not apply. The 23 & 24 Vict. c. 32 excludes clergymen, and it is impossible to say that a parson going quietly into church, with the consent of the churchwardens, could be guilty of riotous conduct. So the inhibition would remain a *brutum fulmen*.

A. Wills and *Jeune*, for the promoters, in arguing in favour of the power of enforcing the inhibition by *significavit*, cited the language of Lord Coleridge in the judgment in *Martin* v. *Mackonochie* (30) as to the absence of hardship in enforcing a clergyman to obey the law of the Church when it has been declared by proper authority, and as to there being nothing unreasonable in resorting to this means of enforcing it, as the Legislature had not (as it might have done) said that such power should be taken away from the Dean of the Arches.

The point raised about the writ *de contumace* not having been opened in Court is answered by the Act of 1849, which repealed the provisions in the Act of Elizabeth. Then terms are abolished by the Judicature Acts, and the provisions in the earlier statute were only directory and not imperative.

[LORD COLERIDGE, C.J.—Assuming that terms are abolished, and that the writ may be issued in vacation, that does not get rid of the enactment requiring the writ, when issued, to be brought into Court.]

The writ was indorsed "enrolled of record."

[LORD COLERIDGE, C.J.—In *Le Roy* v. *Colgate* (31), the Court there admitted that many persons had been liberated from custody because the writs had not been opened in Court. FIELD, J.—In 1840—*Baines's Case* (14)—Lord Cottenham treated this as a good objection.]

Those cases no doubt so treat the point. But it is submitted that really it is a matter of form only; and since the Act of 1849 (12 & 13 Vict. c. 109), which says that all writs may be issued and returned in vacation, that form has been done away with. Then the writ itself is good; it is not necessary to set out more than has been done—namely, the inhibition and the acts of disobedience; for the statute only requires that the nature of the commands and the disobedience thereto be set out.

Charles, in reply.—The provisions of the Acts of Eliz. and Geo. 3 were in favour of the liberty of the subject, and cannot be repealed by implication merely by the Petty Bag Act. But that Act itself was repealed last year. Then the forms have no parliamentary force, and if they are contrary to common law, objection may be taken to them. If they are of statu-

(28) 36 Law J. Rep. P.C. 28; Law Rep. 1 P.C. 463.

(29) 10 H.L. Cas. 704; 33 Law J. Rep. Exch. 209.

(30) 49 Law J. Rep. Q.B. 69; Law Rep. 4 Q.B. D. 697.

(31) Sid. p. 165.

tory authority they must be strictly followed, and in the monition they have not been. When it was issued the form ran in the name of the Judge under the Act, not in that of the Official Principal.

The Canons of 1603–4 have been recognised as binding on the clergy and on laymen in ecclesiastical matters. It is only as to temporalities that they do not bind—*Marshall* v. *The Bishop of Exeter* (25). (*Per* Lord Westbury.)

On the principal point, until Lord Penzance became Dean of the Arches he had no Court at all, he was not Judge of an Ecclesiastical Court at all, but only Judge under the wholly new jurisdiction which, as decided in *Hudson* v. *Tooth* (4) and *Serjeant* v. *Dale* (1), was created by the Act. Then he acquired no fresh authority after becoming Official Principal. The words in section 7 do not enlarge his jurisdiction. The Lord Chief Justice, in *Hudson* v. *Tooth* (4), said, "This is an entirely new tribunal, which had at that time no relation to that of the Dean of Arches."

This being a statutory monition can only be enforced under the statute creating it, and that is by inhibition, which is postponed deprivation. But the contention on the other side would allow the clerk to be both imprisoned and deprived at the end of three years. Then the inhibition is no *brutum fulmen*, because the clerk ceases to be the lawful minister, and may be dealt with under 23 & 24 Vict. c. 32 for interfering with the Bishop's nominee, who becomes the lawful minister. The broad ground is that power of imprisonment cannot be given without express words, and they are wanting.

Cur. adv. vult.

Lord Coleridge, L.C.J.—I am now to give judgment in these four rules, which it has been agreed shall be heard and determined together, because, as the four rules raise a variety of points which are all more or less connected, it is far more convenient that a single argument should dispose of them all.

The rule in which Mr. Dale is defendant raises technically the question whether the writ *de contumace capiendo* is good either in itself or in respect of the proceedings which have taken place since it was issued, and whether, therefore, it affords a good answer to the writ of *habeas corpus*.

The three rules in which Lord Penzance is defendant raise in various forms the question of his jurisdiction: one is to prohibit him from proceeding further in the matter of Mr. Dale; another to suspend the writ *de contumace capiendo* on the ground that the monition, inhibition and *significavit* were issued by Lord Penzance without jurisdiction; another for a *certiorari* to remove and quash the monition and inhibition of Lord Penzance, and the requisition of the Bishop of Exeter, on the ground that they are all defective for want of jurisdiction. All these rules raise in various forms and on various grounds-objections to the jurisdiction of Lord Penzance: the first one raises certain further questions as to the writ *de contumace* after it was issued from the Petty Bag; and the determination of these questions in Mr. Dale's favour might entitle him to his discharge, even although everything done by Lord Penzance was done in proper form and within his jurisdiction. It will be convenient to consider the points as they arise in order of right reasoning, and to dispose of them so as, if possible, not to go over the same ground twice.

First, then, it is said that before Lord Penzance was entitled to exercise any judicial function as Official Principal of the Arches Court of Canterbury, he must have taken the oaths and made the subscription prescribed in the 127th of the Canons of 1603–4. It was contended that the canon is still binding, and the case of *The King* v. *Verelst* (10) was cited as shewing that the appointment of an ecclesiastical officer "contrary to the canon," to use Lord Ellenborough's words—and therefore, if the case was in point, the appointment of Lord Penzance —must be treated as a nullity. There are minds, I suppose, though it is very difficult to realise the supposition, to which an objection of this sort appears to have reality and substance. But I am of opinion that there is nothing in it. I do not put my decision upon the argument that the

Official Principal of Canterbury is not within the 127th canon. If it were necessary (as it is not) to decide that question, I should as at present advised hold that he is within it. Neither do I rest my decision upon the recent changes made by Parliament in the law of oaths and subscriptions. It seems to me that the 37 & 38 Vict. c. 85. s. 7 has conclusively settled the question. It is the law of the realm, binding on all the subjects of the Queen, that in certain events, which events have in fact happened, Lord Penzance shall become Official Principal of the Arches Court of Canterbury, and that "thereafter"—that is, after he has so become Official Principal, which he has in fact become, and which in fact he is—all proceedings taken before him in relation to matters arising within the province of Canterbury shall be deemed to be taken in the Arches Court of Canterbury. Mr. Dale's is such a matter, and these proceedings are such proceedings; and it appears to me that the question is concluded. It is admitted that by the first paragraph of the 7th section the earlier part of the 127th canon, which refers to qualification, has been abrogated; it is plain to me that by the third paragraph of the 7th section, the part of the 127th canon which refers to oaths and subscriptions, has, if it ever bound the Official Principal of the Arches Court, been abrogated likewise. It is unnecessary to say more. But I will point out that *The King* v. *Verelst* (10) is not in point. That case decides that where an ecclesiastical officer is appointed contrary to the only law which governs his appointment, such appointment is bad. It is used in support of a contention that where an appointment is unquestionably valid by Act of Parliament, a canon can annex conditions to the exercise of the functions of a person so appointed—a contention to which *The King* v. *Verelst* (10), when accurately examined, yields no support whatever. The defendant's first point therefore entirely fails.

Next, it is said that Lord Penzance had no jurisdiction, because his jurisdiction rests upon the transmission of the representation by the Bishop to the Archbishop, and upon the requisition by the Archbishop to the Judge, according to the provisions of the 9th section of the 37 & 38 Vict. c. 85, taken together with and qualified by the provisions of the 16th section. Now here it is said that the appointment of the Bishop of Exeter to act both for the Bishop of London and the Archbishop of Canterbury (both of whom were within the meaning of the 16th section "patrons" of Mr. Dale's preferment) was a bad appointment; and that even if it was good, his requisition to Lord Penzance was bad on its face for not stating that a copy of the representation was transmitted to Mr. Dale according to the provisions of the 9th section, and conferred, therefore, on Lord Penzance no jurisdiction to hear the matter of the representation. It is, I know, quite in vain to protest against the time of a Court of law being wasted, as I think it has been, upon questions such as these. They are raised and they must be decided. But before I decide them, I must observe that from this point in the discussion to the very last of the acts of Lord Penzance it has not been even faintly suggested that anything wrong has been done in point of fact; that any notice has been omitted; that there has been any hasty action; that in any single point, however small, the substance of justice has been violated. All the proceedings have been in fact according to law; of all of them Mr. Dale has had notice; on none of them has he attended; against none of them has he made any defence; and now, when he has brought upon himself the punishment of disobedience to the orders of one of the Queen's Courts, he comes to another of the Queen's Courts not to complain (for of that, as I said, we have heard no whisper) of any unjust or illegal act of the former Court, but to take exception, if he can, to the phraseology of the various legal documents in which those acts are stated. It is no part of my duty to express any judgment on such conduct; it is, I think, my duty to state it with strict accuracy.

Now his first point is that, under the 16th section, as the Bishop of London and the Archbishop of Canterbury were both patrons of St. Vedast's, one Bishop should have been appointed under the sign manual of the Queen to act for the Bishop, and another for the Archbishop; because

under the 9th section the Bishop is to determine whether the case is to be heard, the Archbishop to fix the area for the hearing. The point is naught. Under the 16th section the patron Bishop discharges none of the duties imposed on a non-interested Bishop by the 9th. If the papers come to him he simply has to send them on to the Archbishop as papers which have reached him wrongly and with which he has nothing to do. In the case of a patron Archbishop, which is this case, the Queen may appoint under her sign manual, as in this case she has thought fit to do, a Bishop or Archbishop to act in place of the disqualified Archbishop. In this case it appears that the Bishop of Exeter was appointed in terms to act both for Bishop and Archbishop. This appointment to act for the Bishop was, I think, unnecessary, and may be rejected without in any way affecting the validity of his appointment to act for the Archbishop. But if it was necessary the same Bishop may well be appointed to act for both: the Act of Parliament does not forbid it; the functions of the two, though different, are nowise inconsistent, and may well be performed for the two by one and the same person.

Next it is said that the requisition of the Bishop of Exeter conferred no jurisdiction on Lord Penzance, because it did not state—

1. That the representation had been transmitted to Mr. Dale.

2. That the parties had been required to state whether they would submit to the directions of the Bishop.

3. That they had not stated their willingness to submit to the Bishop.

4. The place where the matter of the representation was to be heard.

Now, as to the first objection, it appears to me that it was wholly unnecessary to state in the requisition the fact that the representation had been transmitted to the incumbent. It was an incident of procedure, not a fact essential to jurisdiction.

As to the second and third questions, I think that they fail in fact. The requisition appears to me, by necessary intendment, to state the facts which, it is argued, are omitted.

As to the fourth, I think that, within the meaning of the Act of Parliament, the place is stated. It would be enough if the words of the 9th section were simply followed. In this case some selection has in fact been made. The following paragraph of the 9th section, it is to be observed, leaves to the Judge to give notice of the time and place at which he will proceed to hear the matter, and the language seems to me to shew that as the time is clearly not to be fixed by the Archbishop, neither is the place to be fixed by him in the narrow and restricted sense contended for by the defendant. I am therefore of opinion that none of these objections can be sustained, even if they can be made. But I am further of opinion that if these objections existed, they are unavailing in point of law. It is not necessary to give the Judge the jurisdiction to hear that every incident which gives the Archbishop (or in this case the Bishop) the right to send his requisition to the Judge should appear on the face of the requisition. Quite apart from an answer presently to be considered, the requisition appears to me abundantly sufficient; and if it were not, I think that its sufficiency cannot be questioned by the defendant in this proceeding. If the Judge is properly appointed; if the matter is within his jurisdiction; if he be called upon to act by a person who has jurisdiction to call upon him; if he has been called upon; and if, as regards the defendant, he has acted within his jurisdiction,—the defendant cannot criticise and take exception to the language of the instrument which has called upon the Judge to act. Such objections, if available at all, might be available on the part of the Judge if he refused to act and this Court were to endeavour to compel him. No case has gone the length of saying that a person in the position of the defendant can question jurisdiction on grounds of this kind. There is no authority for any such proposition, and I decline to make one.

The next objection, or rather series of objections, which arise in point of order, are the various objections which have been taken to the language of the monition and inhibition, as not setting forth

with sufficient particularity the various facts which must have existed to give the Judge jurisdiction to issue them. Much time and infinite ingenuity were expended upon this branch of the argument, and many cases were cited which, but for an answer which I am now about to give, it might have been necessary to examine in detail and at length. But it is not necessary. I throw no doubt upon the general proposition that Courts of limited jurisdiction must shew upon the face of the legal instruments they employ the facts which give them their jurisdiction and give validity to their legal instruments. I throw no doubt upon the existence or the importance of the power of this Court to compel such Courts to exercise their jurisdiction if they decline, and to restrain them if they exceed it. But in this case I think that a higher power than this Court has intervened, and that the forms which I am now examining, and one which I have examined, namely, the requisition, have each and all of them the sanction of Parliament. If this is so, it is useless to enquire how the matter would have stood if the forms employed had no such sanction. By the 19th section of 37 & 38 Vict. c. 85, it was enacted that the Queen in Council, with the advice of certain eminent persons, including the Lord Chancellor and the Lord Chief Justice of England, may cause rules and orders to be made for regulating the procedure under the Act. Such rules and orders are to be laid before each House of Parliament in manner specified. If either House addresses Her Majesty praying that any rules may be annulled, the Queen in Council may annul such rules without prejudice to the validity of any proceedings taken under them. Rules and orders under this section have been made by the Queen in Council, and have been laid in manner specified before each House of Parliament. As portions of such rules and orders, forms have been drawn up; those forms, with an exception (trivial, but to which I will refer), have been followed in all the documents now under consideration. I am of opinion that, so far as the rules and orders, including the forms, conform to the statute, and are not inconsistent with it, the rules, orders and forms have parliamentary authority. It is said that the power to make rules and orders regulating procedure does not include the power to frame forms which are procedure. It is said that the statute, having, as it has in more than one place, mentioned a form as to be prescribed by rules and orders, must be taken to have intended that only such forms as are referred to were to be prescribed by rules and orders. I can assent to neither contention. Not to the first for various reasons: Forms are amongst the most important parts of procedure, and especially in ecclesiastical matters are the parts most requiring to be shortened and simplified by authority. In the analogous cases of the Court of Probate and the Court of Divorce, under words not to be distinguished from the words before me, forms have been drawn up which for five and twenty years no one has ever dreamed of disputing. The same thing has happened under 15 & 16 Vict. c. 76. s. 223 (the first part of it), the Common Law Procedure Act, 1852. Nor does the fact that other statutes, such as the 9 & 10 Vict. c. 95. s. 78, have given the power to frame forms in express terms, appear to me to shew that where words abundantly wide enough to give the power are used, their breadth is to be limited, because other statutes under other circumstances have been more specific in their language.

Neither can I assent to the second contention drawn from the words of the statute itself. The fact that the statute speaks more than once of a form to be prescribed by rules and orders seems to me conclusive to shew that under the general power to frame rules and orders, when used in the latter part of the statute, the power to frame forms was intended to be included. And though the observation be perhaps minute it is yet true that in two cases at least where forms are mentioned in the Act itself, they are forms hardly of procedure under the Act; for the first is the form of complaint to the Bishop, which is a request to him to put the Act in operation—a request which he may grant or refuse at his absolute discretion; the other is a form

of appeal when the procedure under the Act is over, and which, but for the Act, it might seem more proper that the Judicial Committee should prescribe. Moreover, if the power to frame forms is given by the statute, I am clear that these forms are within the power. It is to my mind idle to suppose that nothing more was given than power to frame forms which should be good at common law. No parliamentary power was needed to frame forms which would be good without such power; and I have myself little doubt that the power was given for the very purpose of avoiding the minute objections and elaborate arguments to which we have been forced in this case to listen. I come therefore clearly to the conclusion that these forms have parliamentary authority, and are binding on Lord Penzance. It is admitted that they have been followed, with two exceptions to which I will advert; it is not suggested that, in point of fact, Lord Penzance has in any respect done anything exceeding his jurisdiction; and I think, therefore, that all the objections founded upon the language of the requisition, monition and inhibition fall to the ground. The two exceptions remain to be considered. It is said that the requisition of the Bishop of Exeter does not exactly follow any form. Nor does it. The case of a Bishop and Archbishop being both interested in the patronage of a living appears to have been omitted, and the form of the requisition therefore in this case follows the form "as nearly," to use the words at the head of the appendix of forms, "as the circumstances of the case will allow." The words, "We have signified such failure to the said Archbishop," are admitted to be inaccurate and inapplicable; but they may be rejected without vitiating the form, which remains perfectly good without them.

Next it is said that the forms used do not follow the forms given in the rules and orders, and are not in accordance with the statute, for that they misdescribe the Judge, and that he has in them affected to act as Official Principal of the Arches Court of Canterbury, whereas his jurisdiction under the Act is not that of Official Principal, but only of Judge of the Provincial Court of Canterbury. In my opinion this objection fails also. When the rules and orders were first issued by the Queen in Council on the 28th of June, 1875, the places of Official Principals of Canterbury and York were both full; and the proper style of Lord Penzance—the style given him by the Act—was Judge of the Provincial Courts of Canterbury and York. So he might have remained for many years if the Official Principals had neither died nor resigned. Accordingly, the forms drawn up under that state of things call him by the only name he was then entitled to bear. But by the resignation of Sir Robert Phillimore, in October, 1875, he became Official Principal of the Arches Court of Canterbury by the direct operation of the statute, as I have explained at the beginning of this judgment. Thereafter that was his title. Thereafter all proceedings before him became proceedings in the Court of Arches. Thereafter all forms which had heretofore run in his name as Judge of the Provincial Court ran, by force of the statute, in his name as Official Principal; and I think in this respect the note appended to rule 65 of the Rules and Orders of 1875 was really unnecessary, and prescribed only what the law would have prescribed if there had been no such note. Not that proceedings in the Court of Arches ceased to be proceedings under and limited by the statute, but that proceedings under and limited by the statute became statutory proceedings in the Court of Arches. The passage from the judgment of my brother Lush, in *Sergeant* v. *Dale* (1), is capable of being construed as meaning no more than I have now expressed; and I have the highest authority—his own—for saying that in his mouth it did mean no more. Sir Alexander Cockburn cannot tell us what he intended by his language in *Hudson* v. *Tooth* (4). But he, too, may have intended to expound the statute as I have expounded it; and I think he did, because his language in respect of the Act if pressed further would certainly be inaccurate, a thing very unlikely in any case, and with the statute actually before him all but impossible. I may say, in passing, that I do not presume to cast

any doubt on the authority of those cases. Both were, in my judgment, perfectly rightly decided, but they have no bearing on the present point. I think, therefore, that the objection to these documents, so far as it is founded on any supposed misdescription of the Judge entirely fails.

I pass from these technicalities to the one point of substance in the case—a point well worthy of argument, and not to be decided without much consideration. It may in substance be thus stated: This is a new and statutory proceeding; the incumbent, if he is found in the wrong by the Bishop or Judge, is to be ordered to do or to abstain from doing certain things, by monition from the Bishop or Judge, as the case may be. The 13th section of the Act enacts that the monition shall be enforced by a new process of inhibition, and if submission to the monition, in the way pointed out by the 13th section, is not made by the incumbent for three years, his benefice, at the expiration of that time, becomes *ipso facto* void. You cannot, it is said, look beyond the statute, there is no power given by it to enforce obedience to the inhibition; and, as far as the inhibition is concerned, the Judge or Court has been left without any legal power. It may be that it was thought the inhibition would bind the conscience; but if it does not, then for three years, and subject to the penalty at the end of three years, the monition may be disobeyed, and the inhibition defied.

It is contended, on the other hand, that thus to construe the statute would be to bring a scandal on the administration of justice—to leave to the clergy only, of all the subjects of the Queen, the power of obeying or disobeying for three years, at their pleasure, the provisions of an Act of Parliament; that it is incredible that Parliament would have passed a special statute to enforce in a short and inexpensive way a certain uniformity of ceremonial, and yet have left the Court intrusted with the special duty without the power of doing the duty intrusted to it. These and the like considerations were pressed upon us with much force by the counsel who appeared for Lord Penzance and for the churchwardens.

I am not insensible to considerations of this sort on either side. And if the statute stood alone there would be much to be said. At first sight, the 13th section seems to be complete in itself, and to enact the way and the only way in which obedience to the monition is to be enforcéd. Such, I confess, was my first impression. Not having been for many years familiar with ecclesiastical disputes, and never having been familiar with them when the matters disputed about were vestments of the clergy and the particular postures or gestures which a clergyman might or might not assume or use in conducting the public worship of a congregation, it struck me as possible, or even probable, that Parliament might never have contemplated as reasonably possible that clergymen belonging to the Establishment would deliberately disregard and defy the law of their society pronounced by the highest Court of Appeal in the country, and claim for disobedience to the law in matters such as these the sanction of conscience and the credit of virtue. For these are not "the weightier matters of the law, judgment, mercy and faith," but at the best and highest points more or less interesting of ceremonial observance—points on which, prior to experience, it would be difficult to believe any man could persuade himself that disobedience to the law was a matter of moral obligation. And as certainly the inhibition *pendente lite* under the Church Discipline Act could only be enforced, if the clergyman defied it, by a process so lengthy and cumbrous that practically it could not be enforced at all, I should have been disposed to hold, if the statute stood alone, that Parliament had not contemplated the possibility of disobedience and defiance; had assumed that clergymen, like other men, would obey the law of their country; and had not enacted any specific mode of enforcing an obedience which it took for granted would be rendered.

But the statute does not stand alone. It follows the 5 Eliz. c. 23, and the 53 Geo. 3. c. 127—the latter statute substituting the writ *de contumace* for the writ *de excommunicato capiendo*, keeping alive by express enactment many of the forms

of the statute of Elizabeth, and containing these words: "In all causes which, according to the laws of this realm, are cognisable in the Ecclesiastical Courts, where any person or persons having been duly cited to appear in any Ecclesiastical Court, or required to comply with the lawful orders or decrees, as well final as interlocutory, of any such Court, shall neglect or refuse to appear, or neglect or refuse to pay obedience to such lawful orders or decrees, or when any person or persons shall commit a contempt in the face of such Court, . . . it shall be lawful for the Judge who issued out the citation, or whose lawful orders or decrees have not been obeyed, or before whom such contempt in the face of the Court shall have been committed, to pronounce such person or persons contumacious and in contempt, and within ten days to signify the same . . . . to His Majesty in Chancery, . . . and thereupon a writ *de contumace capiendo* shall issue from the Court of Chancery." What may have been the intention of the Parliament which framed the 37 & 38 Vict. c. 85 I have no means of knowing except from the Act itself. The Act has not excluded the operation of the Act of Geo. 3. Lord Penzance was made, by 37 & 38 Vict. c. 85, an Ecclesiastical Judge in an Ecclesiastical Court: there was a cause cognisable before him; there was a person duly cited; there was a lawful order made with which that person was required to comply; that person has refused to pay obedience to such lawful order. It seems to follow that, by the plain and direct enactment of 53 Geo. 3, this *significavit* properly issued. I think this would have been so if Lord Penzance had remained only Judge of the Provincial Court of Canterbury. It is none the less so, according to the view I have already expressed, because since the passing of the Act the events contemplated in the 7th section have happened, and he has become Official Principal of the Court of Arches. I have come, therefore, to the clear conclusion that the 13th section of the Act is not exclusive, and that the power to commit for disobedience to the inhibition exists in and has been properly exercised by Lord Penzance.

There remains the question, whether it is still necessary that the provisions of the 5 Eliz., expressly re-enacted by the 53 Geo. 3, in respect of the writ *de contumace*, are still in force. If they are, I cannot think that they are directory only. The case of *The King* v. *Colgate* (31) and the case before Lord Cottenham, *In re Baines* (14), appear to me quite impossible to reconcile with any such view. And whatever may be the weight due to the reports of cases in Siderfin on points of law—see *per* Lord Holt, *Hayward* v. *Wilson* (32), and *per* Mr. Justice Dolbin in *The Queen* v. *Lee* (33)—the case I have referred to is very strong indeed as evidence of the practice existing at that time. But I think the provisions of the statutes of Elizabeth and of Geo. 3, so far as the latter statute re-enacts the statute of Elizabeth, are no longer in force. Assuming that the writ *de contumace capiendo* comes out of the Petty Bag (as I believe all original writs did), I think the 12 & 13 Vict. c. 109 by necessary implication repeals so much of the Act of Elizabeth and of 53 Geo. 3. c. 127, as require the *capias* to be brought into and opened and allowed in Court. When that Act passed Trinity Term ended in June—I think on the 10th of June; all the interval between that and the 2nd of November was vacation, during which the Court—that is, the Court in Banc—could not sit. So that no proceeding of this nature could be taken between those dates. The 25th and 26th sections of the Petty Bag Act are most explicit—"all writs of *whatsoever description* may be issued and returned in vacation;" the required interval of twenty days between the *teste* and either the day named for the return or the day of the actual return being preserved. The intention plainly was to allow such proceedings to be taken and executed in vacation at a time when there was no Court of Queen's Bench sitting in which the writ could be opened and allowed. It follows that it might be executed without that formality, if the substance of the requirement be preserved,

(32) Comb. 377.
(33) 1 Shower, 223.

namely, that the writ be entered of record in the Court of Queen's Bench so as to give the Court jurisdiction over it. The two Acts cannot stand together, and therefore the later one repeals *pro tanto* the former one.

It is needless to say that if the former Act was repealed *pro tanto* it was not revived by the Judicature Act, 1873, which abolishes terms altogether, and authorises, though it does not require, the Court to sit in the holidays and vacations.

For all these reasons it appears to me that judgment must be given for the Crown in the rule in which Mr. Dale is defendant, and for Lord Penzance in the three other rules in which he is defendant.

FIELD, J.—I have arrived at the same result by the same course of reasoning. The applicant is in custody because (as the gaoler makes return to the writ of *habeas corpus*) it has been signified to the Court of Chancery that he is in contempt for disobedience to an order or inhibition, which restrained him from ministering in the diocese, and that the inhibition issued because he had before disobeyed a monition to abstain from practices which Lord Penzance had found were contrary to law.

We are not in any sense a Court of Appeal upon the facts; but it is not immaterial in the outset to observe that no suggestion has been made that Lord Penzance has decided improperly upon them. We have, therefore, only to see that Lord Penzance has acted within his jurisdiction; if he has, Mr. Dale's mode of obtaining his release is by submitting to the order of the Court. I will only observe further that in every necessary stage he has had every notice, so that he could have defended himself on every charge. As he did not appear, and the charges were proved, Lord Penzance could do nothing else but issue his monition ordering him to conduct his service according to law. That being disobeyed, the only mode by which the scandal of the service being conducted contrary to law could be averted was by inhibition, and this being disobeyed personal restraint became necessary. It is said that there was no jurisdiction to enforce personal restraint, and a number of objections have been raised to the form of the proceedings in every stage. I have gone through them all, and I find that, with the exception of one, all are unsubstantial.

The first point is, that Lord Penzance had no jurisdiction because he had never been duly required to hear under section 9 of the Public Worship Regulation Act.

The history of the matter is shortly that Mr. Dale was proceeded against, tried and sentenced, in 1876, having raised no dispute as to the facts alleged against him. After sentence, however, he then, as appears by the case of *Sergeant* v. *Dale* (1), suggested that the Bishop of London was an interested party as having an alternate right of presentation with the Archbishop of Canterbury; and so this Court was obliged to declare that all those proceedings were null. Then Mr. Dale continues his practices, and the churchwardens were obliged again to make representations to the Bishop of his conduct in violating the law. As, however, the Archbishop was also interested in the living, and so could not act for the Bishop, recourse was had to section 16, to appoint a Bishop to act instead. The language of the section is quite wide enough to include this case, though the instance of an alternate presentation between Archbishop and Bishop is not mentioned.

The next point is, that the Bishop of Exeter, who was appointed under the sign manual, and who sent the requisition to Lord Penzance to hear, did not allege in that requisition that the representation had been sent to him or that he had given Mr. Dale notice or an opportunity of submitting to him. I think that on the construction of the document this does appear; but, whether or no, I am clearly of opinion that such an allegation is not so material as that its omission would render the requisition invalid.

Next, it is said that the Bishop omitted to state the place of hearing. In *Hudson* v. *Tooth* (4) these words were the subject of judicial decision, the hearing having taken place in Lambeth, which was outside the limits prescribed by the requisition to the Judge. But here the hearing

was in a place within the jurisdiction, and also within the terms of the requisition. It is said, indeed, that the Bishop ought to have named some particular place. But the Act, in my opinion, did not mean this: it meant that the Bishop should fix the limits, and that the Judge should fix the place within those limits; and section 9 says that the Judge shall give twenty-eight days' notice of the time and place. The notice here specified the place. I think this point is also practically decided in *Hudson* v. *Tooth* (4), where, after argument as to the jurisdiction of the Judge to hear being founded upon the requisition, Mr. Justice Lush (34), says, "So that, while the Archbishop appoints the limits within which the hearing shall be restricted, the Judge appoints the particular place."

It is next objected that the title of Lord Penzance in the monition and inhibition is that of Official Principal and not Judge. What are the facts as to this? By the Act Lord Penzance was made a Judge of the Provincial Court of Canterbury; by the provisions of the same Act he became afterwards Official Principal and "thereafter," to use the words of the Act, all proceedings were to be "deemed to be taken in the Arches Court of Canterbury."

The next objection is a still more astounding one—that is, that Lord Penzance, before having jurisdiction, must have taken the oaths in accordance with the 127th canon.

On this point I am inclined to agree with the Lord Chief Justice that Lord Penzance is such an official as would come within the canon if he had been appointed Official Principal in the ordinary way. But the statute prescribes certain qualifications for the Judge, and something which when appointed Judge he must do; and then, having done that, it says that, being such a Judge, he is to become, on certain contingencies—namely, the vacancies of the offices—*ex officio* Official Principal.

The next is an objection which seemed to open a very serious question, because it is founded on the necessity of a Court of limited jurisdiction shewing its jurisdiction; and it is said that all the documents must contain all the allegations necessary to shew jurisdiction. I think it is important, because the rule is clear that Courts of limited jurisdiction should state facts shewing the jurisdiction, unless released from the necessity of stating them. I agree, however, here that those acting under this statute have been released from such necessity. The Lord Chief Justice has gone through the reasons for this, and I agree with him. The arguments on the other side really come to this, that the forms are a delusion, and that it is not only of no avail following them, but that it is an absolute error to do so.

I come now to the last and the only serious objection, that is the question whether Lord Penzance had power to "signify" Mr. Dale's disobedience to the Court of Chancery. I am bound to own that I was very much struck with the arguments addressed to us by Mr. Charles on this point; but, having heard the answers given to them at the bar, I have come clearly, and without any doubt whatever, to the conclusion that he had that power.

My conclusion rests on a careful consideration of the Act, and the almost impossibility of coming to the conclusion that the Legislature could have intended not to give Lord Penzance, as Official Principal and as Judge under the Act, the power which he has exercised. At the time the Public Worship Regulation Act was passed, the only Act in force in such cases was the Church Discipline Act of 1841, which dealt with all ecclesiastical offences; and, among other things, with the matters specified in the Public Worship Regulation Act.

These last, enumerated in section 8, would all have been ecclesiastical offences within the Church Discipline Act, for the earlier Act has a much wider scope than the later one, including doctrinal matters as well as ritual offences. Before the passing of the Public Worship Regulation Act, however, many questions had arisen as to ceremonies, vestments and ornaments of churches, and whether they were used in accordance with law. In that state of things the Legislature clearly

(34) 47 Law J. Rep. Q.B. at p. 25.

intended to deal with that class of cases, leaving the whole jurisdiction of the Court of Arches standing for all other purposes, including these matters, and leaving the Judge—a Judge of that Court with all its powers—to deal with these particular matters with the object described in the preamble, which runs as follows: "Whereas it is expedient that in certain cases further regulations should be made for the administration of the laws relating to the performance of divine service according to the use of the Church of England, be it enacted," &c.; that is, it was desired to enforce regularity and uniformity in the performance of public worship, the law as to which was to be administered with that view under the Act. So far from creating new ecclesiastical offences, it was intended by the Act rather to take these ritual offences out of the catalogue of offences ecclesiastical as dealt with under the Church Discipline Act under a general term, which included much more serious and criminous offences, and to deal with them in a simple manner. And the object of this was to avert the scandals, I may almost say, of the public worship of the Church of England, being conducted on different principles from those recognised by her formularies, and contrary to what has been declared to be the law, and so conducted by clergymen in opposition to the wish of their Bishops and congregations. It was hoped that by so dealing with them the object might be attained of putting an end to these differences and violations of the law.

But a case like the present might still have been brought under the Church Discipline Act, and if it had been, it would have come before the same Judge, he would have pronounced the same judgment, issued the same monition and inhibition, and, upon disobedience, would have been able to signify such disobedience as contempt to the Court of Chancery; and committal for such contempt would have followed precisely as it has done in the present case.

Though this course was always open, what the Public Worship Regulation Act did was to provide a new procedure; it did away with the necessity of the formal charge and articles, and created, in the first instance, a kind of domestic forum—that of the Bishop to whom power was given, if the parties consent, to hear and determine the matter at once, and without appeal; and if they did not consent, to send the matter to the Judge to decide.

The Judge, then, after hearing, issues his monition, and if that is disobeyed, his only course is to issue an inhibition, and that is expressly provided for in the Act. But the question then arises, What power has he to enforce the inhibition if disobeyed? If the case had been under the Church Discipline Act, no question could have arisen of this kind; but in this Act there is no particular machinery contained for enforcing obedience to the inhibition, and so the first difficulty arises in consequence of the language of section 13, upon which it is argued that there is no other mode by which the Judge can enforce obedience to the monition than by issuing an inhibition; and, having done this, his power is at an end.

But it is clear that the object was to have the monition obeyed, and it was assumed by the Legislature that the object would be attained by the process provided by the 13th section, and that the issuing of an inhibition which, if in force for three years, should *ipso facto* occasion the benefice to become void, would produce the desired effect.

Now, undoubtedly, as affecting the liberty of the subject, it is most important to see that it appears by express words or necessary intendment that the Legislature meant the consequence to follow, which has in this case followed, upon Mr. Dale's disobedience to the inhibition. It does not appear by express words, but I am of opinion that it does so by necessary implication, and that such a result was intended by the Legislature. If not, what would be the consequence? If Mr. Charles's contention be right, the inhibition would be absolutely useless; there would be no power whatever to carry out the act of the Court in issuing the inhibition, and the incumbent, notwithstanding the inhibition, might do the very thing which he is inhibited from doing, and might continue doing it until the very last day of the three years. But

it is clear to my mind that the Legislature, when they passed this Act, knew that the power of Ecclesiastical Courts in reference to disobedience was that which was given by the Act of 53 Geo. 3. c. 127. s. 1, and given in the plainest words: "In all causes which, according to the laws of this realm, are cognisable in the Ecclesiastical Courts, where any person or persons having been duly cited to appear in any Ecclesiastical Court or required to comply with the lawful orders or decrees, as well final as interlocutory, of any such Court, shall neglect or refuse to appear, or shall neglect or refuse to pay obedience to such lawful orders or decrees, . . . it shall be lawful for the Judges or Judge who issued out the citation, or whose lawful orders or decrees have not been obeyed, to pronounce such person or persons contumacious and in contempt, and within ten days to signify the same to His Majesty in Chancery."

Now this is very remarkable and strong language, and especially when considered in reference to these particular matters which are dealt with under the Public Worship Regulation Act. For we have here an Act passed for regulating public worship and keeping it within the limits of the law. How is this to be done except by compelling the clergy who transgress the law to obey it—first admonishing them to abstain from illegal practices, and then providing means, if necessary, of compelling them to do so? Otherwise there would be all the evils which the Act was designed to suppress going on for three years, and perhaps in twenty churches in the same diocese; so that, instead of having public worship regulated according to law, just the reverse would be effected, and there would be services going on during the whole period of three years in contempt of law and in violation of the order of the Court and the decree made for the purpose of enforcing it.

This power of dealing with contempt and disobedience to its orders is not one which is given to Ecclesiastical Courts in excess of that possessed by or conferred on other Courts; for all the other Courts of the realm have power of enforcing their orders by attachment or imprisonment if disobeyed. So in the case of an injunction—whether an ordinary injunction to abstain from doing an act, or a mandatory injunction to do an act—proceedings of a similar character to those in the present case are taken. There is no Court or Judge who would hesitate if his orders were disobeyed to issue process of attachment against the party disobeying. It is a serious thing to restrain personal liberty, but I know of no other way by which obedience to the lawful orders of a Court can be enforced. I come therefore to the conclusion that this Act was silent as to the mode of enforcing an inhibition, because the Legislature well knew how orders under the Church Discipline Act might be enforced; and because they knew that, in appointing the Judge and in making him Official Principal of the Arches Court, they had clothed him with all the powers necessary for enforcing his inhibition.

This was, in fact, a new mode of exercising, in its early stages, an old jurisdiction attached to an old Court; and the old jurisdiction of the Court remained untouched, with all its powers capable of being made use of for enforcing obedience to orders lawfully made by the Court, though the parties had availed themselves of the new and simplified procedure for the purpose of bringing the matter in which the order was made within the cognisance of the Court.

For these reasons I come to the conclusion that this process of committal for contempt was applicable to the present case, and that on that ground there is no reason for discharging Mr. Dale from custody.

The other grounds which have been urged on his behalf are of the lightest and most technical character; and as I have had the advantage of reading the judgment of the Lord Chief Justice, I will only say that I agree with him in the manner in which he has dealt with them and in his decision upon them.

MANISTY, J.—The proceedings out of which the present applications arise are proceedings taken under the Public Worship Regulation Act, 1874, against the Rev. Thomas Pelham Dale, a clerk in

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holy orders, of the Church of England, and rector of the united parishes of St. Vedast, otherwise Foster, and St. Michael-le-Querne, in the city and diocese of London, for offences against the laws ecclesiastical.

It is not, neither could it be, denied that the alleged offences against the ecclesiastical law have been committed; but it is contended, first, that some of the proceedings were informal and bad on the face of them for not sufficiently stating facts which shewed jurisdiction; and, second, on the ground that on the face of the proceedings Lord Penzance, the Judge of the Provincial Court of Canterbury, and *ex officio* Official Principal of the Arches Court of Canterbury, exceeded his jurisdiction, and that consequently the defendant, Mr. Dale, who has been arrested and imprisoned by virtue of a writ *de contumace capiendo* for not obeying an inhibition, is entitled to be discharged out of custody.

A representation having been made to the Bishop of London on the 12th of July, 1878, by the churchwardens of Mr. Dale's parish, pursuant to the Act of 1874, to the effect that he had been guilty of twelve offences against the ecclesiastical law (each of which was specified), the case came on for hearing before Lord Penzance in February, 1879, when his Lordship adjudged him to have been guilty of eleven of those offences.

Mr. Dale did not appear at the hearing or at any time during the proceedings. I do not think it necessary to add anything to what has been said by the Lord Chief Justice and my brother Field as to the validity of the proceedings anterior to the hearing of the case, and the judgment pronounced by Lord Penzance, beyond saying that I concur with them in holding that those proceedings were regular and valid. The first proceeding as to which I desire to make some remarks is the monition which followed the judgment.

Two objections are made to it—one that Lord Penzance is not correctly described in it, the description given being that of "Official Principal of the Arches Court of Canterbury;" and the other objection being that the monition does not sufficiently shew on the face of it that Lord Penzance had jurisdiction to issue it.

With reference to the first of the objections, it is necessary to consider what office or offices Lord Penzance filled at the time when he heard the case and issued the monition, on the 21st of February, 1879.

In 1874 he was duly appointed a Judge of the Provincial Court of Canterbury, and in October, 1875, he became, by virtue of the Act of 1874, and the resignation of Sir Robert Phillimore, *ex officio* "Official Principal of the Arches Court of Canterbury." Now the Arches Court of Canterbury was and is the Provincial Court of Canterbury; and the Official Principal of the Archbishop, or his substitute, was, prior to the time of Lord Penzance's appointment, the only person who could administer justice in that Court. The Provincial Court of Canterbury got the name of the Arches Court in this way: There was an officer of the Archbishop called the Dean of the Arches, who had a limited jurisdiction over thirteen peculiars of the Archbishop in the City of London (now abolished), and who was often the same person who held the office of Official Principal. This person—either as Official Principal, when he held both offices, or acting as substitute for the Official Principal, when he held the office of Dean of the Arches only—used to hold his Court in Bow Church, in the City of London, which had a steeple raised at the top with stone arches; hence the Judge who administered justice in the Provincial Court of Canterbury came to be called and known as *Officialis de Arcubus*, and the Court itself as *Curia de Arcubus*. A wrong notion thus obtained that it was the Dean of the Arches, as such, who had jurisdiction throughout the province of Canterbury, whereas the jurisdiction of that office was limited to the thirteen peculiars of the Archbishop in the City of London, and the jurisdiction throughout the province for receiving appeals and the like belonged to the Official Principal only (35). This accounts, in my opinion, for the language used and the provisions made in the Public Worship Regulation

(35) Gibson's Codex, 1004; Johns, 257.

Act, 1874. So long as the office of Official Principal was held by Sir Robert Phillimore, so long also the new or additional Judge of the Provincial Court of Canterbury, appointed under the Act of 1874, was called Judge of that Court; but when the office of Official Principal became vacant, as it did by the resignation of Sir Robert Phillimore in October, 1875, then the Judge, appointed under the Act of 1874, became, by virtue of that Act, *ex officio* Official Principal of the Arches Court, and thereafter, by section 7 of the Act, the proceedings before him were to be deemed to be taken in the Arches Court of Canterbury; consequently his proper style after he became Official Principal was that of "Official Principal of the Arches Court of Canterbury."

By that style Lord Penzance is described, and, in my opinion, properly described, in the monition. It runs thus: "James Plaisted Baron Penzance, Official Principal of the Arches Court of Canterbury," to the Rev. Thomas Pelham Dale, clerk, &c., greeting. It recites at length the judgment pronounced at the hearing of the representation, and it is sealed with the seal of the Arches Court of Canterbury, and countersigned by the registrar of that Court, shewing unmistakably the character in which Lord Penzance was acting.

But it is said that in the forms given by the Rules and Orders made in June, 1875, in pursuance of the 19th section of the Act of 1874, Lord Penzance is described as a "Judge of the Provincial Court of Canterbury," and that, consequently, he ought to have been so described in the monition which was issued in February, 1879, when those rules and orders were in force. To this I answer, that by a note at the foot of those rules it is stated that in the event of the Judge becoming Official Principal of the Arches Court of Canterbury, these rules and the forms prescribed shall be applicable *mutatis mutandis* to all cases thereafter arising, such necessary alterations in the style of the forms being made as the Judge may direct. I do not think this note did more than direct that to be done which the Act required, but it shews the view entertained of the matter by the eminent and learned persons who made the rules. In my opinion the first objection to the monition entirely fails.

As regards the second objection—namely, that the monition does not sufficiently shew jurisdiction on the face of it—I think it also fails. The monition issued by Lord Penzance is in the form settled by the late Lord Chancellor (Lord Cairns), and the late Lord Chief Justice of England (Sir Alexander Cockburn), as well as by Lord Penzance and the Archbishops of Canterbury and York and the Bishop of London. It was approved by Her Majesty by and with the advice of her Privy Council, and was tacitly approved by both Houses of Parliament. Nevertheless we are called upon to say it is insufficient and bad on the face of it. I decline to do so for the reasons stated by my Lord and my brother Field; but I am inclined to go further and to hold that at common law, and irrespective of rule 22 and form 19 of June 28, 1875, the monition stated facts which sufficiently shewed on the face of it that Lord Penzance had jurisdiction to hear the case and to issue the monition. It recites that a representation had been made by the churchwardens, and heard in pursuance of the provisions of the Public Worship Regulation Act, 1874, and that the defendant had been adjudged to have offended against the statutes, laws, constitutions and canons of the Church of England in respect of the eleven matters alleged in the representation (specifying them); and then it commands the defendant to abstain and refrain for the future from doing the things complained of, and which are again specified.

One would have thought, as the eminent and learned persons thought who framed the rules and forms, that this sufficiently shewed jurisdiction to hear the case and issue the monition, but it is contended on the part of the defendant that the monition ought at common law to have set forth all the anterior proceedings commencing with the appointment of Lord Penzance as Judge of the Provincial Court of Canterbury, and stating his compliance with the Act of 1874, by making the declaration prescribed by section 7; the vacancy in the office of

Official Principal of the Arches Court of Canterbury, the taking by Lord Penzance of the oaths required by the 127th canon of 1603, the fact of the Bishop and Archbishop being interested as alternate patrons of the benefice, and the appointment of the Bishop of Exeter in the place of the Archbishop, compliance with the several provisions of the 9th section of the Act, and the failure of the defendant and the complainants to submit to the decision of the Bishop of Exeter without appeal, &c.

A number of authorities were cited in support of this contention, but none of them, in my opinion, go the length contended for.

I will not go fully into all these cases, but it may be as well briefly to see how they illustrate my proposition that these proceedings are good at common law. In *The King* v. *Bagshawe* (9), trustees of a turnpike road were authorised to turn a road across private property, making satisfaction to the owners, and if no agreement was come to, after notice to the owners, the trustees were entitled to summon a jury to assess the amount. The inquisition failed to shew on the face of it that any notice had been given to the owners, and was held bad as it seems to me for obvious reasons.

Then *Harrison* v. *Wright* (5) was the case of an interpleader order which can only be made by consent, and as consent was not shewn it was a nullity. Then as to *Christie* v. *Unwin* (6), which was much relied on, the Lord Chancellor acting in Bankruptcy made an order substituting one petitioning creditor for another; but it was not recited that his debt was anterior to the petition, and it might have been the fact that he had not proved a sufficient debt to support a commission. All that the Court held was that they must look to the time of the petition, and thus there was a plain defect of jurisdiction on the face of the order.

Howard v. *Gossett* (7) need not be discussed at length, because it really turned on a question of the privilege of Parliament and the effect of the Speaker's warrant.

The Queen v. *Jones* (16) seems to be more in point because a writ *de contumace capiendo* had there issued, but the ground taken was that it appeared on the face of the writ that it had issued upon the *significavit* of the surrogate, who had no power to issue it.

The last case on this point to which I will refer is that of *Lee* v. *Rowley* (36). Under the Bankrupt Law Consolidation Act, 1849, a person could be made bankrupt only in certain specified cases, and the adjudication did not state whether the bankrupt came within any of them. Mr. Justice Crompton gives the ground of the judgment in two lines when he says, "The commission does not set forth that any of the cases in section 223 have arisen. Should not this be on the face of the order according to the authority of *Christie* v. *Unwin?*" (6). The adjudication might, therefore, clearly have been without any jurisdiction whatever.

It has never yet, so far as I know, been decided that every step in a cause from the commencement to the conclusion, including every notice and act necessary to make the proceedings regular, must be stated on the face of an order or decree made by a Court having limited statutory jurisdiction. If there be such a decision I should very much doubt its correctness. It is one thing to say the order of such a Court must on the face of it shew jurisdiction, and another thing to say it must set out all the proceedings anterior and down to the time of making it. Further, I am inclined to think that the Arches Court of Canterbury, as constituted, is a superior Court. I will call attention to the judgments of Chief Justice Erle and Mr. Justice Willes, in the case of *Ex parte Fernandez* (37), for the constitution of a superior Court as compared with an inferior Court, is there very fully considered. Without following out in detail the questions there discussed, it is enough to say that they are concerned with the consideration of what is to be presumed in favour of jurisdiction and what must be set out on the face of the proceedings in either case. The point raised was whether the Court of a Judge sitting under a commission of assize was a

(36) 8 E. & B. 857.
(37) 10 Com. B. Rep. N.S. 3.

superior Court, and how far it was affected by the rule that a Court having a limited statutory jurisdiction must on the face of its orders state everything necessary to shew jurisdiction. It was held that it was a superior Court, so that in a warrant of commitment for contempt it was enough to state the contempt generally without specifying the grounds. Now by the Public Worship Regulation Act, Lord Penzance is made a Judge of a Court: that Court is constituted a Court of Record. The qualifications required of the Judge are of a high order, and the jurisdiction of the Court is very extensive. So far, therefore, as I can see, it is a superior Court if its character and constitution are regarded, for it is similar in such respects to that described by the learned Judges in *Ex parte Fernandez* (37), and presumptions in favour of its proceedings must be made quite as much as in favour of those of a Court of assize. That the jurisdiction is limited is no objection, for this Court is continually being called upon to exercise a jurisdiction limited by statute, and I do not see why a distinction should be drawn in one case more than another. But be that as it may, I am clearly of opinion that the monition is good for the reasons assigned by the Lord Chief Justice and my brother Field.

The next document which is said to be invalid is the inhibition which was issued on the 19th of March, 1880.

Amended rules and orders with forms were allowed and issued on the 22nd of February, 1879, the day after the monition was issued (3). Those amended rules and orders were made by the same eminent and learned persons who made the Rules and Orders of June, 1875 (2). They were also allowed by the Queen in Council, and tacitly approved by both Houses of Parliament. By the amended rule 37 it is provided that it shall be competent for the complainant, at any time after service of the monition, to apply to the Court to enforce obedience to the monition. In case of disobedience to the monition of the Judge, the application to enforce obedience to it is to be made by motion, and by rule 38 an inhibition, if ordered by the Judge, is to be issued from the Provincial Registry upon the application of the complainant, and the form of it is given in the appendix No. 26. That form was adopted in the present case, and, for reasons already given with respect to the monition, I am of opinion it is free from the objections which have been taken to it. I may observe that, as regards the style of the Judge, it is that of "Official Principal of the Arches Court of the Province of Canterbury," which shews that, in the opinion of the framers of the amended rules, the style adopted in the monition was the correct one.

I now come to the question, whether Lord Penzance, as Judge of the Arches Court of Canterbury, had the power to enforce obedience to his inhibition by *significavit*, followed by a writ *de contumace capiendo*. This is a question of great importance. No express provision is made for it in the rules, but by rule 81 of the amended rules it is as follows: "In any particular not provided for by these rules the general practice of the Arches Court shall be followed as far as the same is applicable."

Now it is not denied that, according to the general practice of the Court of Arches, obedience to an order like the present is enforceable by *significavit* and writ *de contumace capiendo*; but it is said that, in the absence of express provision in the Act of 1874, the Judge has no such power; and, secondly, it is said that, even if the Judge would otherwise have had the power, the 13th section of the Act excludes it. I do not think either of these contentions is well founded.

By the 53 Geo. 3. c. 127. s. 1, it is enacted that in all causes which, according to the laws of this realm, are cognisable in the Ecclesiastical Courts, when any person who is required to comply with the lawful order of any such Court refuses to pay obedience to such order, it shall be lawful for the Judge whose lawful order has not been obeyed to pronounce such person contumacious and in contempt, and to signify the same to His Majesty in Chancery as hath heretofore been done; and thereupon a writ *de contumace capiendo* shall issue from the Court of Chancery.

Now it is not denied that the matter of

the representation in the present case, and the proceedings consequent upon it, constituted a cause within the meaning of the statute, nor is it denied that, in the absence of the 13th section of the Public Worship Regulation Act, 1874, the proceedings by *significavit*, &c., would have been regular and valid; but it is contended that by that section the Legislature has provided special means for enforcing obedience to a monition, namely, by an inhibition against performing divine service, &c., and avoidance of the defendant's benefice if he does not within three years undertake to pay obedience to the monition, and consequently it is contended that the Judge has no power to signify disobedience of the inhibition.

It is difficult to see any reason for such a contention. The expressed object of the Act of 1874 was to make further regulations for the administration of the laws relating to the performance of divine service according to the use of the Church of England. The defendant might have been proceeded against under the Church Discipline Act, 1840 (3 & 4 Vict. c. 86. s. 23), in which case it is not denied that if the cause had been sent to the Court of Arches by letters of request, obedience to the orders of the Judge could have been enforced by *significavit* and writ *de contumace capiendo*. The only difference between proceedings under that Act and the Act of 1874 is in the forms to be gone through in order to arrive at the same conclusion.

The manifest object of the Act of 1874 was to provide a more simple and speedy way of enforcing obedience to the laws of the Church with regard to the performance of divine service in churches and churchyards. It would indeed be strange if the Legislature having provided means for attaining that end have enabled contumacious clerks to set the law at defiance for three years. Yet such would be the result if the Judge cannot enforce obedience to his inhibition by *significavit* and writ *de contumace capiendo*.

Suppose a contumacious clerk were, by writing under his hand in the form prescribed by the Act and provided for by the Rules and Orders, to undertake, pursuant to the 13th section of the Act, that he would pay obedience to the monition and immediately afterwards disobeyed it, could it be contended that he could do so with impunity? I should think not; and if he could not, why should he be permitted to disobey the inhibition, and in so doing also disobey the monition for three years with impunity?

The proposition seems to me to be so monstrous and absurd that in the absence of express words prohibiting the Judge from signifying the clerk's disobedience, I should hold that he is bound to signify it if required so to do by the complainants.

The inhibition is in the nature of an injunction in so far as it restrains the clerk from performing divine service until he undertakes to obey the monition; and surely if a Court (more especially if it be, as the Court of Arches is, a Court of Record) has the power to grant an injunction, it has the inherent power to commit for disobedience of it—the only difference between a temporal Court and an ecclesiastical Court being that a temporal Court makes an order for committal at once and directly, whereas an ecclesiastical Court has to proceed according to its laws and usages by signifying the contempt to the Court of Chancery, and that Court thereupon issues a writ *de contumace capiendo*, by virtue of which the person in contempt is arrested and taken to prison, there to remain till he clears his contempt.

It is said that if the Legislature had intended to give the power of committing by means of *significavit* and writ *de contumace capiendo*, they would have done so in express terms. The answer to this contention is that the Legislature had already provided for it in express terms by the 5 Eliz. c. 23, and 53 Geo. 3. c. 127. s. 1.

I abstain from repeating all the reasons given by the other members of the Court for holding that the Judge had the power which he has exercised. They seem to me to be unanswerable.

The last objection which I intend to notice is that taken to the delivery of the writ *de contumace capiendo* to the sheriff, without it having been brought into the Court of Queen's Bench (now the Queen's Bench Division of the High Court),

there to be opened and delivered of record to the sheriff pursuant to the statute of 53 Geo. 3. c. 127. s. 1, which incorporated 5 Eliz. c. 23. s. 2.

By the 2nd section of 5 Eliz. the writ was required to be issued and also made returnable in term time; and it was provided that after being made and sealed, the writ should be forthwith brought into the Court of Queen's Bench, and there, in the presence of the Judges, opened and delivered of record to the sheriff. By the 12 & 13 Vict. c. 109. ss. 26 and 27, it was enacted that the writ might be issued and made returnable in vacation. At the time when that Act passed (namely, in 1849) the Court of Queen's Bench did not and could not sit in vacation. Hence it followed that, by necessary implication, the 2nd section of the statute of Elizabeth, and so much of the 1st section of the statute of 53 Geo. 3 as incorporated it, were repealed. It is true that the 26th section of the 12 & 13 Vict. has been repealed in part by the 38 & 39 Vict. c. 66, and as to the residue, by 42 & 43 Vict. c. 59; but that repeal has not had the effect of reviving the enactments in question in the statutes of Elizabeth and Geo. 3.

For these reasons I am clearly of opinion that the provision in question in the 2nd section of the statute of Elizabeth was repealed, and that it has not been revived.

But if the case were otherwise, I doubt, having regard to the preamble and some of the enactments in the Act of Elizabeth, whether the defendant could take the objection that the writ had not been brought into Court, &c.; but it is unnecessary to decide that point. The result is, that all the objections taken on the part of the defendant fail.

He must be remanded, and the several rules to shew cause which have been granted must be discharged with costs. I cannot conclude without observing that I earnestly hope this case may be the last of its kind, and may lead clergymen, whose duty it is both to preach and to practise obedience to the law of the land, to consider whether, instead of persisting in disregarding the law, they ought not, as clergymen and good citizens, to make a conscience rather of resigning their benefices and becoming nonconformists if they cannot comply with the law.

We live in perilous times, and a widespread spirit of lawlessness appears to exist and to be sadly on the increase. It behoves all good citizens, not only Judges but clergymen, as ministers of religion and as good subjects, to do their utmost to uphold the law and enforce obedience to it, as the foundation of all the rights which we enjoy.

The rules *nisi* were accordingly discharged and Mr. Dale was remitted to prison.

Mr. Dale appealed.

In the case of the Rev. R. W. Enraght, Lord Penzance, as Official Principal of the Arches Courts, had issued a monition against him on the 28th of August, 1879, commanding him to abstain from certain unlawful acts and practices and from wearing, when officiating in church in the Communion Service and in the administration of the Holy Communion, the vestments known as an alb or chasuble, and a biretta, and "also from all practices, acts, matters and things of a like nature to those hereinafter particularly set forth, or any of them, or from unlawfully permitting the same or any of them."

On the 9th of March, 1880, Mr. Enraght having disregarded the monition, Lord Penzance, as such Official Principal, issued an inhibition against Mr. Enraght which stated the particulars in which he had offended against the monition, and, amongst others, that he had permitted his curate at the celebration of the Holy Communion "to wear certain unlawful ecclesiastical vestments—to wit, a vestment known as a biretta and a vestment known as a stole."

On the 26th of November, 1880, Mr. Enraght not having obeyed the inhibition, Lord Penzance, as such Official Principal, issued his *significavit*, on which a writ *de contumace capiendo* was issued with the same formalities as in Mr. Dale's case.

Mr. Enraght was accordingly arrested and imprisoned. He obtained a rule *nisi* for a *habeas corpus*, and also rules *nisi* for

a prohibition, *certiorari* and *supersedeas* as in Mr. Dale's case. The rules were discharged by the Queen's Bench Division and Mr. Enraght appealed.

A. Charles, Poland and *Dr. W. G. F. Phillimore*, for the appellants.

The Attorney-General (Sir H. James), The Solicitor-General (Sir F. Herschell), A. L. Smith and *Danckwerts*, for Lord Penzance.

A. Wills and *Jeune*, for the promoters.

On the appeal some of the points taken below were abandoned, and the arguments were confined to the following points: First, that there was no power in the Judge appointed under the Public Worship Regulation Act, 1874, to enforce obedience to an inhibition by process of *significavit* followed by a writ *de contumace capiendo*; secondly, assuming there was such jurisdiction, that the writs *de contumace capiendo* were improperly issued, the formalities required by law not having been complied with; thirdly, that the monition and inhibition in each case was irregular in point of form; and further, in Mr. Enraght's case, the inhibition went beyond the monition on which it was founded, for it was extended to a stole, which was not expressly mentioned in the monition, and the wearing of which was not a practice "of a like nature" to those set out in the monition. In addition to some of the authorities cited below the following were referred to: *Bartlett* v. *Kirkwood* (38), *The Queen* v. *Ferrall* (39), *Cox* v. *Goodday* (40), *The Bishop of Lincoln* v. *Day* (41), *Burton* v. *Henson* (42), *Phill. Ecc. Law*, p. 1410, *Anon.* (43), *The King* v. *Fowler* (44), *The King* v. *Theed* (45), *Christ's Hospital, Brecknock* v. *Martin* (46), *The Queen* v. *The Hartley Wintney Union* (47), *O'Connell* v. *The Queen* (48).

(38) 2 E. & B. 771; 23 Law J. Rep. Q.B. 9.
(39) 20 Law J. Rep. M.C. 39.
(40) 2 Hag. Cons. 238.
(41) 1 Rob. Ecc. 724.
(42) 10 Mee. & W. 105.
(43) Cro. Jac. 566.
(44) 1 Salk. 293.
(45) 1 Str. 43.
(46) 46 Law J. Rep. Q.B. 591; Law Rep. 3 Q.B. D. 16.
(47) 1 Q.B. Rep. 677.
(48) 11 Cl. & F. 155.

JAMES, L.J.—The main question, or, at least, that which has been treated as the main question, in this matter, is, whether the inhibition granted by the Dean of Arches in Mr. Dale's case and the similar inhibition in Mr. Enraght's case can be enforced by process of *significavit* and then by writ *de contumace capiendo*. Upon the first question—the question of the jurisdiction of the Dean of Arches to pronounce the inhibition and the consequences of it—I must confess that I have not been from the first able to entertain any real doubt that by the Public Worship Regulation Act, or in compliance with its provisions, Lord Penzance was appointed by the joint appointment of the Archbishop of Canterbury and the Archbishop of York to be a Judge of the Provincial Court of the one and a Judge of the Provincial Court of the other. A good deal has been said to us as to what was the effect of the appointment in the first instance; but, according to my view of the case, it is rather a matter of speculative history, and not very material or very relevant to the question that we have really to consider. My own opinion is, if it were at all relevant, that by the very words of the Act of Parliament the Judge appointed was not appointed a distinct Judge, as constituting or making a distinct or new tribunal, but that he was a Judge of the Arches Court of Canterbury and that he was a Judge of the Chancellor's Court of York—an additional Judge to the then existing Judges—with a right of succession to the then existing offices, and that his Court was a divisional Court of the old Court of Arches in the case of the Province of Canterbury. But it does not seem to me to be very material, because the Act goes on to say that upon the vacancy of the office, which was then filled by Sir Robert Phillimore, the Judge thereupon appointed was to become Dean of Arches. Upon that, it appears to me to be not a matter of opinion, but a matter of what the Act says, namely, that Lord Penzance was to be Dean of Arches, and that he became the lawful successor of a long roll of eminent men who have filled the office from time immemorial of Official Principal of the Archbishop of Canter-

bury. Upon his succeeding to that office, then, his character — whatever it was, whether as a distinct Judge or an additional or extra Judge—as such Judge became merged and absorbed in his office as Dean of Arches; and the Court which he was authorised to hold before—whether it was an extra Court, or a divisional Court, or an independent Court, or a separate Court, whatever it was — became absolutely merged and absorbed into the old, traditional, original Court of Arches. By way of making this quite clear, the Act of Parliament goes on to say that after he succeeds to the office all proceedings thereafter to be taken before him "shall be deemed to be taken in the Arches Court." I, in obedience to the Act of Parliament, do accordingly deem them to have been proceedings in the Arches Court. I am obliged to say they are proceedings in the Arches Court. They are proceedings, therefore, by the Arches Court, and the monition pronounced in this case and the inhibition which followed were, therefore, a monition by the Arches Court and an inhibition by the Arches Court. That being so, it seems to me to follow as a plain matter of course that the monition of the Arches Court and the inhibition of the Arches Court would be a monition and an inhibition with all the incidents and consequences of any other lawful order of the Court of Arches. One of those consequences and one of those incidents was that a lawful order of the Court of Arches was to be enforced by *significavit*, upon which *significavit* a writ *de contumace capiendo* was to be issued. That seems to me to follow as a matter of course, unless there be something in the Act of Parliament to deprive those orders of their ordinary legal consequences. Now, with regard to the monition, it possibly may be argued—it is not necessary for the purpose of to-day to consider whether it could be argued effectually—that obedience to a monition is to be enforced only by an inhibition. I say it may be argued; I myself think that it may be a point of very grave doubt whether the words "may be or shall be enforced by inhibition" mean shall be enforced by inhibition and in no other manner. The Act of Parliament does not go on to say how the inhibition is to be enforced, and therefore it follows, as it seems to me, of necessity that the inhibition is left to be enforced by the ordinary rules of law applicable to inhibitions of the Court of Arches, which, as I say, this was. Then it is said that the Act of Parliament has provided a mode for enforcing the inhibition, namely, that if the inhibition lasts for three years and obedience is not given within that period, then the living is to become void. But that is not an enforcement of the inhibition; it has nothing to do really with enforcing obedience or disobedience to the inhibition. Avoidance of the living is the result of default in making submission and undertaking to comply with the monition. That is the cause which causes the avoidance of the living, but the inhibition remains the same, and would not be enforced by the avoidance at the end of the three years. The inhibition would be enforced during the three years, and after the three years if obedience were not given, because it would apply, not only during that time, but would apply afterwards with regard to the whole of the diocese as the result of disobedience. That being so, it appears to me that the inhibition is an inhibition with its ordinary meaning and ordinary legal consequences—that there should be the process of coercion which has been resorted to in this case. A great deal was said about this being a new jurisdiction and a new procedure. According to my view of the case that is really again not material, because if a new jurisdiction is given to an existing Court—that is to say, a jurisdiction to deal with some matters, or to deal with them with additional powers, or to deal in a different mode with different procedure—if that power be so given, it seems to me that where it is given to a well-known Court, with well-known modes of procedure, with well-known modes of enforcing its orders, it must, unless the contrary be expressed or plainly implied, be given to that Court to be exercised according to its general inherent powers of dealing with the matters which are within its cognisance. But I am satisfied

that in this case no new jurisdiction was given to the Court, assuming it, as I have done, to be the Court of Arches. The Court of Arches always had jurisdiction to deal with these matters; it always had jurisdiction to deal with the same persons. The mode of bringing the matter into the Court and the mode of dealing with the matter when it is in the Court are all matters of procedure and process, and not, according to my view, matters of jurisdiction. That seems to me to dispose of the objection to the jurisdiction of Lord Penzance so far as regards the case of Mr. Dale. There is another point which has arisen upon the appeal of Mr. Enraght—that is, whether the inhibition itself is not in excess of jurisdiction by reason of the alleged departure from the words of the monition; and there it seems to me there was more ground for doubt and for the argument that has been addressed to us. In the monition certain vestments are ordered not to be worn, but the monition, in accordance with the well-established and reasonable practice of the Ecclesiastical Court, goes on to say that you are not only to discontinue certain things, but you are not to do other things of the like kind; that is to say, you are to abstain from the like practices. Those words were put in in order to prevent colourable evasions, which could easily be resorted to if some such addition was not made to the sentence. Whether the monition with those words has been violated is, it seems to me, a question of fact, in every case to be tried by the Bishop or the Judge who has issued the monition. It is a question of fact which he has got to determine whether the person who is charged with disobeying the monition has disobeyed, either in regard to the specific articles mentioned or in regard to other things coming within the clause at the end of the monition forbidding like matters. Now, whether the use of a stole in this case is "a like matter" fairly within the meaning of the monition is, it seems to me, a question, not of jurisdiction, but of fact, upon which the proper Judge of the facts has to determine. It seems to me to be very essential that we, who are sitting merely as a Court of Prohibition should be very careful indeed that we do not attempt to draw within our net a jurisdiction by way of appeal by saying that, as a matter of fact, the use of the stole was a breach of the monition, being a matter of a like character. It was suggested that there was no appeal from that, but I should not like to say that there was not. My own opinion probably is there would be an appeal from it; but, however that be, it is a matter with which we have not to do here. Either there is an appeal or there is not an appeal. If there is an appeal, that is the proper remedy. If there is not an appeal, that is a *casus omissus* in the Act of Parliament, and we cannot enlarge our jurisdiction as a Court of Prohibition because there is not sufficient and proper machinery to deal with it on appeal, where it clearly is, according to my view, a question of appeal and a question of appeal only—that is, as to whether the conclusion in point of fact has been rightly arrived at, and whether the judicial discretion has been properly exercised. That seems to me to dispose of that objection in Mr. Enraght's case; and, so far as I am concerned, the objection to the jurisdiction in Mr. Dale's case has been already disposed of. But then there remains to be disposed of the other question, which, so far as the appellants are concerned, seems to be the real, substantial question in their case, namely, whether they are entitled to be discharged from custody, and whether Mr. Enraght is entitled to the writ of *habeas corpus*, by reason of there being a miscarriage in the mode in which the writ of *capias* has been dealt with. Now, upon this point I find myself unable to concur in the judgment of the Queen's Bench Division. The Judges of that division all expressed their opinion that if it were not for the Act for regulating the procedure of the Petty Bag Office the objection must prevail, and I think they were right, if I may say so. I think they were well founded in that conclusion, that, having regard to the words of the statute 5 Eliz. c. 23, and to the decisions of many very eminent Judges upon that statute, it was not a matter of form—not a matter merely, as it is called, directory

—a thing which not being done or being done was equally valid—but that it was a matter of substance that the writ which was issued from the Court of Chancery, from the Petty Bag Office, should be brought into the Queen's Bench and opened there in order that the judicial mind might, if necessary, be addressed to the *significavit* and to the writ issued upon the *significavit* to see whether it was such a writ as the Court of Queen's Bench would take upon itself to execute. They were not, as has been said, to issue process as mere instruments or conduit pipes, but they were to exercise their own judgment judicially as Judges, and the mode in which this was to be done was by its being brought into Court and opened in Court—not, I presume, in every case read by the Judges or read to them, but it would be the duty of the officer reading it immediately to take the opinion of the Judges if he thought there was anything upon the writ which required to be considered, or which might be of use to the Court, or which might cause the Court not to adopt it or be instrumental in enforcing it. Another reason might be that when the Court was sitting the defendant would have an opportunity of applying at once to the Court for relief in case there should be any miscarriage or error in the proceedings commenced against him. But, whatever might be the reasons, whether good or bad, those were the decisions of a succession of Judges upon the statute of Elizabeth. Then came the Act 53 Geo. 3. c. 127, which in effect and all but in words re-enacts that part of the statute of Elizabeth. Although the purpose for which the statute of Elizabeth is said to have been passed was the giving greater security for the enforcement of the writ *de excommunicato capiendo*, the Act 53 Geo. 3. c. 127, in providing that there should be a writ *de contumace capiendo*, instead of *de excommunicato capiendo*, enacted that the substituted writ should be obtained and dealt with in exactly the same manner as the old writ under 5 Eliz. c. 23 was. We are to read the statute not only as if those words in the statute of Elizabeth were transcribed into the statute of Geo. 3, but we start with this, that where words of an old statute are either transcribed into or by reference made part of the new statute, it is, according to my opinion, a rule of construction that this is always done with the object and intent of giving to those words any legal interpretation which has been put upon them by Courts of law, so that it is convenient that the same words should, either by transcription or reference, be used in order that everything that had been settled before should remain settled without fresh litigation. According to my view, it was an essential part of the proceedings as to the *significavit* that the writ should be brought into the Court of Queen's Bench while the Judges were present sitting there, and given to the Petty Bag Office at the time when the Petty Bag Office Act was passed. I am of opinion that the Act relating to the proceedings of the Petty Bag Office did not certainly in terms, nor, as it appears to me, by any plain implication, or any implication at all, alter that which was required to be done in and by the Court of Queen's Bench. Everything that was to be done in and by the Petty Bag Office is altered. The writ may be issued out of term, the writ may be returnable out of term, because these are things which are to be done in the Petty Bag Office. But, as it appears to me, there is nothing in the Petty Bag Office Act which, by implication, interferes with that which was to be done by the officers of the Court of Queen's Bench in the presence of the Judges of that Court. Everything, as was pointed out by Mr. Charles in his argument, in the Petty Bag Office Act can have effect given to it, and yet, still, everything that was required to be done in the Court of Queen's Bench could be done exactly in the same way, and would have the same effect, without its being in any way inconsistent with the provisions of the Petty Bag Office Act. It may seem to be a very idle thing to attach weight to whether the writ is to be opened in Court or whether it is to be opened in the Crown Office in the Temple; but it may, perhaps, not be more idle than the whole question before us. By law a man is obliged to wear a particular vestment, and he is obliged to do it. By law the

writ ought to be opened in a particular place, and before particular persons. If one law is to be obeyed, the other law is to be obeyed also, and I am of opinion that the writ was defectively issued from the Court of Queen's Bench after it had left the Petty Bag Office, and, that being so, that Mr. Dale is entitled to be discharged from that writ, that having been improperly issued, and the consequence will follow with respect to Mr. Enraght that he will be entitled to his rule for a *habeas corpus* in order that he may also be discharged.

BRETT, L.J.—In such a case as this one would have preferred to carefully prepare the judgment which one had to deliver; but, being a case in which the liberty of the subject is concerned, it ought to receive the immediate decision of the Court if possible. We have now for five days had our minds directed to this case, and have been assisted by arguments which, I beg leave to say, have been as careful and as talented as ever could have been brought before the Court in order to enable it to come to a conclusion. I therefore think that we ought, to the best of our ability, to give an immediate judgment.

Now, the matters brought before us are brought under two distinct heads—the one being whether a prohibition ought to go, and the other being, that, supposing there has been no excess of jurisdiction at all, so that no prohibition ought to go, whether we ought not to order the release of one gentleman or the release of both upon the motion for bringing them up upon the *habeas corpus*, on the ground of there having been an irregularity in the way in which the jurisdiction of the Court has been exercised. Now, with regard to the prohibition, the question is, whether there has been an excess of jurisdiction by reason of Lord Penzance having signified to the Court of Chancery, and thereby having obtained the writ which has been so much discussed. It is alleged that there was excess of jurisdiction in that respect, because it is said that in cases which we conducted under this statute of the 37 & 38 Vict., the Judge could in no case whatever signify the matter into the Court of Chancery so as to obtain this writ. It was said he could not do so in any case whatever; but it was further urged that, even if he could do it in some cases, there was an excess of jurisdiction in the present case, because he had done so in respect of a monition and an inhibition which had been so drawn up that they were void, and therefore he exceeded his jurisdiction in signifying the matter into the Court of Chancery upon void documents. Many reasons were given in order to argue the question, whether he has the power of signifying in any case, but with regard to the question of whether he could signify in the present case the matter depended upon this, whether he was bound to shew upon the face of the monition and upon the face of the inhibition many things which were said to be necessary in order to found his jurisdiction. I think we were all of opinion from the beginning that he was not bound to shew upon the face of these documents the grounds of his jurisdiction in the way in which it was alleged. I should have thought so upon the ground which I shall have presently to discuss, namely, that the Court in which he was sitting and the Court of which he was the Judge is the Court of Arches, the old Court of Arches and no new Court at all; and that the Court of Arches, although it is a Court with a limited jurisdiction, yet is not a Court of inferior jurisdiction, but is for such a purpose as that a Court of superior jurisdiction, and is not bound to shew upon the face of its documents that superior jurisdiction. But I also think that, even if it were not so, that these documents were drawn up in proper form, and cannot be objected to upon the ground that they are drawn up in the form given in the rules and orders which have been made by virtue of the statute. I quite agree that in some cases rules and orders which are drawn up by Judges may not form part of the statute; but the question is, whether the rules and orders which were authorised by this Act did become when they were made a substantial part of the statute. I am of opinion that they did, and upon this ground, that not only is the authority given to certain persons

by the statute to draw the rules, but these rules and orders are to be laid before Parliament for a certain time, and if not objected to are to be binding. Wherever that stipulation is introduced into an Act of Parliament it seems to me that the rules and orders if not objected to by Parliament become really part of the statute. But then it was said that though the rules and orders might be part of the statute, the forms were not. In my opinion the forms are part of the rules and orders. They are referred to in the rules and orders, and the mere fact of their being put into a schedule and referred to in the rules and orders is a mere question of drafting. The forms are, therefore, part of the rules and orders, the rules and orders are part of the statute, and these documents have therefore followed the statutory form; and even, therefore, if they might otherwise be insufficient they are made sufficient by virtue of the statute. Now the main question is, whether this is or is not the old Court of Arches. Now it is argued that, not only is it not the old Court of Arches, but that it is a new Court which is not an Ecclesiastical Court at all. If it is the Court of Arches why then the other proposition fails at once. I confess that, after having listened with all the attention I could, and after having tried to sift and understand the argument, it seems to me as clear as anything that ever was propounded in a Court that this is the old Court of Arches, and nothing but the old Court of Arches; and when the matter is carefully examined no reasonable person could, if they would bring their minds to examine it, suppose that there had been a new Court at all, whether ecclesiastical or lay, established by this Act of Parliament. Now from the time of Lord Coke there had been two Provincial Courts. There had been the Provincial Court of the Province of Canterbury, and the Provincial Court of the Province of York; the one was also known as the Court of Arches, and the other as the Chancellor's Court of York. Each of them, therefore, had two names, but they had one of those two which belonged to each of them, and was a common name which would include both, namely, the Provincial Courts. Therefore anybody wishing to speak in ordinary language of the two Courts at the same time would naturally use the name which was common to both, and which would include both.

Now the first time that the Courts are mentioned in the Act is that the Archbishop of Canterbury and the Archbishop of York may appoint a certain person to be a Judge—of what? "A Judge of the Provincial Courts of Canterbury and York." That seems to me to make him a Judge of the Provincial Courts; that is to say, of the Provincial Court of Canterbury and of the Provincial Court of York. In other words, of the Court of Arches and of the Chancellor's Court of York. But there is more than that. Those Provincial Courts of Canterbury and York had existed for centuries; they were Courts with a Judge appointed by the Archbishops respectively; they had certain officers, and certain seals, and dealt with certain subjects. The day after this Act of Parliament was passed it seems to me impossible to doubt but that the same subject-matters would be heard, the same officers would act in carrying out the decision of the Judge, the same seal would be used, and there is nothing in this statute from the beginning to the end which can be suggested as instituting any new Court. On the contrary, the fact of there being no new officers appointed, no new seal, no new Court named, and, above all, the fact that it is precisely the same persons who are to appoint the Judge, namely, the Archbishops—though they must do it by appointing the same person to both Courts—seems to me conclusive to shew that by the statute itself it was intended that the Judge should be the Judge of the old Courts, which are referred to as the Provincial Courts of Canterbury and York. But then many objections were taken to that view, and it was said that it must be a new Court because the qualification of the Judge was different. Now I cannot conceive that because the qualification of the person to be appointed is altered therefore the Court must be a new one. Then it was said that it was a new Court because the procedure is a new procedure. But how can an enactment which merely enacts a new procedure as to matters

which were before within the jurisdiction of the Court make that a new Court? It is obvious that it does not. But then it was said (and I thought that was the strongest part of the argument) that it was a new Court because a new jurisdiction was given to it, namely, the jurisdiction of the old Court of Arches—which was an appellate jurisdiction—and that this enactment gives it a jurisdiction of first instance instead of an appellate jurisdiction. That seemed to me to be formidable. It was said, further, that even if you consider that with letters of request the Court before had an original jurisdiction, yet, inasmuch as you gave the Court power now to act without letters of request, that is a new jurisdiction. But I think the answer was given during the course of the argument that the jurisdiction of the Court to deal with ecclesiastical offences existed quite independently of the letters of request; that the letters of request were after all only a mode of procedure; and that the Court had power to deal with all the matters with which it has dealt now by reason of its inherent jurisdiction and of its original jurisdiction; and that the mere fact of taking away the necessity of letters of request is a mere alteration of procedure, and is not the giving of a new jurisdiction. But then it was said that we ought to collate from the terms of the statute itself that it was intended to give a new jurisdiction; and much reliance was placed upon the words of the 7th section, which say "that all proceedings hereafter taken before the Judge in relation to matters arising within the Province of Canterbury shall be deemed to be taken in the Arches Court of Canterbury, and so with respect to the Court of York." It was urged that where the statute says that you are to deem that certain things shall be, it assumes that in point of fact they are not so, and that, therefore, those who drew this statute were of opinion that this Court was in reality not the Court of Arches, but that matters which were brought before it under this statute were to be deemed to be in the Court of Arches. But I am of opinion that the true interpretation of these words is this, that, inasmuch as the Court may be held neither within the Province of Canterbury nor within the Province of York, wherever it sat all matters that came before it which arose within the Province of Canterbury are to be considered as in the Court of Arches, whereas all matters which came before it which originated within the Province of York are to be considered as within the Provincial Court of York. Therefore nothing can be gained from that construction. It was said it was obvious that this must be a new Court even now, because it must have been a new Court before the vacancy, and therefore it must be a new Court after the vacancy. Now, in the first place, supposing the first of those propositions were true, it does not seem to me that the second is a consequence from it. I do not think it true to say that even if it were a new Court, or that there was a new jurisdiction after the appointment of the Judge, and before the vacancy, therefore it would follow that it was a new Court or that there was a new jurisdiction. But it seems clear to me that it was neither a new Court nor a new jurisdiction before the vacancy. I cannot accede to the view that power to appoint a new Judge or that power to appoint an additional Judge should alter the jurisdiction. It only gives power to appoint an additional Judge to a Court in order that he may exercise all the jurisdiction of that Court; and it seems to me that the moment the new Judge was appointed, even before the vacancy, all that was done was that he was made an additional Judge of the Provincial Courts of Canterbury and York; and, though it is true that his power of acting within that Court was only confined to certain matters over which that Court had jurisdiction, nevertheless he was made an additional Judge of the Court for the purpose of performing certain duties. But then it was said that, even supposing that this was the Court of Arches and the Court of the Province of York, yet, nevertheless, a new jurisdiction was given within that Court, because the Court was enabled to do things which it had not been enabled to do before, namely, amongst others, that in respect to dis-

obedience to a monition the Court was called upon or had power to direct the inhibition which is mentioned in the 13th section. The proposition, therefore, is, that wherever in the existing Court the Court is enabled to do something which it could not do before, that is a new jurisdiction. In my opinion that is an incorrect proposition. If the Court is dealing with matters which were before within its jurisdiction, but is only enabled to deal with them in a new way, it seems to me to be not a new jurisdiction but only a new procedure. Therefore, I am of opinion that all the stipulations in the statute are mere stipulations as to procedure, and not as to jurisdiction at all. Now there arises the further question, namely—supposing that they are mere procedure, yet it is said that they are an exclusive procedure with regard to the matters which are contained in this statute—that they are a new procedure which is made to take the place of all the old procedure, and therefore, by implication, to get rid of the power of the Court to deal with any matter according to its old procedure, and to oblige it to follow this new one. I do not doubt but that the Legislature would have power, if it thought it right, to substitute one proceeding for another; but the question is, whether it has done so, and, inasmuch as all the enactments with regard to the procedure here are affirmative, I should say that it can only substitute the new procedure for the old when it is made perfectly clear that it is so intended. With regard to the power of enforcing a monition made under this statute, though such a monition might formerly have been enforced by other means, namely, that upon disobedience of it, the matter might have been signified into the Court of Chancery and a writ obtained, as far as my present opinion goes, I am of opinion that the 13th section here does clearly substitute the formal procedure contained in it in the place of signifying the disobedience of that particular monition. But that is not sufficient. The section must shew not only how the monition must be enforced, but that, if the inhibition be disobeyed, the power of enforcing it in any way otherwise than is contained in the section, is taken away. But there seems to me to be no mode enacted here by which obedience to the inhibition during the time it has to run is to be enforced; there is no mode of enforcing obedience to it at all unless it be by the ordinary modes of the Court. Therefore, with regard to enforcing obedience to the inhibition for the time it is running, there is no new process substituted for the old one; and it seems to me, therefore, to follow that though in my opinion the monition must be enforced by this inhibition, yet that for disobedience to this inhibition the old process of the Court for enforcing any one of its orders exists and is applicable; and that, therefore, for disobedience to the inhibition, the Court—being the Court of Arches and being the old Ecclesiastical Court—has a right to exercise its old form of process. Therefore the Act of Geo. 3 applies to disobedience to that order of inhibition of the Court, and that, therefore, for disobedience to that order, the Court not only was entitled, but was bound, upon request, to signify that disobedience and to obtain this writ. It seems to me, therefore, for all these reasons, that the application with regard to the prohibition fails, and that everything which was done by Lord Penzance in this case was done correctly within his jurisdiction (I am speaking now of Mr. Dale's case more particularly), and that it was most clearly and beyond any reasonable doubt done by him as the Judge of the old Court of Arches, and that there is no such thing here as a new Court, and no such thing here as a lay Court, but it is still the Ecclesiastical Court, with all the guards which ever were necessary for the protection of ecclesiastics, namely, that it has the jurisdiction exercised by an authority emanating from the Archbishops, and by a Judge nominated by the Archbishops, who are the heads of the Church.

But then with regard to Mr. Enraght's case it was said that the *significavit* was without authority, because the inhibition mentioned other grounds, namely, that the inhibition had gone further than the monition, and that inasmuch as the inhibition contains an inhibition to exercise the cure of souls for a certain time, which

is within the discretion of the Judge to name, if the extent of that inhibition is made to depend upon matters recited in the inhibition as to the reasons for it, some of which are not mentioned in the monition, and inasmuch as it is impossible to say but that he might have exercised his discretion in that which was not within the monition, therefore the old inhibition is void. I confess that if it could have been shewn that the length of the term might have been determined with regard to a matter which was not within the monition, but which was recited within the inhibition, I should have thought that the inhibition on that ground could not have been supported by analogy to the decision in *O'Connell* v. *The Queen* (48). Then the question is, whether the first of these propositions is made out. I had doubts about it. I did think that Mr. Charles had strong grounds for saying that upon the information in this case—upon the trial originally—the question of the stole could not have been brought forward. Because it was not brought forward, he urged the judgment was not given in respect of the stole, and that the monition therefore, which could not go beyond the judgment, did not have regard to the stole at all. But the inhibition certainly does recite it as a ground upon which the term of inhibition is grounded, and there was a strong argument therefore for saying that the inhibition in this case had gone beyond the monition which the Judge was entitled to put into it, namely, that he was admonished from using certain ecclesiastical vestments or from committing offences of the like kind; and this raises the question whether upon prohibition we can say in this case that the inhibition has gone beyond the monition. If it had been a matter of appeal before us I should have doubted myself much whether the inhibition ought not to have been corrected in this case; but upon a question of prohibition, it seems to me that we are unable to say that the fact of allowing the stole to be used, as in the inhibition, is a matter which has gone beyond the monition. Therefore I am of opinion that upon all the grounds for a prohibition in both cases the appeal fails, and that everything that was here done in the Court of Arches was correctly done.

But then comes the question upon the writ for a *habeas corpus*. Now, I take it to be a general rule which has always been acted upon by the Courts of law in England, that if any person undertakes to procure the imprisonment of another, he must take care to do so by steps, all of which are entirely regular; and that if a person procures the imprisonment of another without following every step in the process with extreme regularity, the Court will not allow that imprisonment to continue. The question here therefore is, whether those persons who undertake to carry through the conduct of the writ here after the matter had been properly signified to the Court of Chancery have proceeded regularly or not. In my opinion they have not. For this purpose I take it that the matter was properly signified into the Court of Chancery, of which mention has been made. That has to be done under the statute of Geo. 3, which has been referred to. That statute is the first one which is to be construed. The statute of Elizabeth was referred to, but that statute of Elizabeth seems to me to have no force at all as of itself in the matter. The whole matter was regulated by the statute of Geo. 3, and all that we can do in looking to the statute of Elizabeth is to look at it by way of reference, in order to see what are the words which by the reference in the statute of Geo. 3 are introduced into it from the statute of Elizabeth. We may treat the statute of Elizabeth itself as absolutely repealed, but, nevertheless, by reason of the reference in the statute of Geo. 3, as matter of drafting, we are to read into the statute of Geo. 3 certain words which were within the statute of Elizabeth. Now, assuming these words to be within the statute of Geo. 3, the enactment is that the writ shall be forthwith brought into the Court of King's Bench, and then, in the presence of Justices, shall be opened and delivered of record. In the present case it may be said that the writ was brought into the Court of King's Bench, but the question is, whether within the meaning of the statute of Geo. 3 it was brought there in the presence of the

Justices. Now, Mr. Wills argued that even before what is called the Petty Bag Office statute there would have been no occasion to bring this writ into the Court itself, because he said that these words, "and there in the presence of the Justices," were really merely equivalent to a description of the Court of Queen's Bench; but he was unable to reply to the point which was put to him from the Court, namely, that if that be the meaning of those words, then it is a mere reiteration of the words immediately preceding it, and that those words are entirely futile and useless in the Act, and have no meaning at all, because the expression "into the Court of King's Bench" is the equivalent of what is said to be *coram rege*; that is to say, that these words described the Court, and that if the next words described the Court again it is a mere reiteration of the former words. That is not the proper mode of reading the statute, unless one is obliged to do it. One is bound to give some meaning to words. Now all the cases that were cited upon this point—more particularly the opinion of Lord Chief Justice Holt, of Lord Chief Justice Parker, and very particularly of Mr. Justice Pratt—seem to me to shew that the reasons why those words should have a meaning given to them is that the secular Courts of the Queen, when called upon to give the power of their jurisdiction to the accomplishment of any sentence in an Ecclesiastical Court, would not do so without the Judge of that Court having the opportunity of seeing whether the documents he was to take from the Ecclesiastical Courts were documents which they had power to issue. It seems to me that those cases shew that the meaning of those words is substantial and real, namely, that the power of the Court of Queen's Bench should not be exercised in order to enforce and assist the judgment of an Ecclesiastical Court without the Judges of that Court having the power of seeing whether that which they were asked to do with their power was a matter in which the Ecclesiastical Court, upon the face of the documents, ought to have asked them to assist.

The Judges of the Queen's Bench Division have not differed from that. Lord Coleridge expressly states that he thinks these are not mere directory words, by which I understand him to mean that at all events they are not futile. He seems to agree with the judgments of the Judges in the former case, and so does Mr. Justice Field, and, so far as I can see, subject to a minute doubt, does Mr. Justice Manisty. Therefore they all agree upon that point, and it seems to me to be a real substantial matter. But then it is said, and the Divisional Court were of opinion, that this substantial matter was repealed by the Petty Bag Offices Act, 1849. Now that statute seems to deal only with the issue of a writ out of the Petty Bag Office. It does not assume to deal at all with the conduct of the case when it comes before the Court, and yet the whole point here, with regard to the statute of Geo. 3, is, whether this matter was rightly conducted after the writ had left the Petty Bag Office, after it was issued, and when it came to the Court of Queen's Bench. The statute does not assume to deal with that matter at all. The statute does deal with the question of issuing the writ from the Petty Bag Office, and that I accede to. It seems to me that that statute so far repeals the statute of Geo. 3 as to say that this writ may issue from the Petty Bag Office out of term, and that it may be made returnable in the Queen's Bench out of term. Those are express matters which are stated in that statute; but then does it repeal this substantial enactment, that when it arrives at the Queen's Bench it is to be opened in the presence of the Justices? It is said to have done so by implication. It cannot do so unless that is the necessary implication, unless the two statutes cannot stand together. It seems to me that they can stand together, namely, that the writ may issue out of term, but that, nevertheless, it must be taken into the Court of Queen's Bench, not for the mere purpose of its being brought into a particular building, but in order that the Judges there may have the opportunity of seeing whether upon the face of it it is a writ with regard to which they ought to exercise their power. Reliance was placed upon the book which was produced from the Crown Office. With regard to the

ice before the statute as to the Petty Office, it seems to me that that book directly contrary to the contention h Mr. Wills had to support. It s to me that that book shewed that iably the writ had been brought into Queen's Bench; that is to say, the te of Geo. 3 had been construed in vay in which I think it ought to be rued. But it was said that, by way rm, at all events, it was handed up to Judges; and the indorsements on the contained the words that whatever done with that writ when it arrived e Qeeen's Bench was done in Court, Mr. Robinson, whose authority was hed, and rightly vouched, had given he alteration which he had made a ing to the words "in Court," be- upon his view of the construction ie Petty Bag statute he had con- ed the words "in Court" to mean lly in Court in the presence of the es. But then it is said that the authority, Mr. Robinson, shews from the time of the passing of the Bag statute he made, as contem- neous exposition, his alteration in his . I confess that I most absolutely wholly deny that the alteration of Robinson, however eminent he might nd as eminent as he was, is to be as coming within the doctrine of mporaneous exposition. It is ob- that Mr. Robinson had intended to rue, or thought he had construed, or rstood, the statute of the Petty Bag as repealing this part of the statute o. 3; but upon that his view of the ruction of the statute is not an au- ty which can be produced in Court l, and it was open to the objection h my Lord took to it, namely, How you ask us to be bound by the rity of Mr. Robinson when we have ht to overrule the decision of the es of the Court of Queen's Bench? as suggested that Mr. Robinson d not have made that alteration in ook without consultation with the es of the Court of Queen's Bench, therefore it must have been done that authority. As a matter of I have not the slightest doubt that aking the alteration in his book he never consulted any Judge of the Court of Queen's Bench. I think, therefore, that the appeal here as to the prohibition fails, but that upon the application for the *habeas corpus* these persons who undertook to conduct this writ in order to obtain the imprisonment of Mr. Dale and Mr. Enraght have failed in conducting their case, because, by a not unnatural mistake, they have conducted it in an irregular mode. I desire to state this, that though in this case I consider that that irregularity is matter of substance, I should be of the same opinion if it were only a matter of form, because I take it, as I have said before, to be a general rule that the Courts at Westminster will not allow any individual in this kingdom to procure the imprisonment of another unless he takes care to follow with extreme precision every form and every step in the process which is to procure that imprisonment. I take it that that was the rule of the Courts whenever any irregularity was pointed out in the execution of the writ of *capias ad satisfaciendum*. It is a wholesome and a good rule, and is in accordance with the great desire which English Courts have always had to protect the liberty of every one of Her Majesty's subjects.

COTTON, L.J.—In this case the appellants seek to be released from custody on various grounds which may be summarised in this way, as coming in part under the applications for prohibition, and in part under the application for *habeas corpus*. Now before coming to the different questions which arise, I should like to say one word as to what we are dealing with. We are not dealing with the question whether there is a punishment which has been rightly inflicted upon the appellants. It is no question of punishment, it is merely a question as to whether the process to enforce obedience to an order of the Court has been rightly issued and rightly used; and it is a mere process of contempt for enforcing obedience to the order for the prohibition, not an order prohibiting them from continuing certain practices which have been declared to be illegal, but an order no doubt founded on the fact of their having been

found to commit illegal practices, because the order prohibits them not from dealing with any practices, but from performing any act of divine service within the churches, and I think within the diocese. So that it is a matter utterly unconnected with the practice, with reference to which the suits were instituted.

Now, first, on the prohibition, it has been said that the Court has no power at all to issue a *significavit* in order that process might issue to enforce the order of inhibition. That clearly depends on the Act of Geo. 3, and I will consider what the points were which were pressed in argument and see whether any objection can be taken to the power of the Court to issue the *significavit* on any of the grounds that have been taken. Now the statute applies in all cases which, according to the laws of the realm, are cognisable in Ecclesiastical Courts, and the person against whom the writ issued must be a person lawfully cited to appear in an Ecclesiastical Court, and he must have disobeyed a lawful order. Those are the three matters with reference to which the argument of the appellants was addressed. Now on the first point, that this was a matter cognisable in an Ecclesiastical Court, I need hardly say anything. There was some argument addressed to it, but in my opinion it raised no doubt whatever, because this matter, not by particular legislation before the statute, was always a matter cognisable in an Ecclesiastical Court and was always a matter (subject to what I shall have to say at a later stage as regards the Statute of Citations) cognisable in the Court of Arches; but it certainly was a matter cognisable in the Ecclesiastical Courts. Then we come to the question, and no doubt it is a serious one, although it is one on which I entertain not the slightest doubt, whether the appellants here have been cited to appear in an Ecclesiastical Court; that is to say, whether Lord Penzance, when he made the order, was acting as and was a Judge of an Ecclesiastical Court. Now, for my part, I decline to decide what would have been the result of this had all taken place before the vacancy had occurred in the Court of Arches. No doubt it may fairly be an argument that you must regard the *status* of the Judge before that event occurred, in considering as to whether, after that vacancy had occurred, he can be considered as a Judge of the Court of Arches and a Judge of an Ecclesiastical Court; and if there were any doubt on the construction of the statute as to what his position was after the vacancy had occurred, I should have considered and dealt with that; but as it is a matter not before us, and in my opinion not necessary to be considered, having regard to the provisions of the statute after the vacancy occurred, I decline to deal with it. Now what does it say? It says that "whenever a vacancy shall occur in the office of Official Principal of the Arches Court of Canterbury, the Judge shall become *ex officio* such Official Principal." Now stopping there, what is this—that the person there described as the Judge, who is a person who has been appointed to certain offices—I will not consider what—by the Archbishops of Canterbury and York, shall become the Official Principal of the Arches Court. From that time, at all events, he is the Judge of that Court, and his orders are the orders of the Court. But then it was said that doubt was thrown upon that by these words—"that all proceedings thereafter taken before the Judge in relation to matters arising within the Province of Canterbury shall be deemed to be taken in the Arches Court of Canterbury." Now one explanation of that has been given by the Attorney-General which I think is a good one, but there may be another explanation—and in my mind, whether it was the intention or not, it has this effect, that these words clearly shew that, even after there had been a vacancy in the office of Official Principal, and the person named as the Judge had become the Official Principal of that Court, the old Court was not to be at an end, but the Arches Court was to be continued, and he was to be considered as acting in and as Judge of that Court. Probably it was merely put in for the purpose of removing any doubt on that question when there should be only one person and only one Judge of both Courts, and to prevent any argument, that when that event occurred the two separate and

distinct Courts were at an end, and all that existed was some Court constituted by Act of Parliament. In my opinion, we are not dealing here with a Court constituted by Act of Parliament—we are dealing here with the old Ecclesiastical Court, the Court of Arches, the Court of the Archbishop exercising the Ecclesiastical functions of that Court. Now it must be that the person so cited is to appear in that Court; and if that is, as I say, an Ecclesiastical Court, we have all the requisitions of the statute complied with; but there are other objections which I will deal with. It is said that, even if this is not a new Court, there is a new jurisdiction given to it. Now I think we very often fall into difficulties from not accurately defining what we mean by the general language we use. No new jurisdiction is given to the Court of which Lord Penzance is the Official Principal as regards the subject-matter. That is clear. This was a subject-matter which was within the cognisance of all the Ecclesiastical Courts and within the cognisance of the Court of Arches. It is a very different thing to say that new jurisdiction is given as against individuals, and new jurisdiction given in the sense of a different subject-matter being brought within the cognisance of the Court. When you say that new jurisdiction as against individuals is given, what as a rule you mean, and which can be the only sense attributed to it in the present case, is, that you have power given to you to cite and compel appearances as against persons whom it seems to me you could not have cited and compelled to appear; but when one looks to the Statute of Citations and considers what, if anything, is done here, it only removes certain restrictions which were imposed by the Statute of Citations over the power of the Arches Court, namely, the citing before it individuals not in the diocese in which they resided. It was not that the Court of Arches had new original jurisdiction, the Statute of Citations does not take away its original jurisdiction, but simply prohibits that Court for the benefit of persons who might be cited out of their diocese, with certain exceptions, from citing persons beyond that diocese. The exceptions shew that it had original jurisdiction; and there is a passage from Sir John Nichol, which I will quote, shewing it is merely taking away the power compulsorily enforcing appearance, and not taking away any jurisdiction which was given by the Statute of Citations. Sir John Nichol, in *Chesterton* v. *Donegal* (I quote it from Phillimore, p. 1286, and I have looked at the report), says this: "It is certainly true that both the canon and statute law forbid the citing of parties out of their diocese or peculiar jurisdiction, but it is equally true that the rule, at least of the statute law, was meant for the benefit of the subject, which benefit has uniformly, as far as I can see, been held to provide for sufficiently by giving the defendants who are cited the privilege of pleading to the jurisdiction; but if they appear voluntarily and do not raise that plea to the jurisdiction, then the Court has jurisdiction over them." So that even if in any sense it can be said that new jurisdiction was by this Act given to the Court of Arches, it was only the power of citing compulsorily and not a new jurisdiction as regards subject-matter. That is an important distinction, and if it is only new jurisdiction in the sense of being able to cite persons whom it could not otherwise have compelled to appear, then, in exercising that, without doubt it will have all its original powers and will be citing as the old Court, though with power given to it to compel appearance which it would not otherwise have had. That being so, all pretence for saying that a new jurisdiction is given to this Court in the sense of its having power to deal with new subject-matter and to exercise an entirely new kind of jurisdiction or judicial faculty, in my opinion disappears. But then it is said that new powers were given to it under section 13, and that, therefore, the old powers of the Court, as regards orders made under that section, cannot go with it. It is true that a new power is given by that section of making an order which, according to the practice of the Ecclesiastical Court, would not have been made in consequence of disobedience to a monition; but then it is the order of the Court, and if it is once the order of the

Court no principle can possibly require us or enable us to say, that in enforcing that order, although without that statutory enactment the Judge could not have made it, the Court is not to have, and has not, the power which it had originally in enforcing any order which it may have made without that special power. What we have to deal with is the statute of Geo. 3. Is not this an Ecclesiastical Court, although it is exercising this new power? Is it not a matter cognisable in an Ecclesiastical Court? Then comes the question whether it is a lawful order of the Court which has been disobeyed, and that I will deal with presently; but before I do so I will just advert to this which was pressed upon us in the argument, that in *Hudson* v. *Tooth* (4) expressions were used by some of the Judges in the Queen's Bench Division which seem to say that this was a new jurisdiction and a new Court. If they did say so I should decline to follow what they laid down. If we are asked to revise that judgment of the Court of Queen's Bench, I should say that was erroneous; but if one really looks on what they decided it is not, upon a fair interpretation of their language, any expression of opinion inconsistent with what I have said. What was principally relied upon was what was said by Lord Justice Lush; but I pointed out in the course of the argument that what occurred there was this: Mr. Tooth had been cited to appear in a place not sanctioned by the Act, and under the Act the power of citing is to cite in certain places. That had not been followed. Mr. Tooth in that case did not appear but let the matter go on by default. There was no power to compel appearance, and the Court, going on in the absence of parties cited, had no right to do so, and the judgment was *ultra vires*, and was a judgment which could not be enforced. But that is entirely different from the question which I have been considering, and therefore the expression used by the Judge must be considered with reference to the question before him. He particularly notes that in that case Mr. Tooth did not appear but let the case go on in his absence, and says, that being so, there was no jurisdiction because the place to which he was cited to appear was not a place in which he could be cited to appear compulsorily. Therefore, in my opinion, that is not in any way inconsistent with our judgments. And now comes the question whether the orders made in this case were lawful orders. Now, as regards both cases it is said that this was not a lawful order, for that the statute gives a remedy, and therefore it was the only remedy if a clerk refused to obey the order of the Court. Now if the question were whether this *significavit* could be issued for disobedience to a monition, one would have to consider whether the remedy given by section 13 for disobedience to the monition is to be on the true construction of the Act the only remedy; but I need not deal with that question, for we are dealing not with a question whether disobedience to a monition can be enforced by *significavit* and writ, but whether disobedience to the order inhibiting the performance of divine service can be enforced; and, as has been already pointed out, there is no penalty attached by the Act for disobeying such an order.

Nothing which can be said in the construction of the Act upon this section takes away the power of enforcing the order where it otherwise exists. But then it is said, and that I will deal with presently, that we can see in the Act another ground for saying that no *significavit* or writ can be issued to enforce the order. It is said, Here is the Bishop, he has power, under certain circumstances, to deal with the matter. He is the person who, if his monition is disobeyed, must make an order of inhibition; and, as he would have no power to issue a *significavit*, neither can the Judge. In my opinion, even if the Bishop were the person who was to make the order for the inhibition in cases where he had dealt with the matter in the way of monition, the consequences would not follow. If a person has power to deal with the matter, he, from his position, has not such an office as would entitle him to issue a *significavit* in order to enforce obedience to his orders, because he could not be considered an Ecclesiastical Court. If an Ecclesiastical Court, or the Judge of that Court under the

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as power also to make an order, he to be deprived from such an ce as that of the power he would ise possess of enforcing his order? opinion, that would not be a wise, r proper construction of this or her statute. But the foundation fails, because, in my opinion, the , if he deals with the matter in any is not the person to make the necessary for inhibition. The acts only by the consent of the , and as far as the consent of the goes what he has to do is this: oth parties agree to submit to the on of the Bishop without appeal, shop shall forthwith proceed to hear atter of the representation, and ronounce such judgment and issue nonition as he may think proper, appeal shall lie." That is where rties say, "We will agree to submit r direction;" but if they do not , why then must the enforcement inhibition of the Bishop necessarily efore him? It is true he has to whether his monition has been dis- or not, but when that is so there is d in the Act saying that the Bishop leal further with the matter, and re words in the Act (I refer to the the 13th section) which do point , that the Judge is to act in the as to directing proceedings for ing obedience to that order. It t been said that the Bishop is to go than the parties have agreed he ct. In my opinion, his function, so far as the Act says the contrary, icted to giving his directions which ties have agreed to be bound by, erefore the foundation of the argu- ddressed to us by Mr. Charles on int, in my opinion, fails. Now we another question. Are the orders monition and the orders for the ion wrong? Now as to that I con- yself to this: In my opinion the Parliament gives power not only e new rules without forms, but to orms as part of the rules; and as forms referred to in the rules as forms were properly made under hority of the Act, and as the orders cases for the monition follow the form given in these rules, in my opinion that is sufficient; and if there were (I do not say there was) any objection independently of the rules and forms, it is cured by following the form.

Now there is one objection to the form of the inhibition peculiar to Mr. Enraght's case, and I will deal with that first. As I regard it, it is this, that the monition admonished him from unlawfully wearing certain vestments, and prohibited him from allowing or permitting other persons unlawfully to do the same, and also from all practices, acts, matters and things of the same or a like nature to those hereinbefore set forth. Now the Act says, at the latter end of the 13th section, "Any question as to whether a monition or order given or issued after proceedings before the Bishop or Judge, as the case may be, has or has not been obeyed, shall be determined by the Bishop or the Judge, and any proceedings to enforce obedience to such monition or order shall be taken by direction of the Judge." This was the monition of the Judge in the present case, and therefore he has to determine whether it has been obeyed or not, and where one finds that he has decided that certain vestments, although not mentioned in the monition, are unlawful vestments, and there is in the monition, the warning against doing any acts similar to those specially mentioned, I think it is impossible for us to say that the Judge has exceeded his power in saying that the permitting the wearing of a biretta and alb is an offence of a similar character to that which was dealt with when he made the monition. Of course a Judge ought, in my opinion, to be very careful how he introduces into the grounds of his granting the order of inhibition any matters not dealt with in his original judgment, and when he was giving the order for the monition. But whether he had acted with a different exercise of judicial discretion or not is matter of appeal, and we must not be lead into saying that there is an excess of jurisdiction, so that the order is to be treated as a nullity by any doubt as to the power of appeal given by the statute, or as to any view that if we were sitting here as appellate Judges hearing an appeal from the order of the

Judge of the Arches Court, we should have taken a different view as to what ought to have been done by the Judges on the facts brought before him. In my opinion, having regard to the form of these general words in the order of monition, and what it is that has been introduced *de novo* in the order of inhibition, we cannot say that there has been an excess of jurisdiction in framing the order of inhibition as it is.

Now I come to the *habeas corpus*, and there, having before me the opinion of the Court below, I must say I think the conclusion at which they arrived is wrong. Now, what we have to deal with is this: Here is a statutory writ issued under the 53 Geo. 3, and that statute expressly provides that certain provisions, which it does not name and put in terms in the Act, but expresses by reference to the Act of Elizabeth, shall be followed in all proceedings under the Act, and proceedings under which the *significavit* was made and the writ was issued. Now, I quite agree with Lord Justice Brett, that when persons take upon themselves to imprison or cause another to be imprisoned, they must strictly follow the powers given in the order, and if they do not, the person imprisoned may be discharged. But what have we to consider here? It is not, in my opinion, in any way a mere matter of form, but a matter of substance. The Act of Elizabeth, to which one has to refer for the terms, says—I omit in term time—"that the writ may issue out of the Petty Bag Office, and that after the same writ shall be made and sealed, then the said writ shall be forthwith brought into the said Court of Queen's Bench, and there, in the presence of the Justices, shall be opened, and being opened, it is to be recorded." Lord Justice Brett dealt with one argument of Mr. Wills, that this only meant that it was to be brought into the Queen's Bench and enrolled. But there are two things—it is to be brought into the Queen's Bench, and there, in the presence of the Justices, it is to be opened. In my opinion, it would be wrong, as a mere matter of ordinary construction of any document, to say that these latter words, "in the presence of the Justices," can mean nothing more than that which had been originally expressed by "brought into the Court of King's Bench." No doubt, precedents were cited to us where, in pleas or any other matters, a man was cited to appear before our Sovereign Lady the Queen or our Lord the King in his Court. That means that the matter was in the Court of King's Bench, but that is already expressed. Then it is said that these words, "and there before the Justices," are equivalent to the Court of Queen's Bench; but they mean something else, and what is it? In my opinion, if one looks at the statute alone, one would say that this meant that there should be something done before the Justices of the Court of Queen's Bench, which was going to take upon itself the enrolling and consequent enforcement of this writ; that is to say, by seeing that the sheriff did his duty, and by seeing that the process was properly issued. The writ issues as of course out of the Petty Bag Office when a *significavit* is brought there; but this statute required that before the writ is put into the hands of the sheriff who is to enforce it, it shall always be brought into the Queen's Bench and there opened in the presence of the Justices, and why? That they might see that the Ecclesiastical Court should not, without sufficient reason, get the benefit of the process of the secular Court in order to take the person who is charged with an ecclesiastical offence. It is true that, as a rule, the Judges of the Court would never read the writ that was brought before them to see whether it had or had not been properly issued; but if it is brought into Court and handed to the officer, he at once, if there is any doubt, can consult the Judges whether or no it is a writ that ought to be issued. Now, we are not really here bound to enter into the question as to whether it ought to be brought into open Court or whether it is sufficient to take it into one of the offices of the Court while the Court is sitting. What the respondent here contends is this, that that portion of the statute is sufficiently

complied with if the writ is taken not into open Court, but into the office of the Court when the Judges are not sitting, and when the officer of the Court cannot therefore consult them at the time. In my opinion, that is wrong. That deprives the subject of that protection which is given by the statute that the writ shall not be put into the hands of the sheriff without at least the opportunity of the Judges being immediately consulted if there is any doubt whether the writ has been properly issued or not. In my opinion, it ought to be brought into open Court, because one knows it is much more probable, having regard to the general way in which men deal with matters, that if there is a slight doubt in the mind of the official, he will at once ask the Judge, whom he is sitting below, about it. He can immediately speak to him, which he cannot do if he were in some office some miles away from the place where the Judge is sitting, or at any rate out of the sight of the Judge, so that there may be some delay in consulting the Judge. In my opinion, this is a provision of the statute that it should be brought into Court so that the attention of the Judges may be directed to any possible question as to whether the writ has or has not been properly issued; and although there is no express decision on that point in any case, for the exact point does not seem to have arisen, yet in my opinion what was said by Lord Chief Justice Parker and Mr. Justice Pratt in that case of *The King* v. *Theed* (45) strongly bears upon it, and strongly supports the view which I and the rest of the Court take. Because what Chief Justice Parker says is this (the question in that case was, whether or not the writ might be quashed before the return day): "Certainly this Court might have quashed it before it was delivered to the sheriff, and *a fortiori* therefore now, for it is no more for us to correct our own mistake by calling back a writ issued through our oversight." Unless the writ were to be brought into Court, how could there be any oversight on the part of the Judges, and how could there be any mistake that they would have to correct? Then Mr. Justice Pratt says, "I take the reasons of the provision, that this writ issuing out of Chancery and returnable into this Court, must first of all be opened in this Court, and in the presence of the Justices of this Court be delivered to the sheriff, to be a provision in favour of the liberty of the subject, that the subject may not be deprived of his liberty by writs which issue of course out of Chancery, until such time as the Judges of this Court see whether he has deserved it or not." In my opinion, that, although it is not an expressed decision, does most strongly support the view which I take; and, as has been mentioned by Lord Justice Brett on this part of the case, independently of the question which I shall now deal with, the Judges of the Queen's Bench Division were also of opinion that the omission was one which would be fatal but for a subsequent statute. I do not deal with the question as to whether the writ could be issued by the Petty Bag Office out of term or not—I think probably it could; but that is immaterial. I am dealing with the question of "opened in the presence of the Justices." It is said that the Act relating to the practice of the Petty Bag Office repeals that. In my opinion, it would be quite wrong, without very strong necessity, to hold that such a statute as that intended to regulate the practice of the Petty Bag Office did repeal the provision in the statute of Geo. 3, if it was a provision which was introduced there for the protection of the subject. But in my opinion it has no such effect. A later statute does not repeal another without express terms, unless the two cannot stand together. Now it was argued by Mr. Wills that the statute regulating the Petty Bag Office meant this—not that writs might be issued in vacation time, but that all writs might be made effectual in vacation time. There is nothing of that sort in the Act. It is only that writs may be issued in the vacation and made returnable in the vacation; and that is not in any way inconsistent with this, that some of these writs, before they can be made effectual, or be put into the hands of the sheriff, must be taken before the Court while it is sitting, and there the Judges and the

Court must consider before they put it into the hands of the sheriff, whether or no it has been properly issued, so that they can direct the sheriff to enforce it. The Judges of the Court below seem to have dealt with that in this way, that the writ may be issued in vacation and may be returnable in vacation. They seem to have construed "may" as "must;" that is to say, that if a writ might be issued at the beginning of the long vacation it must be returnable in the long vacation too. But there is nothing of that sort in the Act. Whenever it is necessary, in order to make the writ effectual, that the return day shall be at a long period, because vacation intervenes, the officer in the office will make it returnable on a distant day, and it is not in any way a fair or true construction of the Petty Bag Office Act to say that a writ issued at the beginning of the vacation must be made returnable after twenty days, or at any time within the vacation. If that is so, there is nothing whatever in the second Act inconsistent with the provisions of the first Act, which require that before that writ could be made returnable—that is, before it could be put into the hands of the sheriff—it shall be brought into open Court when the Judges are sitting. In my opinion, there is nothing in the subsequent Act which may be construed in any way as repealing the provisions of the Act of Geo. 3, to which we have been referred. Now the practice has been referred to. The practice cannot really alter the Act of Parliament, and although it is true it is said there are a number of cases in which these writs have been issued and made returnable in vacation and put into the hands of the sheriff when the Court was not sitting, yet it was not shewn in any way that under any one of these writs anyone has ever been taken. There is no opportunity of testing whether the practice was right. It here comes before us for the purpose of saying what is the right of the subject, and in my opinion he is right in saying that here was a provision in the 53rd Geo. 3—a provision necessary in order to enable the writ to be put into the hands of the sheriff and made effectual against him—which has not been complied with; and that being so, he is entitled to his discharge.

JAMES, L.J.—All the applications for prohibition fail. The applications as to the arrests succeed. The appeals as to the prohibition and *certiorari* will all be dismissed.

Charles.—I do not ask for any judgment on the rule for a *supersedeas*. I am satisfied with the decision on the *habeas corpus*.

Wills.—The application for a *supersedeas* had better be disposed of one way or another. The writ was properly issued. What is wrong is only what was done with it afterwards.

JAMES, L.J.—I feel great difficulty in superseding the writ.

Charles.—In the meantime I ask that Mr. Dale and Mr. Enraght may be discharged from custody.

JAMES, L.J.—Yes; of course they will be discharged. The question of costs must be mentioned again when the judgment given has been considered.

Jan. 29.—*Dr. W. G. F. Phillimore* submitted that the appellants were entitled to their costs on their application for writs of *habeas corpus*, in which they had succeeded; and contended that Lord Penzance was not entitled to his costs of appearing on the prohibition. It was not usual to give a Judge his costs—*The Mayor of London* v. *Cox* (49).

The Attorney-General (Sir H. James).—The rules were moved on grounds going to the whole jurisdiction of Lord Penzance to act as Judge of the Court of Arches. If the appellants had succeeded on those rules, Lord Penzance would have been shewn to have acted for years without jurisdiction. He was, therefore, entitled to appear before the Court to ascertain what his jurisdiction really was. In *Martin* v. *Mackonochie* (50) Lord Penzance had his costs of the appeal.

(49) 36 Law J. Rep. Exch. 225; Law Rep. 2 E. & I. App. 239.

(50) 49 Law J. Rep. Q.B. 9; Law Rep. 4 Q.B. D. 697.

In re Rev. T. P. Dale (App.), Q.B.

Dr. Phillimore, in reply.

Jeune, for the promoters, submitted that the Court of Appeal had no jurisdiction to give costs on the application for a writ of *habeas corpus*. It is a criminal proceeding.

COTTON, L.J.—It is not a question whether the proceedings in the Ecclesiastical Courts were civil or criminal. They were civil here, and the Court of Appeal has ample jurisdiction under Order LVIII. rule 5, to make such order as to the costs of the appeal as may seem just.

JAMES, L.J.—There appears to be no reason why we should not adopt the usual rule. All the proceedings were of a civil character. The original proceedings were in respect of a contempt of Court. The costs will follow the usual rule as in *Martin* v. *Mackonochie* (50).

BRETT, L.J.—No part of these proceedings were criminal. The proceeding in respect of a contempt of Court cannot be called criminal. The appellants must pay the costs of appeal on the proceedings in which they have failed, and the respondents must pay the costs of appeal on the application for a *habeas corpus*.

COTTON, L.J., concurred.

Solicitors—Brooks, Jenkins & Co., for appellants; The Solicitor to the Treasury, for Lord Penzance; J. Girdlestone, for promoters.

[IN THE QUEEN'S BENCH DIVISION.]

1880. Nov. 13. } ROUCH (*appellant*) *v.* HALL (*respondent*).

Sale of Food and Drugs Acts, 1875, 1879 (38 & 39 *Vict. c.* 63. *s.* 14, *and* 42 & 43 *Vict. c.* 30. *s.* 3)—*Consignor and Consignee—Adulterated Milk in course of Transit—No Delivery of Sample to Agent of Seller.*

[For the report of the above case, see 50 Law J. Rep. M.C. 6.]

[IN THE QUEEN'S BENCH DIVISION.]

1880. Dec. 20. } FRAZER AND COMPANY *v.* CUTHBERTSON.

Ship and Shipping—Necessaries for Ship—Authority of Part Owner to pledge other Owners' Credit—Managing Owner—Entry on Register under 39 & 40 *Vict. c.* 80. *s.* 36.

The Act 39 & 40 *Vict. c.* 80. *s.* 36 *requires the name and address of the managing owner for the time being of every British ship to be registered at the custom-house of the ship's port of registry. In accordance with this provision W., in* 1877, *being the registered owner of certain shares in a ship, caused himself to be entered as managing owner. Subsequently, in* 1879, *the defendant became registered owner of certain other shares in the same ship, and agreed to sell them to W. for cash, informing W. that he had no intention of navigating the ship, and would not take any part in her management. W. thereupon agreed that the vessel should not leave port till the cash was paid. Shortly after, W., without the defendant's knowledge, ordered necessaries for the ship from the plaintiffs, and sent the ship to sea.*

The defendant had no interest in the adventure, of which he knew nothing, nor was he aware of the entry in the register of W. as managing owner, which still remained uncancelled. The plaintiffs had inspected the register before supplying the necessaries, and found the defendant's name as part owner.

W. shortly after went into liquidation.

On action brought to recover the price of the necessaries from the defendant,—

Held, *that W. had not in fact authority to bind the defendant, and that the fact of the entry on the register of W. as managing owner remaining uncancelled, was not a holding out by the defendant of W. as his managing owner, or as clothed with authority to bind any other owners than those who had in fact entrusted to him the management of the ship.*

CASE heard before Bowen, J., on further consideration. The facts appear sufficiently from the judgment.

Cave and *McClymont*, for plaintiffs.

A. Wills and *Edge*, for defendant.

Cur. adv. vult.

Frazer v. *Cuthbertson*, Q.B.

BOWEN, J. (on Dec. 20).—The plaintiffs are ship provision merchants, carrying on business at Newport, and the defendant Cuthbertson, at the date of the supply of the goods and stores for which this action is brought, was the owner of forty sixty-fourth shares in the ship *Coniscliffe*, and at the same date J. H. Watson was registered owner of twenty-four sixty-fourth shares in the same vessel, and was also on the register as managing owner in the manner which I shall presently discuss. The defendant denies that the goods and stores were ordered on his credit, or that he is liable to pay for them, and the question of his liability is the one which I have to decide. The *Coniscliffe* belonged originally to W. H. Watson (the father) and J. H. Watson (the son), who together were in partnership, W. H. Watson being registered as owner of thirty-six shares and J. H. Watson of eight shares. On the 18th of November, 1875, W. H. Watson was entered on the register as managing owner. On the 7th of August, 1877, W. H. Watson died, leaving J. H. Watson, his son, and the defendant Cuthbertson his executors. His thirty-six shares were transferred on the register to J. H. Watson, who, on the 21st of December, 1877, caused himself to be entered on the register as managing owner, pursuant to the provisions of 39 & 40 Vict. c. 80. s. 36. The entry is as follows:—

"31st December, 1877.

"John Hunter Watson, of 8 Mill Street, Sunderland, is managing owner by letter under his hand dated the 15th of December, 1877, being registered owner of eight shares.

"(Signed) J. Toyster, Registrar."

The management of the ship, after the death of W. H. Watson, was left in the hands of J. H. Watson, the defendant Cuthbertson taking no part in it. At the time of the death of W. H. Watson the *Coniscliffe* was at sea, having sailed on the 26th of October, 1876. She returned home on the 30th of April, 1878, and in the ship's husband's books relating to the voyage, kept by J. H. Watson, is a signature of the defendant Cuthbertson as executor of W. H. Watson, dated the 23rd of July, 1878. After the return, in April, 1878, the defendant Cuthbertson tried, as executor, to sell her. She was put up to auction, without any result, on the 13th of May, 1878. On the 27th of May, 1878, it was agreed between the defendant Cuthbertson and J. H. Watson that J. H. Watson should purchase the thirty-six shares belonging to the testator's estate. The price to be paid by J. H. Watson was 787*l.* 10*s.*, payment to be made by his promissory note, given on the 1st of June, 1878. J. H. Watson gave the promissory note as agreed; the note, however, was dishonoured, and the money remained unpaid.

The *Coniscliffe* meanwhile had again gone to sea upon the 3rd of June, 1878, upon a voyage to Venice, remaining still under the management and control of J. H. Watson, with the knowledge of the defendant Cuthbertson, who, though a co-executor, was not at this time a registered owner. The ship in this voyage, beginning June, 1878, and ending March, 1879, was not navigated on the defendant Cuthbertson's account, but for J. H. Watson and the then owners. Having agreed for the sale of the vessel to J. H. Watson, the defendant Cuthbertson took no interest in the arrangements for this voyage.

On the 1st of March, 1879, she returned. At this date J. H. Watson still owed money to his father's, the testator's, estate, which he could not pay, and was called on, upon the part of the defendant Cuthbertson, his co-executor, to reduce his indebtedness. To protect his interest a bill of sale was taken by the defendant Cuthbertson of thirty-six shares belonging to J. H. Watson, which was entered on the register on the 21st of May, 1879, and four shares were at the same time transferred by another brother to Cuthbertson, leaving the defendant Cuthbertson as registered owner of forty shares in all upon the 21st of May, 1879, J. H. Watson still continuing to hold twenty-four other shares in her. This was the first time that any entry appeared on the register of any interest in the ship being held by the defendant Cuthbertson. The memorandum of the 31st of December, 1877, was still left standing in the register.

he date of the bill of sale and the r of April and May, 1879, the de- t Cuthbertson informed J. H. n that he (the defendant Cuthbert- id not intend to navigate the ship, ant to have her sold. On the 6th June a meeting of the executors ld, and a resolution was come to e should be sold by auction. Later the same day a further meeting of cutors took place, at which J. H. n agreed to purchase the forty registered in Cuthbertson's name *l.*, and to pay cash on signing the sale; and it was agreed that the was not to leave port till the cash aid and the bill of sale signed: rtson at the same time informing Watson that he had no intention of ting the ship, and would not take rt in her management. The follow- try was thereupon made in the ors' books: "Mr. Watson agreed the shares in the *Coniscliffe* for to pay cash on signing the bill of The vessel not to leave port until aid and bill of sale signed."

order for the goods and stores for this action was brought was given [. Watson on the 21st of June, 1879, t the knowledge of the defendant rtson. The plaintiffs, doubting Watson's credit, wrote for a copy ship's register, and found Cuth- n's name upon it as registered owner y shares, and learned upon enquiry uthbertson was a solvent person. der was given and accepted on the June, and the goods of the value *l.* (which it is admitted were neces- for the ship if she was to sail) supplied upon the 23rd of June. their delivery the ship was sent to J. H. Watson without Cuthbertson's dge, and in breach of the arrange- made to the contrary on the 6th of

In the following August J. H. n filed his petition in bankruptcy. laintiffs subsequently sued the de- t Cuthbertson for the price of the and stores, the defendant Cuthbert- to that time having had no know- of the transaction.

vas contended on the part of the ffs that the defendant Cuthbertson was liable as owner of the ship and as a party to the adventure; but that in any event he had held out Watson as managing owner to the world, and was bound by his contracts made in the employment of the ship. The plaintiffs contended that during the former voyage J. H. Watson had been allowed to navigate the ship by or on behalf of the owners, and that the entry of the 31st of December, 1877, on the register, by which he purported to nominate himself a managing owner, still remained uncancelled after the transfer to Cuthbertson of forty shares upon the 21st of May, 1879. Of the existence of this entry of the 31st of December Cuthbertson was, in fact, unaware, unless the above facts amount in law to notice to Cuthbertson of its existence.

I entertain no doubt that the defendant Cuthbertson was not interested in the adventure, and that as a fact the order for the goods was not only not given on his behalf or with his authority, but without his knowledge or sanction, and in violation of the express bargain between himself and J. H. Watson that the vessel should not be sent to sea. The only serious question, as it seems to me, is, whether the effect of the uncancelled entry of the 21st of December, 1877, was to hold out J. H. Watson to third parties as agent to navigate and manage the ship on behalf of the defendant Cuthbertson from and after the 21st of May, 1879.

The entry of the 31st of December, 1877, was made in pursuance of 39 & 40 Vict. c. 80. s. 36, which is as follows:—

"The name and address of the managing owner for the time being of every British ship registered at any port or place in the United Kingdom shall be registered at the custom-house of the ship's port of registry.

"Where there is not a managing owner there shall be so registered the name of the ship's husband or other person to whom the management of the ship is entrusted by or on behalf of the owner; and any person whose name is so registered shall, for the purpose of the Merchant Shipping Acts, 1854 to 1876, be under the same obligations, and subject to the same liabilities, as if he were the

managing owner. If default is made in complying with this section the owner shall be liable, or, if there be more owners than one, each owner shall be liable, in proportion to his interest in the ship, to a penalty not exceeding in the whole 100*l.* each time the ship leaves any port in the United Kingdom."

The law relating to the position and liabilities of registered owners of the ship is tolerably clear. Shipowners, to begin with, are not necessarily partners. An owner's liability or non-liability for necessaries supplied to a ship, depends on the question, whether the person who gave the order had his authority to give it. The register no doubt is evidence of ownership of the vessel, and the registered owner, until the contrary is shewn, may be presumed to be the employer of those who have the custody of her, and who are engaged in her navigation. But a part owner, whether registered or not, has no power to bind the other owners without their assent. The question in each case is one of fact, whether he has had such authority committed to him, or, if this is not in fact the case, whether he has been allowed to hold himself out as armed with such apparent authority. Such being beyond all doubt the general law, what has really to be determined in this case is the question, whether, by inadvertently suffering the entry of the 31st of December, 1877, to remain unaltered, the defendant Cuthbertson held out to third parties consulting the register that J. H. Watson was his agent to manage and navigate the ship on his behalf. I will assume for the purpose of my judgment that third persons consulting the register had a right to consider as between themselves and all owners upon the register, including of course the defendant, that J. H. Watson was a managing owner within the meaning of the section I have referred to.

The term "managing owner," however, is not defined in the Act of Parliament; it is a commercial and not a legal expression. It is perfectly true that a managing owner is a name which frequently and commonly denotes an owner to whom the other owners have delegated the management of a vessel. But I do not think it follows as of course that every single other owner must be taken to have joined in the adventure merely because there is an owner called a managing owner.

Language occurs both in some text books and in some decided cases which seem to be based on the assumption that a managing owner is an owner employed by and on behalf of all his brother owners without exception—see *Abbott on Shipping*, 10th ed. p. 72; *Barker* v. *Highley* (1); *Coulthurst* v. *Sweet* (2). But there is no magic in the term "managing owner" which creates him a plenipotentiary for those owners whose agent he is not in fact. The writers and judges in the passages and cases to which I allude have been discussing the extent of the authority of the person appointed, not the question whether every single owner must be taken to have joined in his appointment. In the two cases I have cited it was assumed, and was no doubt the fact (as it often, if not generally, must be the fact), that all the owners were partners in the employment of the ship, and assented to the appointment of one managing owner. But an advertisement that A B is managing owner of a vessel seems to me to mean no more than that as owner he is intrusted by such of the owners as are interested in the ship's employment to manage her affairs.

An entry to a like effect upon the register does nothing further.

The 36th section of the Act nowhere creates new agents, new functions, new capacities, nor clothes existing agents with enlarged powers. The section is part of the machinery designed to secure adequate protection for lives and property at sea; and provides, with that or a similar object, that a certain class of agents when they are appointed shall be registered, so that it may be known who in fact is managing the vessel. A managing owner registered under the Act is no more and no less than a managing owner before the Act. He binds those whose agents he is; he binds nobody besides. Here J. H. Watson was not in fact the agent of the defendant Cuthbertson—it is not suggested that he was; and I do not

(1) 32 Law J. Rep. C.P. 270.
(2) Law Rep. 1 C P. 649.

think that, by leaving unaltered the entry in the register which describes J. H. Watson as managing owner, the defendant Cuthbertson, held him out as his managing owner—that is to say, as clothed with authority to bind any owners, other than those who had in fact entrusted to him the management of the ship. Judgment must therefore be entered for the defendant, with costs.

Solicitors—J. & E. Scott, agents for Hodge & Westmacott, for plaintiffs; Shum, Crossman & Co., agents for Kidson, Son & McKenzie, Sunderland, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1880. Dec. 16. EDWARDS *v.* THE MIDLAND RAILWAY COMPANY.

Corporation — Malice — Railway Company—Ultra Vires—Employment of Police.

A corporation may be liable for malicious prosecution.

The employment of police is within the scope of the business of a railway company.

This was an action for malicious prosecution against a railway company and a detective, J. B. Shaw, employed by them. The plaintiff was arrested on a charge of theft from the company, on a warrant obtained by them, and, after having been kept in custody, was taken before two Justices, who dismissed the charge. The action was tried at Gloucester, at the Spring Assizes, and damages were given by the jury to the plaintiff to the extent of 150*l.* Objection was taken at the trial that as a matter of law a corporation could not be guilty of malice, and therefore could not be liable in an action for malicious prosecution, and that the employment of police was beyond the power of a railway company. The case now came on upon further consideration before Fry, J.

Powell and *Patrick Evans*, for the defendants, relied on the case of *Stevens* v. *The Midland Railway Company* (1) as a subsisting authority which had never been overruled that a corporation not being possessed of mind could not be liable for malicious prosecution which involved a mental state. Though the decision had not been always approved, the opinions of many judges were in favour of it—*The Bank of New South Wales* v. *Owston* (2), *The Pharmaceutical Society* v. *The London Provincial Supply Association* (3).

[FRY, J., referred to *Green* v. *The London General Omnibus Company* (4).]

Moreover, the arrest and prosecution by the company's policeman were not incidental to the company's business and were beyond his authority—*The Bank of British North America* v. *Strong* (5). It lay on the plaintiffs to establish want of reasonable and probable cause and malice —*Walker* v. *The South Eastern Railway Company* (6), *Burley* v. *Bethune* (7).

Staveley Hill and *A. T. Lawrence*, for the plaintiff.—The authority of *Stevens* v. *The Midland Railway Company* (1) has been considered as no longer binding and corporations have been made liable for acts of their agents, implying mental capacity, just as natural persons are liable for such acts of agents—*Green* v. *The London General Omnibus Company* (4), *The Queen* v. *The Great North of England Railway Company* (8), *Whitfield* v. *The South Eastern Railway Company* (9). A railway company has power to employ police for the protection of property under its control, and are liable for acts of such police done in the discharge of their service—*Goff* v. *The Great Northern Railway Company* (10).

Powell replied.

FRY, J.—The question which I have to determine is this, whether or no a

(1) 10 Exch. Rep. 352; 23 Law J. Rep. Exch. 328.

(2) 48 Law J. Rep. P.C. 25; Law Rep. 4 App. Cas. 270.

(3) 49 Law J. Rep. 338–736; Law Rep. 5 App. Cas. 857.

(4) 7 Com. B. Rep. N.S. 290; 29 Law J. Rep. C.P. 13.

(5) Law Rep. 1 App. Cas. 307.

(6) 39 Law J. Rep. C.P. 346; Law Rep. 5 C.P. 640.

(7) 5 Taunt. 580.

(8) 9 Q.B. Rep. 315; 16 Law J. Rep. M.C. 16.

(9) E., B. & E. 115; 27 Law J. Rep. Q.B. 229.

(10) 3 E., B. & E. 672; 30 Law J. Rep. Q.B. 148.

railway company can be liable in an action for malicious prosecution. The malice which will support a cause of action need not be express. It may be implied from a wrongful act being done without just cause or excuse, and it is enough, therefore, if such malice can be attributed to a railway company. It is obvious that great evils would arise if, on the ground that a corporation can have no mind, and therefore can have no malice, a corporation were able to escape from that liability which if they were not incorporated they would have to bear. A case has been suggested by Mr. Hill which forcibly illustrates that. A private partnership carries on business; one of their agents maliciously prosecutes a particular person: all the partners are liable. The same partners shortly afterwards incorporate themselves under the provisions of the Limited Liability Acts. The same servant maliciously prosecutes another person and the corporation is not liable. That would seem not to be a very intelligible or reasonable conclusion, though, of course, I do not forget that the individuals who authorised the prosecution were all of them liable.

Now how do the authorities stand? The question came before the Court of Exchequer in *Stevens* v. *The Midland Railway Company* (1), and three Judges expressed their opinions in that case: Baron Alderson upon the proposition that in order to support the action it must be shown that the defendant was actuated by *animus* in his mind—that a corporation has no mind. The two other learned Judges—Baron Platt and Baron Martin—without expressly differing from that proposition, declined to enunciate it, and determined the case upon the ground that there was not sufficient evidence of authority to affect the defendants—the railway company. Now has that case been followed? Mr. Powell says it has been followed in a case in Australia, in which the Chief Justice of the colony, differing from his two learned brothers, followed the decision of Baron Alderson. Is that decision consistent with other authorities which bear upon the same question?—I mean the question whether there can be malice in a corporation. Now so far back, I find, as the great case tried on *quo warranto* of *The King* v. *The City of London* (11), the point appears to have been considered. There it appears Lord Chief Justice Saunders, according to the statement of the pleadings which I find in a note appended to *Whitfield* v. *The South Eastern Railway Company* (9), and which no doubt, therefore, is correct, contemplated the proposition that a corporation aggregate could be charged with maliciously publishing a libel. No doubt it may be said that that decision is, on some grounds, not of the greatest weight; that is to say, it was a decision which is often considered to have been affected by political as well as legal considerations. Still it was the decision of a very great and very eminent Judge. Then, again, the question arose for decision in the case of *Yarborough* v. *The Bank of England* (12), and there Lord Ellenborough referred to an earlier case (I think in 1781) of *Argent* v. *The Dean and Chapter of St. Paul's* (13). There he says the action was "for a false return to a *mandamus* respecting an election to a verger's place in that cathedral; and no objection was made that the action would not lie. *Vidian's Entries*, p. 1, is an action for a false return against the mayor and commonalty of the city of Canterbury for a false return to a writ of *mandamus* to restore an alderman to his precedency of place, &c. It states the mayor and corporation as *attached* to answer, and the return as falsely and *maliciously* made. The instances of actions against corporations for false returns to writs of *mandamus*, which are so often directed to them, must be numberless, though I have not found many of them in the books of entries." The question again came before the Court in the case of *Whitfield* v. *The South Eastern Railway Company* (9), when a count against a railway company as a corporation aggregate was held good on demurrer; and there Lord Campbell said, "The demurrer to the declaration in this case can only be supported on the ground that the action will not lie with-

(11) E., B. & E. 122 *n.*
(12) 16 East, 6.
(13) 16 East, 8 *n.*

out proof of express malice as contra-distinguished from legal malice. But if we yield to the authorities, which say that in an action for defamation malice must be alleged (notwithstanding authorities to the contrary), this allegation may be proved by showing that the publication of a libel took place by order of the defendants, and was therefore wrongful, although the defendants had no ill-will to the plaintiffs, and did not mean to injure them. Therefore, the ground upon which it is contended that an action for a libel cannot possibly be maintained against a corporation aggregate fails. But considering that an action of *tort* or of trespass will lie against a corporation aggregate, and that an indictment may be preferred against a corporation aggregate, both for commission and omission, to be followed up by fine, although not by imprisonment, there may be great difficulty in saying that under certain circumstances express malice may not be imputed to and proved against a corporation." He held, therefore, that it clearly might be implied, and therefore in certain cases express malice might be proved. Then, again, in *Green* v. *The London General Omnibus Company* (4), a similar question came before the Court of Common Pleas. The marginal note is to this effect: "A corporation aggregate may be liable to an action for intentional acts of misfeasance by its servants, provided they are sufficiently connected with the scope and object of its incorporation." The allegation there was that the placing and driving of omnibuses in the manner complained of was done wrongfully, vexatiously and maliciously, and judgment was delivered by Chief Justice Erle. He said, "This is an action against the defendants for wrongfully, vexatiously and maliciously interfering with the plaintiff's rights by causing their vehicles to be driven in such a manner as to obstruct and molest the plaintiff in the use of the highway. The declaration alleges various grievances of that general character. To this declaration there is a demurrer raising for our decision the question whether the action will lie. The ground for the demurrer is that the declaration charges a wilful and intentional wrong, and that the defendants, being a corporation, cannot be guilty of such a wrong, and therefore the action will not lie."

I pause to observe that to my mind it is equally absurd to suppose that a body corporate can do a thing wilfully, which implies will; intentionally, which implies intention; or maliciously, which implies malice. They are all acts of the mind, and one is no more capable of being done by a corporation aggregate than the other; so that if there is absurdity in the one case, there is equal absurdity in all the others. The judgment proceeds: "But the whole of the acts that are charged against the defendants are acts connected with driving vehicles; and the defendants are a company incorporated for the purpose of driving omnibuses, and therefore the acts alleged to have been done by them are all acts which are within the scope and object of their formation. Unless the acts charged were wrongfully done, the plaintiff of course would have no ground of complaint. We are clearly of opinion that the action lies, and there are abundant authorities to warrant that opinion. The whole course of the authorities, from the case of *Yarborough* v. *The Bank of England* (12) down to *Whitfield* v. *The South Eastern Railway Company* (9), which is the case I just now referred to, which was in reality an action against the Electric Telegraph Company, shews that an action for a wrong will lie against a corporation where the thing that is complained of is a thing done within the scope of their incorporation, and is one which would constitute an actionable wrong if committed by an individual. The doctrine relied on by Mr. Giffard—that a corporation having no soul cannot be actuated by a malicious intention—is more quaint than substantial." In other words, I understand the Court of Common Pleas in that case to have disregarded as quaint and not substantial the *ratio decidendi* of Baron Alderson in the case of *Stevens* v. *The Midland Railway Company* (1). In my judgment, therefore, that *dictum* or decision of his has been overruled, or rather has not been followed, by a Court of co-ordinate juris-

diction; therefore I feel myself at liberty in that condition of the authorities, and, as at liberty, I think I am bound to decide according to what I conceive to be the true view of the law. That being so, it only remains to enquire whether or no this was done within the scope of the incorporation. Now these great railway corporations are bound to maintain, and in fact they do maintain, police for the purposes of restraining the commission of crimes upon their railways; and the observations in the judgment of Lord Blackburn, then a member of the Court of Queen's Bench, in the case of *Goff* v. *The Great Northern Railway Company* (10), shew that in his view, at any rate, a company would be responsible for the arrest by their police of persons, supposing the arrest was wrongfully effected. Can it be said that if the police whom they employ conduct a prosecution in the performance of their duties as officers of the company it is not done within the scope of incorporation of the company? The company take to themselves as a necessary part of their business the protection of property which is entrusted to them as common carriers and otherwise. In my view it is within the scope of their incorporation, and is not like a thing entirely outside the objects of their business. It is a thing which, taking into account the nature of their business, they could not reasonably do without and do not do without. If so, it seems to me I am bound to hold that the company may be responsible for malicious prosecution, and that being the only point which, according to my understanding, was reserved for further consideration, it appears to me to follow that I am bound to give judgment, and I do give judgment, for the plaintiff for the damages found by the jury —150*l.*—with costs of the action.

Solicitors—J. C. Selby, agent for F. Stroud, Cheltenham, for plaintiff; Beale, Marigold & Co., for defendants.

[IN THE COURT OF APPEAL.]

1881. March 7. BURNAND AND OTHERS *v.* RODOCANACHI AND COMPANY AND OTHERS.*

Marine Insurance—War Risks—Valued Policy—Money paid by State to Owner after Destruction of Cargo—Difference between Real and Insured Value of Cargo—Right of Underwriters to Recover.

The defendants insured with the plaintiffs, by valued policies, a cargo which was destroyed by the "Alabama" by risks within the policies. The plaintiffs paid to the defendants the sum insured, which was stated in the policies to be the value of the cargo. The United States Government having received compensation from Great Britain for damage caused by the "Alabama," an Act of Congress was passed constituting a Court to distribute the money to claimants whose loss might not be covered by their insurance. The defendants made a claim for a sum representing the difference between the sum insured and the real value of the cargo. This claim was allowed and a sum of money was paid to them. The Act contained a clause by which the insurers were prevented from obtaining any money from the Court, either by applying in their own names or in the names of the assured. The plaintiffs sought to recover from the defendants the money received by them from the United States Government:—Held (*by the Court of Appeal, dissentiente* BAGGALLAY, L.J.), *that the plaintiffs were not entitled to recover, and that the money received by the defendants was paid to them as a free gift and not as portion of the salvage.*

Appeal from the judgment of Coleridge, C.J., on further consideration. The case is reported 49 Law J. Rep. C.P. 732.

The defendants insured with the plaintiffs, by two valued policies of 7,500*l.* each, a cargo of tobacco for 15,000*l.* The perils insured against included war risks. The cargo was totally destroyed by the *Alabama* during the American Civil War, and formed the subject of a claim by the United States against Great Britain. This claim was dealt with by the Geneva

* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Brett, L.J.

l, and after the payment of the y to the United States under that l, the defendants made claim in a t in the United States pursuant to provisions of an Act of Congress, h constituted a Court of Commis- rs to appropriate money received gst the parties who might be ad- d entitled to compensation. The provided that it should be the duty e Court to receive and examine all s and to decide upon them pursuant e provisions of section 13, which was llows:—

That no claim shall be admissible or ed by the said Court for any loss or ge, for or in respect to which the injured, his assignee or legal repre- tives shall have received compensa- or indemnity from any insurance any, insurer or otherwise; but if compensation or indemnity so re- d shall not have been equal to the r damage so actually suffered, allow- may be made for the difference. in no case shall any claim be ad- d or allowed for or in respect to rried freights, gross freights, pro- ive profits, freights, gains or advan- , or for wages of officers and seamen longer time than one year next after reaking up of a voyage by the acts said. And no claim shall be admis- or allowed by the said Court by or ehalf of any insurance company or er, either in its or his own right or assignee or otherwise in the right person or party insured as aforesaid, s such claimant shall show to the faction of such Court that during the ebellion the sum of its or his losses in ct of its or his war risks exceeded sum of its or his premium or other upon or in respect to such war risks, in case of any such allowance the shall not be greater than such ex- of loss. And no claims shall be ssible or allowed by the said Court ng in favour of any insurance com- not lawfully existing at the time of loss under the laws of some one of United States. And no claim shall be ssible or allowed by the said Court ng in favour of any person not en- l at the time of his loss to the pro- tection of the United States in the pre- mises, nor arising in favour of any person who did not at all times during the late rebellion bear true allegiance to the United States."

The defendants made a claim for 6,557*l.* 7*s.* 3*d.*, being the difference be- tween the 15,000*l.* received by them from the plaintiffs under the policies and the actual value of the cargo. The Court of Commissioners allowed the claim, and the defendants, after certain deductions had been made, received a sum of 2,803*l.* 17*s.* 2*d.* from the United States Govern- ment.

The plaintiffs claimed to recover this sum from the defendants on the ground that they had on the payment of the valued policies become subrogated to the position and rights of the defendants with respect to the cargo.

At the trial before Coleridge, C.J., without a jury, judgment was given for the plaintiffs.

The defendants appealed.

The Attorney-General (*Sir Henry James*) and *Gathorne Hardy*, for the defendants. —The plaintiffs, the underwriters, claim the money received by the defendants, the owners of the cargo, because there was a total loss, and it is alleged that this money has been received by the owners as trustees for the underwriters. The appellants do not dispute the doc- trine established by *The North of England Insurance Association* v. *Armstrong* (1), nor do they dispute that the underwriters are entitled to any advantage arising out of the goods to the assured; but in the present case the contention of the owners is that the money received by them from the United States Government under the Act of Congress was a pure gift, an act of free bounty, and that it was not paid in respect of any legal right, and was not paid in respect of any portion of the sal- vage. When this cargo was destroyed the owners had no right to recover any- thing from the United States Govern- ment; the Act of Congress did not create for them any right to recover, although

(1) 39 Law J. Rep. Q.B. 81; Law Rep. 5 Q.B. 244.

it constituted a tribunal before which they could advance a claim. The money given by the United States Government was given as though there had been a general subscription to reimburse losers in trade owing to the war; it was not given in respect of the loss of the subject-matter of the insurance. *Randal* v. *Cockran* (2) and *Blaanurpot* v. *Da Costa* (3) do not conflict with this argument, for the circumstances of those cases distinguish them from the present case: the letters of reprisals in the former case were issued for the express purpose of compensating the owners of vessels which had been destroyed, and in the latter, the money paid was held to be part of the salvage. In *Gracie* v. *The New York Insurance Company* (4) the underwriters contested their obligation to pay the amount of the bond, as they alleged there was a *spes recuperandi*; the judgment of Kent, C.J., was that the *spes recuperandi* was too remote, although he held that if thereafter the Government of the United States should recover anything, it would hold that as trustee for the party entitled. Moreover there is no state of facts in which, if the underwriters are entitled to recover, they cannot sue in the name of the assured; whereas if in this case the assured were to sue on behalf of the underwriters, they could only recover by means of a fraud, as, if the true facts were stated to the Court, the suit would be barred by the Act of Congress. The value of the cargo agreed on in a valued policy is not an estoppel for all purposes, but only for the purpose of insurance—*Irving* v. *Manning* (5).

Butt (*Cohen* and *Hollams* with him), for the plaintiffs.—The question is shortly whether this money was paid as a gratuity or not; and if it was not, then whether this right is pursuant to the principle laid down in *The North of England Insurance Association* v. *Armstrong* (1) subrogated to the underwriters, and further, whether, if this be so, the Act of Congress prevents them from recovering the money paid. The rights of underwriters are stated to be, "that where one person has agreed to indemnify another he will, in making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss"—*Simpson* v. *Thomson* (6). It was decided in *Stewart* v. *The Greenock Marine Insurance Company* (7) that to constitute a total loss actual annihilation is not necessary; but that on claiming as for a total loss the assured must give up to the underwriters all benefit and advantage belonging or incident to the property. There is subrogation implied in the contract of insurance, and the implication is that the assured will pay over to the underwriters all moneys received by them. All money that in circumstances similar to these comes into the hands of the assured is salvage, and this money is a sum received in respect of the cargo, so that it is already recovered by the assured, and there is not, as in the case of *Gracie* v. *The New York Insurance Company* (4), a mere shadowy prospect.

Hardy, in reply.

Bramwell, L.J.—I am unable to agree with the opinion of Lord Coleridge, and with that which Lord Justice Baggallay has formed in this case. The matter is short and presents no complication of facts, so that it does not appear to me that there would be any advantage in our postponing our judgment. I do not differ from a word of Lord Coleridge's judgment. He says that two points arise in the case, and that they are—"First, is the value in the policies which have been paid absolutely conclusive in case of actual total loss between the parties to the policy? Secondly, was the payment of their money to the defendants more than a free gift, a pure act of grace on the part of the United States?" I think that a third and a material point arises, which is, whether the payment of this money was a gift which can be held to be a portion of the salvage of the thing insured. It appears to me that this is the

(2) 1 Ves. sen. 98.
(3) 1 Eden, 130.
(4) 8 Johnson, New York Rep. 183.
(5) 1 H.L. Cas. 287.
(6) Law Rep. 3 App. Cas. 279, at p. 284 (Scotch).
(7) 2 H.L. Cas. 159.

question on which our decision must turn. Lord Coleridge deals with the first question, and concludes that, if the awarding of the money in question was a mere act of grace on the part of the United States Government, the action would not be maintainable. He then proceeds: "It is, therefore, no doubt clear that the defendants could have had no legal claim capable of being enforced against the United States in their sovereign character. But it seems to be equally clear, as the result of great authorities both in England and America, that if a country puts a fund of this sort in course of distribution by regular process amongst such of its subjects as are morally entitled to share in the fund, then what their subjects so recover they recover as a right, not perhaps enforceable by law, but yet with such a character of moral equity about it as makes them, in respect of what they so recover, trustees for those who in equity and justice are entitled to it." Now I agree, if I may say so, in substance with that reasoning. I think that, if the money in question had been awarded to the defendants on account of the cargo taken by the *Alabama simpliciter*, it would then have formed a portion of the salvage, and would be within the principles of the cases which have been cited. The principle of those cases is that, if a person receives money given by the Sovereign in compensation for loss, he is bound to hand it over to those who are entitled to the salvage. But I think that this reasoning omits to consider the third question in the case, which is, whether this money was a free gift or whether it was given in the way of salvage. If reference be made to the Act of Congress, it appears to me that the money was not given on account of any insured claim. It says in effect that no claim is to be admitted in respect of which compensation has been received from an insurance company, and that no claim is to be admitted on behalf of any insurance company; that if a person has insured his goods by a valued policy for less than the real value of the goods, he is to receive nothing in respect of the policy, but that if the compensation which he receives from the insurer is not equal to the loss sustained, he is to have an allowance and indemnity in respect of the difference. I am of opinion, therefore, that what the defendants received was not part of the salvage. Suppose the case put in argument, of a subscription, or suppose that a grant was made for the encouragement of the insertion of moderate values in policies, and that a person received from this grant an indemnity in the case of a loss, I do not think that in such a case the money so paid would be part of the salvage. Suppose that these defendants were to apply to the American tribunal, and to say that they were still not indemnified, inasmuch as an English Court had directed them to pay over the money they had received to the insurer, what would happen then? Suppose that a cargo arrived safe after all, and that the owners received the benefit of the full value of the cargo, would the underwriters be entitled, having paid the policy moneys, to recover more than the insured amount?

Suppose that, in the cases cited, proceedings had been taken in the name of the underwriters alleging that they were really entitled, in those cases such an action could have been maintained; but could such an action so brought in this case have been maintained in the United States? Could the underwriters have gone before the Court of Commissioners there? They could not; and in truth this money was not given in respect of the loss, but in respect of an under-insurance, and the distribution of it comes under the maxim *cujus est dare ejus est disponere*.

BAGGALLAY, L.J.—I am unable to agree with the opinion of my colleagues. I think that the judgment and the reasons for that judgment given by Lord Coleridge are right, and I agree with them. If this money was given to the defendants as a mere act of grace on the part of the United States Government then the case on behalf of the plaintiffs would not be well founded; but it appears to me that the circumstances of the present case bring it within the principle of the cases decided by Lord Hardwicke and Lord Northington. In those cases the fund to be distributed was similar in its

origin to that with which we have here to deal. The English Government in those cases and the United States Government in this case could deal with the money as they thought fit; they both, however, determined to distribute it in a certain way. In the case of *Blaauwpot* v. *Da Costa* (3) there was a commission and a distribution under that commission just as in the present case; the money received was considered to be a portion of the salvage and a retribution to the underwriters; the facts seem to me to be the same as here, and I cannot but think the same principle applies in the present case. It is said that what was here received from the United States Government was not paid in respect of anything covered by the insurance, but that it was paid in respect of the difference between the amount for which the cargo was insured and the real value of that cargo. But these policies were valued policies, and on the principle laid down in the case of *The North of England Insurance Association* v. *Armstrong* (1), I think that the insurers are entitled to be paid all that has been recovered in respect of the loss. It is clear that the claim made before the Court of Commissioners was based entirely on the damage done to the ship and cargo, the subject-matter of the insurance. I therefore think that this action is well founded, and that the appeal should be dismissed.

BRETT, L.J.—Having had opportunities during the argument of discussing this point, which is simple, though I do not say it is easy, it does not seem necessary to take time to consider our judgment as I should naturally—Lord Justice Baggallay having a different opinion on this case—wish to do. The money in question was in the first place received by the United States Government from Great Britain under a treaty. The United States Government did not bind itself in any way as to the disposal of that money, and was under no obligation to give any to the defendants or to any persons in a similar position. It may well be that if the United States Government had paid over part of this money to the defendants as a portion of the salvage, or in some way in respect of their loss, the money so paid would belong to the underwriters. The principles laid down in the cases before Lord Hardwicke and Lord Northington might effect that. I doubt whether those decisions were based on the principle that the money then in question was in the hands of the British Government to give as a free gift or to withhold at its pleasure. I think that the principle of those decisions was that the Government had recovered the money for certain persons, and I would venture to add that if those cases were decided on the supposition that the money was in the hands of the Government to be distributed as a free gift, I should be unable to follow them as authorities. If, however, the money in question in the present case was paid as part of the salvage, then those cases would be binding authorities.

I think that the true ground on which our decision should rest is, that this money was in the hands of the United States Government in such a way that the distribution of it to the defendants and other persons was a pure gift, and that it was not paid over as part of the loss sustained by the defendants or as salvage. The Government refused to pay anything in respect of losses covered by insurance; but the Government made a gift to persons like the defendants who had not insured their goods to their full value, and this was done in pursuance of the provisions of the Act of Congress, to which reference has been made. The assured could not recover this money in England, they could only sue—if that be the right word—in the United States before the commissioners appointed for that purpose. In all the English cases the assured has been allowed to recover if he informs the Court that he has been paid and that he sues for the insurers, and the underwriters recovered if they sued in the name of the assured; but this is not so with respect to claims made under this Act in the United States. The assured in such a case would receive nothing if the facts were truly stated, and it appeared that they were really claiming on behalf of the insurers. The

case is more like that put by Lord Blackburn in *Simpson* v. *Thomson* (8). The Act of Congress makes this money to be a pure gift and not salvage, and this appears to me to distinguish the present case from those relied on by the plaintiffs. In my opinion, therefore, this appeal must be allowed.

Judgment reversed and entered for defendants.

Solicitors—Waltons, Bubb & Co., for plaintiffs; Markby, Stewart & Co., for defendants.

[IN THE COMMON PLEAS DIVISION.]

1880. Dec. 10. MANZONI *v.* DOUGLAS.

Negligence—Horse bolting without Assignable Cause.

A horse being driven in a public thoroughfare, suddenly, and from no apparent or assignable cause, bolted, and notwithstanding the efforts of the driver, who was not shewn to be lacking in skill, became totally unmanageable and caused injury to plaintiff:—Held, *that there was no evidence for the jury.* Held, *further, that there was no evidence of negligence for the jury arising from the fact that the horse cast a shoe directly after he bolted, and that the driver did not call out or give any warning.*

Hammack *v.* White (11 Com. B. Rep. N.S. 588; 31 Law J. Rep. C.P. 129) *confirmed.*

This was an action for damages for personal injury to the plaintiff by the alleged negligence of defendant's servant, which was remitted to the Westminster County Court for trial under 30 & 31 Vict. c. 142. s. 10.

The plaintiff was walking along the foot pavement in Cockspur Street, on the 9th of June, 1879, when he was knocked down from behind. He did not hear any one call out or shout.

One Davis, who saw the accident, said that a brougham came from Charing Cross towards the Haymarket at the rate of twelve to fourteen miles an hour. The coachman was doing his utmost, but could not stop the horse, which was galloping. When opposite Waterloo House the horse slipped up and fell over the kerb. Evidence was tendered by the plaintiff as to the state of the horse's shoes, on the ground that to drive a horse with an improper shoe was negligent driving, but was objected to by the defendant's counsel, and rejected by the Judge. A proposed amendment of the statement of claim by inserting the words "or by the negligence of your servant in neglecting to take care that the horse was properly shod," was objected to by the defendant's counsel, and the Judge refused leave to amend.

One Raynes, who did not see the accident, gave evidence of the horse casting a shoe opposite the railway booking-office near Scotland Yard, and another in about three strides. In cross-examination he said that the coachman was doing his utmost to stop the horse, but had no control over it.

It was submitted on behalf of the defendant that there was no evidence of negligence to go to the jury.

The Judge, on the authority of *Hammack* v. *White* (1), nonsuited the plaintiff.

A rule *nisi* having been obtained for a new trial,

Pollard, for the defendant, shewing cause, argued that on the authority of *Hammack* v. *White* (1) and *Cotton* v. *Wood* (2), cited in *Smith* v. *The Great Eastern Railway Company* (3), the nonsuit was right as it lay on the plaintiff to bring some affirmative reasonable evidence of negligence, and that for him to adduce evidence consistent alike with negligence or with no negligence was not enough.

E. Morton Daniel, for the plaintiff, in support of the rule, contended that the cases of *Hammack* v. *White* (1) and *Cotton*

(8) Law Rep. 3 App. Cas. 279, at p. 293 (Scotch).

(1) 11 Com. B. Rep. N.S. 588; 31 Law J. Rep. C.P. 129.

(2) 8 Com. B. Rep. N.S. 568; 29 Law J. Rep. C.P. 33.

(3) 36 Law J. Rep. C.P. 22; Law Rep. 2 C.P. 4.

v. *Wood* (2) did not apply. The former case was decided on the ground that all had there been done to prevent the accident, but there was in this case no evidence to shew what caused the horse to bolt, and when it was bolting there was no warning given to foot passengers, as far as the evidence shewed, by shouting or otherwise giving an alarm. It should therefore have been left to the jury to say if this was negligence. There was some evidence, and that reasonable, of negligence, and therefore that should have been left to the jury—*Bridges* v. *The North London Railway Company* (4). An inference of negligence arises from the horse casting a shoe, and inferences from matters of fact are for the jury. The cases of *Hammack* v. *White* (1) and *Cotton* v. *Wood* (2) do not therefore apply, but if they did they are no longer authorities. In support of this contention the learned counsel cited the following cases: *Mitchi* v. *Alestree* (5), *Christie* v. *Griggs* (6), *Byrne* v. *Boodle* (7), *Scott* v. *The London Dock Company* (8), *Briggs* v. *Oliver* (9), *Kearney* v. *The London, Brighton and South Coast Railway Company* (10) and *Simson* v. *The General Omnibus Company* (11).

DENMAN, J.—I think this nonsuit was right. The first consideration is as to whether the case of *Hammack* v. *White* (1) is still an authority and not overruled. The earlier cases—*Mitchi* v. *Alestree* (5) and *Christie* v. *Griggs* (6)—do not touch the point, as the case in Ventris turned on the plaintiff's knowledge of the wild, unbroken nature of the horse, and on the danger of exercising such an animal in a public thoroughfare; and in *Christie* v. *Griggs* (6) the duty incumbent on the proprietor of a public carriage to afford one reasonably fit for its purpose was the ground of the decision. No case of later date than these two decides that *Hammack* v. *White* (1) is not law. It has been often cited without objection, and often with approval on the part of the Judges. Except the case last cited by the counsel for the plaintiff all the cases deal with inanimate creatures and accidents arising from some mismanagement of them. It was said in the judgment of Erle, C.J., in the case of *Scott* v. *The London Dock Company* (8) that "there must be reasonable evidence of negligence. But where the thing is solely under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen to those who have the management of machinery and use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care." But this was in reference to a case where some bags of sugar slung from a crane above a public thoroughfare fell, from some cause not assigned, and injured a foot passenger. But the two cases differ *in toto*—a bale of goods falling and a horse bolting; and it would require a great deal to make me think that the same principle governs the two, for, to apply the words of Erle, C.J., can it be said that a horse bolting is such an accident as in the ordinary course of things would not occur if those who have the management use proper care? It is impossible to say that horses do not sometimes bolt without any fault on the part of those who have the management of them. That something coming suddenly into a horse's head should render it uncontrollable is only a natural thing, and there need be no misconduct on the part of the driver or rider. There was not a question put as to the bolting being caused by negligence, and I do not think we should stretch the meaning of the words in *Scott* v. *The London Dock Company* (8) to the prejudice of the defendant. The case of *Simson* v. *The General Omnibus Company* (11) is more germane, and on the first blush seems to overrule *Hammack* v.

(4) 43 Law J. Rep. Q.B. 151; Law Rep. 7 H.L. Cas. 213.
(5) 1 Vent. 295.
(6) 2 Campb. 79.
(7) 2 Hurl. & C. 722; 33 Law J. Rep. Exch. 13.
(8) 3 Hurl & C. 596; 34 Law J. Rep. Exch. 220.
(9) 4 Hurl. & C. 403; 35 Law J. Rep. Exch. 163.
(10) 39 Law J. Rep. Q.B. 200; Law Rep. 6 Q.B. 759.
(11) 42 Law J. Rep. C.P. 112; Law Rep. 8 C.P. 390.

White (1); but the judgment is founded on a ground that in no way overrules *Hammack* v. *White* (1), namely, the duty of a "person keeping a public conveyance to provide proper horses, and such as will not endanger his passengers." But that is not this case where the horse of a private person suddenly bolts, without any negligence on the part of the driver. I therefore think that *Hammack* v. *White* (1) is still law. That being so, I think the County Court Judge was right in nonsuiting the plaintiff. The plaintiff in his statement of claim alleges that the brougham was being driven negligently, and injury was in consequence caused to him. The evidence was this: The plaintiff was on the pavement in Cockspur Street and was knocked down by the defendant's horse. When cross-examined he said he heard no one call out. There was evidence of a passer-by that the coachman did all he could to stop the horse; and a witness deposed to the fact that the horse cast a shoe after it had bolted for about twenty yards, so that the evidence of improper shoeing, which was objected to on the part of the defendant, and rightly rejected by the Judge, would, if admitted, have carried the case no further. Looking at the case as a whole, I think there was no evidence of negligence on the part of the driver. As regards the fact, if fact it was, that the coachman did not shout out and warn the plaintiff, this is not alleged as a specific head of negligence, but is only a matter of evidence. But suppose there were no calling out, it is not clearly shewn that the accident was due to that. Calling out would not have averted the accident, and if it would, there was no evidence, beyond the plaintiff's statement that he did not hear it, that there was no shouting. The whole occurrence took place in a few moments, and absence of warning could not, under the circumstances, raise an inference of negligence. We cannot, therefore, distinguish this case from *Hammack* v. *White* (1). The nonsuit therefore was right, and this rule must be discharged.

LINDLEY, J.—I am of the same opinion. The plaintiff was lawfully on the footpath and was knocked down by a horse driven by the defendant's servant in a brougham. The case does not stop there, however, or, if it did, there might be a *prima facie* case of negligence; but it was explained by the evidence for the plaintiff that the defendant's servant had lost all control over the horse which had bolted. The cause of the horse running away is not shewn by the evidence, and I cannot see in that evidence any support of the allegation of negligence. But it is said that negligence must be inferred from the fact that the driver did not call out or give any warning. Surely this cannot, under the circumstances, be construed into evidence of negligence. The man was struggling with the horse and in fear of his own life: he was concentrating his energy on the horse. How could the coolest man be expected to give warning to others in such a case? The casting the shoes is another fact from which it is said negligence should be inferred; but casting a shoe while a horse is running away cannot surely be evidence of negligent driving. It cannot be said, either, that the mere fact of bolting raises a *prima facie* presumption of negligence. Horses run away for all sorts of reasons, and no such inference can be drawn from the mere fact of bolting.

It is said that *Hammack* v. *White* (1) has been overruled, as also *Cotton* v. *Wood* (2), but I find no case expressly overruling them, and the principle laid down by Erle, C.J., in the case of *Scott* v. *The London Dock Company* (8) is not opposed to the principles on which they were decided. The rule should therefore be discharged.

Rule discharged with costs.

Solicitors—Farlow & Jackson, for plaintiff
Meynell & Pemberton, for defendant.

[IN THE COURT OF APPEAL.]
(*Appeal from the Exchequer Division.*)
1880. Nov. 29. } WINSPEAR *v.* THE ACCIDENT INSURANCE COMPANY.*

Insurance — Policy, Construction of — Death or Injury by Accident—Drowning.

A policy of insurance against death or injury by accident contained a proviso that "the insured shall not be entitled to make any claim under this policy for any injury from any accident, unless such injury shall be caused by some outward and visible means of which proof satisfactory to the directors can be furnished"; and that "this insurance shall not extend to . . . . any injury caused by or arising from natural disease or weakness, or exhaustion consequent upon disease, . . . or to any death arising from disease, although such death may have been accelerated by accident."

The insured was seized with an epileptic fit whilst crossing a shallow stream, and fell down in the water and was drowned. He did not sustain any personal injury to occasion death other than drowning:—

Held (*affirming the judgment of the Exchequer Division*), *that the circumstances of the insured's death were not such as to relieve the insurance company from liability within the terms of the proviso.*

Appeal from a judgment of the Exchequer Division on a Special Case.

The action was to recover on a policy of insurance against accident. The following were the material facts stated in the Special Case:—

The plaintiff was the executrix of William Winspear, who effected a policy of insurance, dated the 5th of February, 1879, for 1,000*l.*, with the defendant company. The policy contained a clause "that if at any time before the expiration of one year from the date of this policy, or at any time thereafter whilst the insured shall duly pay the above-mentioned premium, according to the provisions and conditions of this policy, or any increased or decreased premium agreed to be received by the directors, the insured shall sustain any personal injury caused by accidental, external or visible means, within the intention of this policy, and the provisions and conditions thereof, and the direct effect of such injury shall occasion the death of the insured within three calendar months from the happening of such injury, then the funds and property of the company shall be subject and liable to pay to the legal personal representatives of the insured, within three calendar months after it shall have been proved to the satisfaction of the directors of the company that the death of the insured was occasioned as aforesaid, the amount insured under the provisions of this policy."

The policy further contained an agreement by the company to pay a weekly compensation in case the injury to the assured should not prove fatal, and a proviso, of which the material parts are as follows: "Provided further, that the insured shall not be entitled to make any claim under this policy for any injury from any accident, unless such injury shall be caused by some outward and visible means of which proof satisfactory to the directors can be furnished; and that this insurance shall not extend to death by suicide, whether felonious or otherwise, or to any injury caused by or arising from natural disease or weakness, or exhaustion consequent upon disease, or by any medical or surgical treatment, or operation rendered necessary by disease, or to any death arising from disease, although such death may have been accelerated by accident."

Paragraph 4 of the case stated that "whilst the policy was in force—that is to say, on the 26th of May, 1879—the insured, whilst crossing and fording a stream or brook, . . . was seized with an epileptic fit, and whilst in such fit fell down in the said stream or brook, and there and then, whilst suffering such fit, was drowned in the waters of the said stream or brook. The insured did not sustain any personal injury to occasion death other than drowning."

The question for the opinion of the Court was, whether the death happened under such circumstances as to entitle the plaintiff to make a claim under the policy in respect of the death of the insured.

The Exchequer Division gave judg-

* *Coram* Lord Coleridge, C.J.; Baggallay, L.J.; and Brett, L.J.

ment for the plaintiff, holding that the death was occasioned by such an accidental injury as to make the defendant company liable under the policy.

The defendant company appealed.

Cohen and *Gainsford Bruce*, for the company.—The insurance is against injury or death caused by accident, and the question here is, whether the insured's death was so caused. *Trew* v. *The Railway Passengers Insurance Company* (1) decides that death by drowning is an injury caused by accident, and it is admitted that, apart from the proviso, the death was so caused here. But the proviso directly applies to prevent the company from being liable. The injury was "caused by external and visible means," and also "arose from natural disease." It was a death arising from epilepsy, and it is submitted that the proviso does not refer merely to injury caused by disease apart from accident, but expressly refers to cases like the present, where the accident "arises from" the disease.

[LORD COLERIDGE, C.J.—In *Reynolds* v. *The Accidental Insurance Company* (2) death by drowning in shallow water while the insured was in a state of insensibility was held to be caused by accident.]

There was no proviso like this in Reynold's policy, and the case therefore does not apply.

The real, and not the proximate, cause of death is to be looked at in every case. In ordinary language the real cause of death here was the epileptic fit.

They also referred to *Fitten* v. *The Accidental Insurance Company* (3), *Sinclair* v. *The Maritime Passengers Assurance Company* (4), *Smith* v. *The Accidental Insurance Company* (5).

F. O. Crump and *Tarleton*, for the plaintiff, were not required to argue.

(1) 6 Hurl. & N. 839; 30 Law J. Rep. Exch. 317.
(2) 22 Law Times Rep. N.S. 820.
(3) 17 Com. B. Rep. N.S. 122; 34 Law J. Rep. C.P. 38.
(4) 30 Law J. Rep. Q.B. 77.
(5) 39 Law J. Rep. Exch. 211; Law Rep. 5 Exch. 302.

LORD COLERIDGE, C.J.—I am of opinion that this judgment must be affirmed, and upon very plain and short grounds. The statement of facts in the 4th paragraph of the Special Case appears to me a perfectly clear statement that the deceased died from drowning. He was in an epileptic fit no doubt at the time, but still the cause of death was drowning, and that has been decided to be within the words "accidental injury caused by external and visible means." I am of opinion that the injury from which the assured died was clearly one the risk of which the defendants had taken upon themselves under the policy. The only question left is, whether it comes within the exception in the proviso. It is certainly not within the first portion of the proviso. But it is said that the further portion of the proviso exempts the defendants, because that applies to "any injury caused by or arising from natural disease, or weakness, or exhaustion consequent upon disease, or to any death arising from disease." It appears to me that the cause of death, as found in the Special Case, is not within these words. The cause of death was not "injury caused by or arising from a natural disease or weakness, or exhaustion consequent on the same," but it was an injury occasioned by drowning. This portion of the proviso therefore has no application to this case. It is intended to mean what it says—that the company will not pay when the death is caused by or arises from natural disease. Here the death did not arise from such a cause. The judgment is right and must be affirmed.

BAGGALLAY, L.J., and BRETT, L.J., concurred.

Judgment affirmed.

Solicitors—Bird, Moore & Ratcliff, agents for E. T. Ratcliff, Birmingham, for plaintiff; Wynne-Baxter & Rance, for defendants.

[IN THE COURT OF APPEAL.

1881. March 8, 9, 11. } DANFORD *v.* M'ANULTY.*

Practice—Action for the Recovery of Land—Pleading—Rules of Court, 1873, *Order XIX. rule* 15.

Under the Rules of Court, Order XIX. rule 15, *the mere statement by a defendant to an action for the recovery of land that he is in possession, puts the plaintiff to the proof of his case. So held by the Court of Appeal.*

Appeal from the judgment of Stephen, J., at the trial.

Action for the recovery of land.

The statement of claim was, as far as is material, as follows:—

1. Benjamin Badger, late of Birmingham, in the county of Warwick, duly executed his last will, dated the 13th day of November, 1815, and thereby devised five freehold messuages and seventeen other freehold messuages, therein described, and all his real estate, and the rents and profits thereof, to the use of his cousin, Isaac Badger, with remainder in tail male to the heirs of the body of the said Isaac Badger, with like remainder to the heirs of his body, and, in default, to the use of his cousin, Edward Badger, with like remainder to the heirs of his body, and, in default, to the use of such person, being a male, and bearing the surname of Badger, as should be nearest of kin to the testator, and the heirs male of his body, and, in default, to the use of the testator's own right heirs for ever.

The statement of claim then alleged that Badger died, that his will was proved, that the first, second and third devisees died without issue, that a son of an elder brother of Isaac and Edward Badger took possession of the property in question and died without issue, that since his death his trustees had been in possession of the real estate devised by the testator, that the defendant held possession, under the trustees, of part of the said estate, that the testator left an only brother, who died, leaving none but female descendants, from one of whom the plaintiff was descended.

The statement of defence was as follows:—

"The defendant is in possession of the said premises sought to be recovered in this action."

Issue.

At the trial no evidence was offered on either side, and Stephen, J., holding that the *onus* of proof was on the defendant, directed a verdict for the plaintiff.

The defendant appealed.

Mellor and *Dugdale*, for the appellant.—The *onus* of proof is on the plaintiff, for that is the effect of the 15th rule of Order XIX. (1). This defence is like the plea of not guilty, it puts the plaintiff to the proof of his case, for the rule was intended to protect a defendant in possession.

[BAGGALLAY, L.J.—Does it do more than excuse him from stating his title?]

Yes, it is sufficient for him to state the single fact that he is in possession.

Charles and *Graham*, for the plaintiff.—Rule 17 of Order XIX. (1) enacts that every allegation of fact not denied is to be taken as admitted, and none of the allegations of fact of the plaintiff are denied by this statement of defence, so

* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Brett, L.J.

(1) Rules of Court, Order XIX. rule 15: "No defendant in an action for the recovery of land who is in possession by himself or his tenant need plead his title, unless his defence depends on an equitable estate or right, or he claims relief upon any equitable grounds against any right or title asserted by the plaintiff. But, except in the cases hereinbefore mentioned, it shall be sufficient to state by way of defence that he is in possession. And he may nevertheless rely upon any ground of defence which he can prove except as hereinbefore mentioned."

Rule 17: "Every allegation of fact in any pleading in an action, not being a petition or summons, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against an infant, lunatic or person of unsound mind not so found by inquisition."

that the plaintiff's case is admitted, and he need not offer any evidence.

Cur. adv. vult.

BRAMWELL, L.J. (on March 11.)—This case is a curious one. Mr. Justice Stephen construed the rule in favour of the plaintiff. I should have done the same if I had been in his position, and so I understand would Lord Justice Baggallay have done. I may say that construction seems to me to be a reasonable one. I understand the general rule to be this, that a man in possession of premises can say, Here I am and here I stay, make out your case against me and then I will answer and dispose of it. It is like the case of chattel for the recovery of which a person is sued: the defendant does not shew his title but he calls on the plaintiff to prove his title to the chattel. But the other Judges have been enquired of, and they say that the construction put by the appellant on this rule is correct, that the intention of those who prepared the rule was that it should receive the construction contended for by the appellant, and that such a construction has been adopted. We must therefore hold that Mr. Justice Stephen was wrong, that this appeal must be allowed, and that there must be a new trial.

BAGGALLAY, L.J.—I do not dissent. I think that looking at rules 8, 15 and 17 (1) of this order I should be of opinion that Mr. Justice Stephen was right; but it appears that a different view has been taken of the meaning of the rule, and therefore the appeal must be allowed.

BRETT, L.J.—My colleagues have so gracefully yielded that it would be ungracious in me to give reasons, although I think I could give strong reasons why the construction of the appellants should prevail. But in justice to the framers of the rule, who well knew the difficulty of expressing a view in plain English, and Lord Justice Bramwell was one of them, I wish to say that I think strong reasons could be given why the rule was clearly intended to express the view, and that it did express the view, that a mere statement by the defendant that he is in possession puts the plaintiff to the proof of his case.

Appeal allowed.

Solicitors—S. W. Johnson & Son, for appellant; Remnant, Penley & Grubbe, for respondent.

[IN THE COMMON PLEAS DIVISION.]

1881. Feb. 21, 22. } FARMER *v.* MAY.

County Court—Costs of Action remitted under 19 *&* 20 *Vict. c.* 108. *s.* 26—*Rules of Court, Order LV.*

The costs of an action remitted by the Superior Court to the County Court for trial under 19 *&* 20 *Vict. c.* 108. *s.* 26 *are not within the jurisdiction of the County Court. The action remains in the Superior Court; it is remitted to the County Court for trial only, and the power over costs conferred by Order LV. still remains in the Superior Court.*

Appeal from chambers on a summons calling on the plaintiff to shew cause why the taxation of costs should not be reviewed, or why so much of the judgment as related to the costs of an action tried in the County Court should not be struck out.

An action was brought by the plaintiff in the Superior Court in which he claimed 44*l.* for wrongful distress, and the defendant paid 15*l.* into Court. The action was remitted to the County Court for trial under 19 & 20 Vict. c. 108. s. 26, and there tried, when a verdict passed for the plaintiff for the full amount claimed. The defendant being dissatisfied with the trial obtained a rule for a new trial, and the cause was a second time tried in the County Court: it was tried by the Judge of the County Court without a jury, and a verdict passed for the plaintiff for 6*l.* 15*s.* which, together with the amount paid into Court, raised the amount to 21*l.* 15*s.* There was a dispute as to whether anything was said by the County

Court Judge as to the costs, but the Registrar, in the certificate returned to the Superior Court in accordance with form 65 of 19 & 20 Vict. c. 108, stated the result of the hearing in the County Court to be a "verdict for the plaintiff for 6*l.* 15*s.*, with costs."

A summons was taken out by the plaintiff to enter judgment, but was abandoned. The plaintiff next obtained *ex parte* a *fiat* authorising him to sign judgment with costs, and proceeded to taxation of costs. It was objected before the Master that the plaintiff was not entitled to costs and the matter subsequently came before Bowen, J., at chambers, who refused to amend the judgment (1). Appeal was then brought by the defendant to the Divisional Court asking for leave to strike out so much of the judgment as related to costs, and the plaintiff applied by cross summons for judgment with costs.

Robinson, for the plaintiff.
Gore, for the defendant.

Cur. adv. vult.

GROVE, J. (on Feb. 22.)—We took time to consider our judgment because we felt we were deciding a point important with reference to the practice of County Courts.

The nearest case to the present is *Scutt* v. *Freeman* (2), which decides that on the certificate of the Registrar judgment may be signed *simpliciter*, but that case does not touch the question of costs. There appears to be no statute or reported case which decides that the County Court Judge, still less the Registrar, has dominion over the costs of an action remitted to the County Court for trial under 19 & 20 Vict. c. 108. s. 26. A case so remitted belongs *prima facie* to the Superior Court, and the power over costs conferred by Order LV. remains in the Superior Court. The proper mode, therefore, to obtain these costs was for the plaintiff to apply at chambers or to the Superior Court.

Without saying that the County Court Judge may not give an opinion in order to guide the Court, I consider that he cannot, nor can the Registrar decide the question of costs in cases remitted for trial under 19 & 20 Vict. c. 108. s. 26. We hold therefore that the Registrar had no power to make a return adjudging costs to the plaintiff, and we therefore grant the application of the defendant to strike out so much of the judgment as relates to costs.

With regard to the plaintiff's application to sign judgment with costs, we think he has come late, he should have continued his original application for judgment; still we consider he ought to have his costs: he has been the successful party and is substantially entitled to costs, and under Order LV. we give him the costs of the trial in the County Court.

We therefore grant both applications, but without costs of these motions to either party.

LINDLEY, J.—I am of the same opinion; and I will only add that on looking over my notes I find that this point seems to have been decided in a case of *White* v. *Vanderburgh* (3). The County Court there gave judgment for the plaintiff, but said nothing about costs. The defendant took out a summons to set aside the judgment, and the plaintiff made a cross application to sign judgment with costs. The case came before Lord Coleridge and myself, and we held that, though technically in the wrong, the plaintiff was substantially right, and gave him judgment with costs as we have done here.

Judgment accordingly.

Solicitors—C. Harcourt, for plaintiff; Harper, Broad & Battcock, for defendant.

(1) It was now stated that the parties were not represented by counsel at chambers, and that the question whether the County Court Judge had power to grant costs was not brought before Bowen, J.

(2) 46 Law J. Rep. Q.B. 173; Law Rep. 2 Q.B. D. 177.

(3) Not reported.

[IN THE COMMON PLEAS DIVISION.]

1881. Feb. 18. BARBER *v.* STONE.

Solicitor—Negligence—Breach of Duty—Double Retainer—Conflicting Interests.

A employed B as his solicitor in an action against C. The learned Judge on the trial reserved his judgment, intimating that there would be certainly a verdict for A as regarded part of his claim, but as to the balance he would consider the matter. In the interval, and before judgment actually given, D, a former client of B's, consulted him professionally whether he could safely leave in C's possession property bought by him of C, which was nearly all C's property, and on B's advice a bill of sale was executed by C in D's favour. When judgment was given, C filed a petition for liquidation of his affairs, and in consequence of the bill of sale A only received a dividend under the liquidation proceedings on his judgment:*—Held, *on appeal by Special Case, that there was a right of action on the ground of negligence if B acted in ignorance of his duty; or on the ground of misconduct and breach of duty if he were aware of it.

This was an appeal from the judgment of the learned County Court Judge at Tunbridge Wells, by Special Case stated.

The plaintiff claimed 40*l.* damages for negligence, misconduct or breach of duty, and costs (which amounted to 12*l.* 10*s.*) from the defendant under the following circumstances:—

The plaintiff had brought an action in the aforesaid County Court against one Wœrne, and engaged the services of the defendant as his solicitor in that action. On the hearing the learned Judge intimated that he would give judgment on a future day, and that there would certainly be a verdict for part of the plaintiff's claim, but as to the rest he must take time to consider. The case was accordingly adjourned, and during the adjournment Harris, a former client of the defendant, called on the defendant professionally and consulted him as to whether he could safely leave goods in the hands of Wœrne which he had purchased from Wœrne, and which comprised nearly all Wœrne's property. The defendant advised Harris that it would not be safe, and that Wœrne ought to give a bill of sale in order to protect Harris from Wœrne's liabilities. A bill of sale was accordingly executed and duly registered. About four days afterwards judgment was pronounced in the case of *Barber* v. *Wœrne* in favour of the plaintiff for the whole of his claim. Wœrne then filed a petition for liquidation of his affairs, and the plaintiff only obtained a dividend of some 2*s.* 6*d.* in the pound on the amount of his judgment.

Thereupon the plaintiff brought his action against Stone in the County Court, and at the hearing the jury found that there was no negligence, but that there had been breach of duty, and the plaintiff recovered a verdict and judgment for 40*l.* and 12*l.* 10*s.* costs.

The defendant appealed.

Cave (*Baldock Stone* with him), for the appellant, contended that there was no bad faith on the part of the defendant, who had only acted in accordance with his duty to his client when consulted by him as to leaving property in Wœrne's possession, that the plaintiff had not then recovered any judgment, that the defendant was only securing to Harris what was Harris's, and to the plaintiff what was the plaintiff's, and that there was no actionable wrong; that even if there were an actionable wrong, there was no *damnum*, as it was in evidence that Wœrne had given instructions to his solicitor, Shiel, before the bill of sale to take proceedings for liquidation directly judgment should be signed, and therefore the plaintiff would not have got any more than he did. In support of these contentions the learned counsel cited *Addison on Torts*, 4th ed. p. 403; *Comyn's Digest*, "Action on Case for Deceit," p. 5.

Kerans, for the respondent.—It was expressly proved that the object of Harris was to take the things out of Wœrne's possession purposely to avoid this judgment. The form and dates of the sold notes which Harris already had should have put Stone in knowledge of that. There

was no evidence given in reduction of damages. The interests were conflicting, and therefore the same solicitor should not be employed—*Taylor* v. *Blacklow* (1).

GROVE, J.—I am of opinion that the decision of the learned County Court Judge is correct and should be affirmed. The action was brought for negligence, breach of duty and misconduct. The terms are almost convertible, and may be applied to nearly the same kind of acts. If a solicitor take a retainer for one client, and then a retainer for another whose interests are opposed to those of the first, only for the purpose of getting additional fees or to support an old client against a new, this would be breach of duty and misconduct. But it might be that the solicitor did not know that he could not be retained by two clients of opposing interests, which would be negligence. Both misconduct and neglect will support an action.

[The learned Judge briefly recapitulated the facts of the case and then proceeded:]

In all cases the solicitor's duty up to the time of the issue of execution is to safeguard his client's interests, but in this case it would be enough were it only his duty so to act until judgment is delivered. Now Stone was consulted in a matter relating indeed to Wœrne, but the object of that consultation had reference to some action which might affect Barber; and in permitting himself to advise his client so consulting him the defendant was clearly guilty of a breach of duty to Barber. There is nothing to shew that either client was informed that the defendant was acting for both. If he committed this breach of duty in ignorance of what was his duty, it is negligence. It appears manifest that, while retained as possessing certain professional knowledge and skill on behalf of one client, a solicitor cannot rightly accept a retainer to employ that professional knowledge and skill on behalf of another whose interests are opposing. The case of *Taylor* v. *Blacklow* (1), cited by the counsel for the respondent, supports this view. The proposition in *Comyn's Digest* does not go to the same length, because there was there a question of collusion, but in the case of *Taylor* v. *Blacklow* (1) there was no such question. The defendant in that case disclosed defects in the title of the then plaintiff to a person, a former client of his, proposing to lend money to the plaintiff. Chief Justice Tindal, in giving judgment, says, "If the defendant thought he had a conflicting duty towards his several employers it would have been an easy course to deliver back the deeds to the plaintiff and consider his lips sealed with a sacred silence as to the whole of their contents." I cannot feel any reasonable doubt that this is a breach of duty. It is not important for the decision of this case whether there was any intentional wrong, and I do not desire to pronounce as to whether the defendant acted as he did for the sake of obtaining more fees or not. I do not say he did or did not know more of Wœrne's affairs than appears. There was evidence that as regards this bill of sale he said at the meeting of creditors, when asked if he intended to impugn it, "It is not for me to do so as I have acted in the matter." Can there be more evidence of a wrong having been done? He declared himself incapacitated from taking part in anything respecting the bill of sale. He had put himself in that position in derogation of the interest of the man whose solicitor he was. Many other consequences would flow if it were a recognised thing that a solicitor could act for those having opposing interests. For instance, those not parties to the matter in hand might engage solicitors already retained to the prejudice of those whose retainer they hold. This would endanger the interests of justice, and lead to a great deal of fraud. Mr. Cave has suggested instances of solicitors being retained in the interest of more than one person. In the case of bankruptcy it may be convenient, and I am not deciding a case of a solicitor appearing for more than one creditor. Directly, however, there is any clashing of interest it would be his duty to elect for which he would still deem himself retained, and allow the

(1) 3 Bing. N.C. 235; 6 Law J. Rep. C.P. 14.

other to employ another solicitor. If the defendant did not know he ought to have known that the advice asked must be antagonistic to Barber's interest. It is said that he only effected what was right, but a solicitor is not required to seek about for what is the justice of the case, but ought to look to his client's interests. It is also said if the defendant had not advised and prepared the bill of sale some one else would have done so. This argument might be used as an excuse for every kind of irregularity—*e.g.*, adulteration of food by a tradesman. But what has the defendant to do with what another might do? Nor has the argument much bearing on the amount of damages. If the defendant had declined to act we do not know what Harris might have done. Many things might have prevented Harris finding another solicitor who knew the judgment was on the eve of being given against Wœrne. These arguments, therefore, do not shake my conviction that there was a manifest actionable breach of duty on the part of the defendant. As to the amount of the damages I have much doubt. Shiel, who acted as Wœrne's solicitor in the action of *Barber* v. *Wœrne*, endeavoured to get a compromise of 20*l.* His evidence is not satisfactory. Had it been Wœrne's intention really to file his petition, as Shiel said, the petition would have been filed immediately judgment was foreshadowed or when formally given. I don't believe that Shiel had definite instructions to proceed to liquidation. This, therefore, cannot be deemed to be evidence that the plaintiff might not have sustained damage to the whole extent of his claim. In fact, therefore, there was no question on the trial as to the amount of damages. The County Court Judge had before him evidence that there was a fair possibility, but for the act of the defendant, of the plaintiff obtaining the whole amount of his judgment. The judgment must, therefore, be affirmed.

LINDLEY, J.—I am of the same opinion. I quite agree that there is no standard of conduct to suit all cases, but the legal duties of a solicitor to his client are of two kinds: First, positive—that is, to advise him as to his rights and claims, and to prosecute the same by all legal means and methods; secondly, negative, which are no less clear, namely, to abstain from all acts contrary to his positive duties. The case of *Taylor* v. *Blacklow* (1), cited in the argument by the counsel for the plaintiff, shews that there is no justification of the defendant's act, and that a solicitor must not get so entangled as to be in the position of serving two masters. Mr. Cave put some cases in support of his argument on behalf of the petitioner. As regards the case of a solicitor proving in bankruptcy for half-a-dozen creditors, this may very properly be done within certain limits so long as there is no conflict of interests, and the claims are plainly provable, but directly a right to resist the claims arises the solicitor gives up his retainer. Let us see now how the principles laid down apply to this case. Stone's act, in my opinion, was clearly on the wrong side of the line. He prosecutes the case for Barber against Wœrne. On the 4th of February he ascertains that Barber will obtain at any rate a partial judgment. On the 13th of February Barber does obtain judgment for all his claims. The usual course would be to proceed to judgment. But in the meanwhile, between the 4th and 13th of February, he acts for the benefit of another client, and in strict performance of his duty to that other client Harris, but as between him and the plaintiff in a perfectly unjustifiable manner. The consequence is that a bill of sale is executed by Wœrne in favour of Harris, and registered on the 7th of February, and the plaintiff is deprived of the benefit of his judgment. I gather from the case that nothing else but what was subject to the bill of sale could have been taken under a writ of *fi. fa.* Therefore *prima facie* there was a loss to the plaintiff of the whole debt and costs. But it has been suggested that the damages should be reduced, because some one else would have advised Harris in the same way if Stone had not. This, however, is pure speculation, though highly probable. How much less would have been lost is not a question. I, therefore, think that the judgment in the

Court below should be affirmed with costs.

Cave asked leave to appeal.

GROVE, J.—If I had any doubt in this case I should give leave to apply, but as I have none, nor has my brother Lindley either, we must refuse.

Judgment for the plaintiff affirmed with costs. Leave to appeal refused.

Solicitors—Collyer-Bristow, Withers & Russell, for appellants; John Holder, for respondent.

[IN THE COMMON PLEAS DIVISION.]

1881. Feb. 19. } MOSSE *v.* KILLICK.

Church and Clergy — Presentation — Simony—31 *Eliz. c.* 6.

The plaintiff, who was incumbent and patron of a living, put the rectory into repair, and, with the sanction of the bishop of the diocese, let it to a tenant for a certain period. Before the termination of the tenancy the plaintiff resigned the living, and presented the defendant thereto. The presentation was made upon an understanding and agreement between the plaintiff and the defendant that the defendant should, in consideration of having received the benefit of the said repairs, hand over to the plaintiff any rent which he should receive in respect of the said tenancy between the date of the presentation and the termination of the tenancy:—Held, *a simoniacal agreement and the presentation therefore void under* 31 *Eliz. c.* 6.

Demurrer to a statement of claim.

Statement of claim alleged as follows: The plaintiff and the defendant are both clergymen of the Church of England. The plaintiff is vicar of Patcham, near Brighton, in the county of Sussex, where he resides. The defendant (as hereinafter appears) is the present incumbent of the united benefice of Great Smeaton and Appleton, in the diocese of Ripon, and resides at the rectory of Great Smeaton.

Previously and until the month of August, 1878, the plaintiff was the incumbent of the said united benefice, of which he was also the patron.

During the summer and autumn of 1876 the plaintiff, being desirous of repairing the rectory of Great Smeaton, which was at the time very much out of repair, and in order to put himself in funds for that purpose, obtained the sanction of the bishop of Ripon to let the said rectory to a tenant for a certain period, and to devote the profit rent upon such letting to the repairs of the said rectory.

The plaintiff accordingly, in anticipation of such letting, put the rectory into perfect repair at a considerable outlay of money, and then let it to a Major Godman at a yearly rent of 100*l.* up to the 20th of April, 1879, with the intention of recouping himself his said outlay out of the said rent when received by him.

In or about the month of August, 1878, the plaintiff resigned the aforesaid living of Great Smeaton and Appleton, and presented the defendant thereto. At the time of such presentation there was a considerable quantity of fixtures in and upon and about the said rectory, and the said rectory was in a condition of thorough repair.

The said presentation was made upon an understanding and agreement between the plaintiff and the defendant that the defendant should pay the plaintiff for the said fixtures a sum to be fixed by a valuation as between outgoing and incoming tenants; and further, that he, the defendant, should also, in consideration of having received the benefit of the said repairs, and having regard to the scheme sanctioned by the bishop as aforesaid, hand over to the plaintiff any rent which he should receive in respect of the said tenancy of Major Godman between the date of the said presentation and the said 20th day of April, 1879.

After the expiration of Major Godman's tenancy the defendant in due course took possession of the said rectory with the fixtures, and on or about the 9th of July, 1879, the said fixtures were, pursuant to the above arrangement, duly valued at

76*l.* 5*s.* The defendant has refused to pay this sum to the plaintiff, and the said sum still remains wholly unpaid.

The defendant has also received from Major Godman the sum of 67*l.*, being the amount of rent which accrued due from him in respect of his said tenancy between the presentation of the defendant to the living and the expiration of the said tenancy. The defendant has, however, absolutely refused to pay any portion of the said 67*l.* to the plaintiff.

The plaintiff claims 143*l.* 5*s.*, being the total of the said two sums of 76*l.* 5*s.* and 67*l.*

Statement of defence, paragraph 9: The defendant demurs to the statement of claim on the ground that the said alleged agreement was and is simoniacal and void in law, and contrary to the provision of 31 Eliz. c. 6. s. 5.

Gainsford Bruce, in support of the demurrer.—The presentation was made upon an agreement that the defendant should pay over to the plaintiff part of the profits of the benefice; and this is an agreement which is corrupt and void by 31 Eliz. c. 6. s. 5 (1)—*Young* v. *Jones* (2), *Fletcher* v. *Lord Sondes* (3). If one part of a consideration is illegal the whole is void—*Bullen and Leake on Pleading*, 3rd ed. p. 530, *Scott* v. *Gilmore* (4), *Hay* v. *Ayling* (5).

R. O. B. Lane, in support of the statement of claim.—At most it is a collateral agreement, and not the inducement for the presentation. The contract is divisible and can be separated and so applied as not to make the whole bargain corrupt—*Newman* v. *Newman* (6). Simony was unknown to the common law, and it now depends upon 31 Eliz. c. 6, which has defined it to be a corrupt agreement to present—*Barrett* v. *Glubb* (7). Lord Mansfield, in *Young* v. *Jones* (2), seemed of opinion that the word "corrupt" in the statute was an emphatic word, and that if the presentation was pure the resignation was not corrupt; but the rest of the Court were of a contrary opinion, and thought every resignation for money was corrupt.

The agreement was entirely subsidiary to the presentation, and did not act as the motive—see *Wright* v. *Davies* (8).

The right of letting the rectory is given by 1 & 2 Vict. c. 106. s. 59. The defendant, as incoming incumbent, would have had to put the parsonage into repair, and the outgoing incumbent would have had to pay. The facts are perfectly consistent with the assumption that the plaintiff put the rectory into better repair than would be required by the ecclesiastical surveyor; the defendant would have the benefit of this, and would repay the plaintiff by handing over the rent, therefore it would be fair for the outgoing incumbent to obtain repayment from the incoming incumbent.

Gainsford Bruce, in reply.—The Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), would prevent the outgoing incumbent having a right to any claim for excessive repairs, consequently this repayment would be pure gain.

GROVE, J.—I must hold this agreement to be *prima facie* simoniacal. Section 5 of 31 Eliz. c. 6 shews that if the incoming incumbent has agreed to pay anything to the outgoing incumbent or the patron in consideration of the presentation to the living, such payment is *prima facie* simoniacal and corrupt, and the presentation void. I cannot on this statement of claim read this agreement in any

(1) 31 Eliz. c. 6. s. 5: "And for the avoiding of simony and corruption in presentations . . . . of and to benefices . . . . and inductions to the same: Be it further enacted that if any person . . . . shall . . . . for any sum of money, reward, gift, profit or benefit, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant or other assurance, of or for any sum of money, reward, gift, profit or benefit whatsoever, directly or indirectly, present or collate any person to any benefice with cure of souls . . . . or give or bestow the same for or in respect of any such corrupt cause or consideration, that then every such presentation, collation, gift and bestowing, and every admission, institution, investiture and induction thereupon shall be utterly void, frustrate and of none effect at law.

(2) 3 Dougl. 97.

(3) 3 Bing. 501.

(4) 3 Taunt. 226.

(5) 16 Q.B. Rep. 423; 20 Law J. Rep. Q.B. 171.

(6) 4 M. & S. 66.

(7) 2 W. Black. 1053.

(8) 46 Law J. Rep. C.P. 41; Law Rep. 1 C.P. D. 638.

other sense than as an agreement for the incoming incumbent to pay over a sum of money to the outgoing incumbent, to which but for the agreement the incoming incumbent would be entitled by force of law; the words "perfect repair," moreover, do not amount to more than such repairs as by law the outgoing incumbent has to do, and consequently the agreement is without any consideration except that of the presentation to the living. On the whole, therefore, I hold this agreement to be simoniacal, and the presentation void by the statute 31 Eliz. c. 6.

Demurrer allowed (9)

Solicitors—G. W. Barnard, for plaintiff; Cree & Son, agents for Bowes & Hett, Darlington, for defendant.

[IN THE COMMON PLEAS DIVISION.]

1880. Nov. 27. } WATSON *v.* THE GREAT WESTERN RAILWAY COMPANY.

Shorthand Notes of Evidence—Direction as to Costs of.

The Court will in its discretion order the allowance on taxation between party and party of the expense of shorthand notes of evidence at the trial as part of the costs of a rule for a new trial, when such notes are essentially necessary for the disposal of the motion for a rule for a new trial.

This action, tried before Lord Coleridge, C.J., at the Hilary sittings at the Guildhall, in this year, was for damages for injury done to a steam-vessel belonging to the plaintiff which struck on a sunken rock whilst entering the company's lock at Millbay, Plymouth Sound, when in charge of a licensed pilot. The plaintiffs obtained a verdict. A rule *nisi* for a new trial, on the ground that the verdict was against the weight of evidence, was obtained at the ensuing Easter sittings. Cause was shewn against the rule *nisi* on the 6th and 9th of November, and on the 27th judgment was given discharging the rule with costs.

A. L. Smith (*Benjamin* with him) asked for the costs of the shorthand writer's notes of the evidence given at the trial. A special direction is necessary —*Kirkwood* v. *Webster* (1). If asked for at the time judgment is pronounced they will be allowed—*Hill* v. *The Metropolitan Asylums Board* (2). Here till the rule *nisi* was obtained it was not known whether the notes would be wanted.

Phillimore (*J. C. Mathew* with him).—Though doubtless the Court of Appeal, having the matter in its entirety before it, has power under the Judicature Acts, 1873 and 1875, to make such an order, this Court has never pretended to have and has never exercised such a power.

LINDLEY, J.—There is no doubt in my mind as to our having the power to make the order prayed, or that this is the proper stage at which to apply for these costs. The case was of grave importance, and without the aid of shorthand notes the Court could not have come to a satisfactory conclusion on such a mass of evidence as was given at the trial.

LOPES, J.—I am of opinion that this Court has full power to make the order asked for. The plaintiffs, in order to put themselves in a position to resist the rule, reasonably incurred the expense of having shorthand notes taken of the evidence at the trial and of the Judge's summing-up. Nor could it be known that they would be necessary until the rule *nisi* was obtained, and therefore at no earlier stage than this could an application for a special

(9) The question whether the demurrer to so much of the statement of claim as related to the agreement to pay for the fixtures was good, was reserved for further argument, leave being given to the plaintiff to amend. It came on for argument on the 2nd of March, when, on amendment of the statement of claim by inserting the word "removable" before fixtures, and altering the time of the agreement to pay for the fixtures, Mr. Justice Grove held the agreement to be separable from the simoniacal agreement to present, and the action in respect of them to be maintainable. Judgment, therefore, on the demurrer, was ultimately given for the defendant on the question of simony, and for the plaintiff on the question of fixtures.

(1) 47 Law J. Rep. Chanc. 880; Law Rep. 9 Ch. D. 239.

(2) 49 Law J. Rep. C.P. 668.

direction have been made. Still the expense of shorthand notes are not necessarily to be allowed in all cases where they are found to be useful or convenient. This, however, being a peculiar and difficult case, it would have been almost impossible to pronounce a decision without the aid rendered by these notes.

Rule discharged with costs. The expense of the shorthand writer's notes of the evidence and the Judge's summing-up to be allowed as part of the costs of this rule.

Solicitors—Thomas Cooper & Co., for plaintiff; R. R. Nelson, for defendants.

[IN THE QUEEN'S BENCH DIVISION.]

1881. Feb. 25. GOFFIN *v.* DONELLY.

Defamation—Privilege—Parliamentary Committee—Protection of Witness.

A witness summoned to give evidence before a select committee of the House of Commons is privileged as to anything he may say while under examination by the committee, and no action will lie for any slander uttered by him under such circumstances.

This was a demurrer to a paragraph in a statement of defence.

The plaintiff had been headmaster of the United Westminster Endowed Schools, and was also a certificated teacher and lecturer to a science class held at the said schools, the pupils of which were examined from time to time by the examiners appointed by the Committee of the Privy Council on Education. The defendant was the director of the science division of the science and art department of the said committee.

The 10th paragraph of the statement of claim alleged that in July, 1879, the defendant falsely and maliciously spoke and published of the plaintiff as such teacher as aforesaid certain defamatory matter.

Paragraph 7 of the statement of defence, in answer to the above 10th paragraph, alleged that on the 16th of July, 1879, the Commons House of Parliament ordered that a select committee be appointed to enquire into and report upon the circumstances relating to the suspension of the certificate of the plaintiff by the science and art department, and a committee, consisting of members of the said House, was nominated; and it was further ordered that the committee have power to send for persons, papers and records, and that three be the quorum of the committee. Such committee thereupon met from time to time, and made a report to the said Commons House of Parliament, and did all things appertaining to such enquiry. The said committee, in the course of its enquiry, summoned the defendant as a witness, and administered an oath to the defendant and examined him as they lawfully might. The words set out in paragraph 10 of the statement of claim (saving the innuendoes) are extracts from the evidence given by the defendant before such committee in the character of a witness and not otherwise.

Demurrer to the 7th paragraph of the defence on the ground that statements made before a select committee of the House of Commons are not privileged.

Edward Clarke (*English Harrison* with him), in support of the demurrer.—The privilege of witnesses was discussed in *Seaman* v. *Netherclift* (1), but the Court will not extend the rule there laid down as to judicial proceedings to other tribunals. In every judicial enquiry, including Courts martial, the person whose conduct is under consideration has the power of calling witnesses, or may cross-examine those who are called against him. But before a committee of the House of Commons it is different. The committee call such witnesses as they choose. No one but the committee can examine them or cross-examine them, and the statement may be made on oath or not as the committee resolve.

[FIELD, J.—We must look to see on

(1) 45 Law J. Rep. C.P. 798; 46 ibid. 128.

what principle it has been held that witnesses are protected. MANISTY, J.—None of the tests you mention were held necessary in *Seaman* v. *Netherclift* (1).]

The plaintiff had, in fact, no opportunity of challenging the evidence before the committee, and he ought to be allowed as he is anxious to challenge it in a Court of law.

[FIELD, J.—Is there any distinction between this and the military Court of enquiry in *Dawkins* v. *Lord Rokeby*? (2)]

There the plaintiff's conduct was the subject of enquiry, and he could be heard.

The Attorney-General (*A. L. Smith* with him), *contra*.—The bringing of the action is itself a breach of privilege of the House of Commons—see *Parrott's Case* (3). There is also a resolution of the House that all witnesses called before the House or committees of the House are entitled to the protection of the House. Independently of this, on principle such witnesses must be protected. The witness is compelled to attend and to answer, and may be indicted for perjury if he answers falsely—34 & 35 Vict. c. 83.

He was then stopped.

FIELD, J.—I am clearly of opinion that this plea is good, and sets up a perfect answer to the plaintiff's case. He seeks to recover damages for what is a serious slander on him; and it is not unnatural that he should like to have the matter investigated elsewhere than in the committee-room of the select committee of the House of Commons. But as that of which he complains was evidence given by the defendant before such committee, the defendant is entitled to say that he is protected from having such an action brought against him, because he was guilty of no malice in making the statement, but was compelled to make it before the committee of the House, by whom he was duly summoned, and where he was compelled to answer, and to answer according to truth.

Now the law is clearly laid down in *Seaman* v. *Netherclift* (1) in these terms: "A witness in a Court of justice is absolutely privileged as to anything he may say as a witness having reference to the enquiry on which he is called as a witness."

This shews how untenable is the only ground upon which Mr. Clarke rested the distinction which he attempted to draw as to the principle involved in the cases referred to and that in the present case; for whereas he said that it would be contrary to natural justice that a person should be prejudiced by statements made in his absence when he could not dispute or contradict them, it is plain that the plaintiff in *Seaman* v. *Netherclift* (1) had no opportunity of disputing the defendant's allegation as to the forgery.

What is the principle on which a witness is protected in respect of slanders uttered by him in the witness-box? It is because it is for the benefit of the public that he should speak without fear of the consequences. For, although it is important that a person should not speak disparagingly of others in public, yet it is of still greater importance, because of universal public interest, that there should be truth spoken in judicial proceedings.

But this being clear as to proceedings in the ordinary Courts of law, Mr. Clarke relies on the exceptional character of the tribunal before whom the libellous matter in this instance was stated. I cannot, however, see any sound distinction between witnesses in the one case and in the other. That it is to be found in the fact of the absence of the accused is negatived by *Seaman* v. *Netherclift* (1), and also by cases of application made *ex parte* to magistrates.

The House of Commons has to enquire into many subjects with a view to legislation, and among them the department of education is not the least important. Having then appointed a committee before whom witnesses are summoned and compelled to answer, and there being a statute which makes such witnesses liable to the penalties of perjury, the House of Commons has surely constituted a tribunal having all the elements which go to negative the suggestion that a statement made by a witness originated

(2) 45 Law J. Rep. Q.B. 8.

(3) May's Parliamentary Practice, 8th ed. p. 158.

in malice. I think, therefore, that the demurrer fails, and the defendant is entitled to our judgment.

MANISTY, J.—I am of the same opinion. I take it that it was settled conclusively by the House of Lords in *Dawkins* v. *Lord Rokeby* (2), that a statement by a witness not on oath in the course of a military enquiry was entitled to the same privilege as that of a witness upon oath in an ordinary judicial proceeding. It was there held to be inadmissible to give evidence that the statements so made were malicious and untrue. It is *a fortiori*, in my opinion, when a select committee, having power to insist on evidence being given on oath, receives such evidence from a witness whom it has summoned, that such witness is protected. Then there is the additional fact that a statute expressly provides that a witness examined under such circumstances is liable to an indictment for perjury if he speaks falsely.

This, then, was not an actionable slander, and there must be judgment for the defendant with costs.

Demurrer overruled.

Solicitors—Baker & Nairne, for plaintiff; Hare & Fell, agents for the Solicitor to the Treasury, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1880. Nov. 20, 27. } CLARK (*appellant*) *v.* THE ASSESSMENT COMMITTEE OF THE ALDERBURY UNION AND OTHERS (*respondents*).

Poor-Rate — Refreshment Contractor— Quarter Sessions—Appeal against Assessment—Admissibility of Evidence—Annual Value less than Rent—Case stated by Sessions—Costs—Removal of Order without Certiorari — Summary Jurisdiction Act, 1879 (42 & 43 *Vict. c.* 49), *s.* 40—*Rules of Court*, 1880—*Order LXII.*

[For the report of the above case, see 50 Law J. Rep. M.C. 33.]

[IN THE COURT OF APPEAL.]

(*Appeal from the Queen's Bench Division.*)

1880. Nov. 3. 1881. Feb. 5. } BOWEN *v.* HALL AND OTHERS.*

Master and Servant—Contract—Breach —Contract to render Exclusive Personal Service—Action for procuring Breach of Contract with Employer, when Maintainable.

F. contracted to make and glaze bricks, &c., at agreed prices, for the plaintiff exclusively, during a period of five years :— Held (*by* LORD SELBORNE, L.C., *and* BRETT, L.J., LORD COLERIDGE, C.J., *dissenting*), *that, the contract being for exclusive personal service, the plaintiff could maintain an action against the defendant for maliciously procuring F. to break it, notwithstanding that the strict relation of master and servant did not exist between the plaintiff and F.*

Judgment of the Queen's Bench Division affirmed.

Lumley *v.* Gye (2 E. & B. 216; 22 Law J. Rep. Q.B. 463) *followed.*

Appeal from a judgment of the Queen's Bench Division.

The action was to recover damages as against the defendants, Hall and Fletcher, for wrongfully enticing and keeping away the defendant Pearson from the plaintiff's employment, and for wrongfully receiving and harbouring him after notice that he was the plaintiff's servant. The plaintiff also claimed an injunction to restrain the defendants, Hall and Fletcher, from employing Pearson to work for them at making and glazing bricks.

As against the defendant Pearson the plaintiff claimed an injunction to restrain Pearson from engaging himself to work for Hall and Fletcher until a contract of service entered into by him with the plaintiff was at an end.

The action was tried before Manisty, J., and a jury, at the Staffordshire Summer Assizes, 1879, when the following facts were proved in evidence or admitted :—

The plaintiff was a brick manufacturer,

* *Coram* Lord Selborne, L.C.; Lord Coleridge, C.J.; and Brett, L.J.

carrying on business at the Clattershall Firebrick Works, in Staffordshire. The defendant Pearson was a bath and brick-maker, and in June, 1877, he entered into a written agreement with the plaintiff, as follows:—

"Clattershall Firebrick Works, Stourbridge,
"June 18, 1877.

"I, George Pearson, of Stamber Hill, near Stourbridge, hereby agree and undertake, for the consideration of the prices below named, to find all labour for the whole manufacture in a workmanlike manner of best quality white glazed bricks and baths (with exception of hooping the baths and preparing the clay mass), in such quantities as you require and when you require, and deliver anywhere they may be required, on the above premises, the said quality to be quite equal to sample supplied and marked ——, and the said prices to be subject to the standard prices of the trade for the manufacture of the same. [Here followed a list of prices for bricks and baths.]

"I also agree to find body and glaze for baths at 2*s.* each.

"I also agree to load carefully into trucks, when required, bricks at 1*s.* 6*d.* per 1,000. Baths, packed, loaded and fixed into trucks, at 6*d.* each; also to do any day work when required at 5*s.* per day of nine hours.

"I also agree not to engage myself to anyone else for a term of five years.

"Terms of Payment.

"Fifty per cent. of the cost of making, to be paid when the goods are in the kiln, and the remainder to be paid when the goods are delivered on the bank.

"I, Edward Bowen, do hereby agree to the foregoing conditions, also to supply clay for the manufacture of the said goods in a proper state, also to find all materials (with the exception of body and glaze) and tools, and not engage anyone else for the same work for a term of five years.

"(Signed) Edward Bowen.
George Pearson."

It was alleged on behalf of the plaintiff that the defendant Pearson had peculiar skill in the manufacture of the white glazed bricks and baths mentioned in the agreement, and that he with a few others was possessed of a secret in respect to their manufacture which made his services of peculiar value.

The defendant Hall was a manufacturer of white glazed bricks and baths in the neighbourhood, and the defendant Fletcher was his manager.

In May, 1878, Hall and Fletcher, as was alleged by the plaintiff, induced Pearson to leave the plaintiff's service, and make for Hall glazed bricks and baths such as he had contracted to make for the plaintiff.

Field, J., in September, 1878, granted an *interim* injunction in the terms claimed against all the defendants.

At the trial, Manisty, J., held that there was no evidence to support the plaintiff's claim against Hall and Fletcher, and directed a verdict to be entered for them. The learned Judge also thought that there was no reason for granting a perpetual injunction against Pearson, as he had not acted or threatened to act contrary to the *interim* injunction.

The plaintiff obtained a rule *nisi* in the Queen's Bench Division for a new trial against all the defendants. On argument, the Queen's Bench Division made the rule absolute against Hall and Fletcher, but discharged it as regarded Pearson.

The defendants Hall and Fletcher appealed from the order for a new trial of the Queen's Bench Division, and the plaintiff appealed from the order discharging the rule for a new trial in respect of the defendant Pearson.

Jelf (*J. O. Griffits* with him), for the defendants Hall and Fletcher; and *A. T. Lawrence*, for the defendant Pearson.—The contract is not one of personal service by Pearson, so as to bring this case within the decision in *Lumley* v. *Gye* (1). Pearson could as well have performed his agreement by procuring some one else to execute the work, and, if the construction is that Pearson was bound not to engage himself to anyone else, although the plaintiff failed to find him work under the contract, it is in restraint of trade, and void. There is no evidence of "enticing" or "harbouring" against Hall and Fletcher. If the contract is within *Lumley* v. *Gye* (1), it is submitted that

(1) 2 E. & B. 216; 22 Law J. Rep. Q.B. 463.

udgment of Coleridge, J., in that is right, and should be followed by Court. With respect to Pearson, ontract is of such a nature that a of equity would not grant a per- l injunction against him. Damages w would amply compensate the iff for the alleged breach. There evidence that Pearson ever refused nal supervision under his contract. ie Court thought there was evidence ie jury against all the defendants, equested the plaintiff's counsel to e their argument to the questions with respect to the decision in y v. *Gye* (1).

Matthews (*Anstie* with him), for the iff.—First, it is contended that under ontract the strict relation of master ervant existed between the plaintiff he defendant Pearson, and therefore laintiff is entitled to maintain his . See *Ex parte Gordon* (2), where ract similar to the present was held ate the relationship of master and at between the parties to it.

ondly, if the strict relationship of r and servant did not exist, the ct was one for personal service, ie case is within *Lumley* v. *Gye* (1), is sufficient to rely on the judg- of the three Judges who formed the ity of the Court in that case.

ie Court invited counsel to furnish nces to any authorities subsequent *nley* v. *Gye* (1), and bearing on the decided in that case.

following is a list of the authorities which the Court was afterwards hed, namely, *Evans* v. *Walton* (3), v. *The Stockton Waterworks Com-* (4), *Haskins* v. *Royster* (5), *Burgess rpenter* (6), *Bixby* v. *Dunlap*, and t the end of that case (7), *Bryan te* (8), and *Walter* v. *Cronin* (9).

Cur. adv. vult.

5 Law J. Rep. M.C. 12.
6 ibid. C.P. 307; Law Rep. 2 C.P. 615.
4 Law J. Rep. Q.B. 139; Law Rep. 10 3.
6 Amer. Rep. 780.
6 ibid. 643.
2 ibid. 475.
4 Georgia, 328.
07 Mass. 555.

LORD COLERIDGE, C.J.—In this case, as far as regards the defendant Hall, I am sorry to be obliged to differ from the Lord Chancellor and from my brother Brett. The facts are undisputed, and I understand that all the members of the Court are agreed that the relation of master and servant did not, in the strict sense of the word, exist between the plaintiff and the workman whom the defendant induced to break his contract. That being so, the point is neatly raised, whether the opinion of the majority of the Judges or the opinion of the dissentient Judge in the case of *Lumley* v. *Gye* (1) should prevail in a Court which is not bound by the decision in that case. I am of opinion that, as we are not bound by it, we ought to overrule it.

I believe, if it is not admitted, at least it is the fact, that *Lumley* v. *Gye* (1) stands alone. Cases more or less analogous to it are no doubt cited in the judgments of the judges, relied upon as authorities by the majority, but, in my opinion, distinguished successfully by the dissentient Judge. Since its decision I cannot find that its authority has ever been so acknowledged as to be followed in any decided case which has found its way into the reports. From its nature it cannot be a very common form of action, and, though no doubt it is quite fair to say that this may reasonably account for the bareness of the reports, it ought also in fairness to take away any weight from the circumstance that the case of *Lumley* v. *Gye* (1) has stood so many years in the books without being in terms questioned or overruled. Unfavourable observations have been made upon it; and, at least in some text-books, where it is treated as an authority, it is so treated with the qualification of a "*Semble.*" Further, it has certainly not had the unanimous assent of the profession. The three Judges who decided it, and my two colleagues here, are no doubt lawyers entitled to the highest respect; but there have been great lawyers who are well known to have thought that it was wrongly decided. I may mention in particular Mr. Justice Willes—no doubt the counsel who argued unsuccessfully in the case—but one of the greatest jurists of this or any other time.

This state of things, I conceive, leaves me free to express here what has always been my own opinion, namely, that an action does not, and ought not to, lie against a third person for maliciously and injuriously enticing and procuring another to break a contract in a case where the relation of master and servant in the strict sense does not exist. I do not propose to state at length my reasons for this opinion. I could only recite the cases and restate the arguments of Sir John Coleridge in *Lumley* v. *Gye* (1). I agree with my brother Brett that the conflicting views are stated as well as they can be stated by the Judges who respectively entertained them in that case, and that there is really no more to be said about it. The question is, With which view do you agree? and I have said, I differ from the majority. Only one independent observation occurs to me to make. It is, I believe, admitted that if a man maliciously endeavours to persuade another to break a contract, but fails in his endeavour, the malicious motive is not in itself a cause of action. It is, I believe, also admitted, except by Sir William Erle, whom I think no one has ever followed on this point, that if a man endeavours to persuade another to break his contract, and succeeds in his endeavour, yet, if he does this without what the law calls malice, the damage which results, however great, is not in itself a cause of action—I mean, of course, a cause of action against him. But if the damage, which is not in itself actionable, be joined to a motive which is not in itself actionable, the two together form a cause of action. This seems a strange conclusion, but I am reminded of the analogies of libel and conspiracy, in both of which it is said that malice makes that same thing actionable, which without it would not be so. I venture to think that in this there is a fallacy. In the instance of libel there is not even an apparent parallel, except in cases of *prima facie* privilege. A statement, in itself defamatory, made deliberately and intentionally, is, I apprehend, a ground of action, however pure and exalted be the motive of him who makes it. The case of privilege is an exception to the general law. A statement that is defamatory and untrue, and which may do irreparable damage, is yet protected under certain conditions, on the ground that it is better for the general good that individuals should occasionally suffer, than that freedom of communication between persons in certain relations should be in any way impeded. But the freedom of communication which it is desired to protect is honest and kindly freedom. It is not expedient that liberty should be made the "cloke of maliciousness," and in such a case the general law applies. It is not, I think, accurate to say that the malice makes the statement actionable. Deliberate and intentional defamation is always actionable; and the law implies that a man means what he does, save that under peculiar and exceptional circumstances the law will not make the implication which it makes in all others.

So, too, in conspiracy: the gist of the civil action, as of a criminal offence, is the act of conspiracy by two or more minds to bring about certain ends by certain means. It is true that each separate conspirator might not in some instances be actionable, nor indictable, for attempting to do, or even for doing, with the utmost malice, what he becomes actionable or indictable for conspiring to do with others. But here, too, I conceive that from the act of conspiring to bring about the unlawful end, or to use the unlawful means, the law implies that malice which is necessary in law to found the action or support the indictment. If, therefore, the suggested analogies be accurately looked at, I think with all deference they turn out to be no analogies at all. I do not know, except in the case of *Lumley* v. *Gye* (1), that it has ever been held that the same person, for doing the same thing, under the same circumstances, with the same results, is actionable or not actionable, according to whether his inward motive was selfish or unselfish in what he did. I think the enquiries to which this view of the law would lead are dangerous and inexpedient enquiries for Courts of justice: Judges are not very fit for them, and juries are very unfit. I think that *Lumley* v. *Gye* (1) should be overruled, and that this action as against the defendant Hall is not maintainable. As to the other defendant, Pearson, I agree with the rest of the Court.

TT, L.J.—In this case we were of
n at the hearing that the contract
ne for personal service, though not
hich established strictly for all pur-
the relation of master and servant
en the plaintiff and Pearson. We
of opinion that there was evidence
tify a finding that Pearson had been
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ct of service, that he had broken it,
ad thereby in fact caused some in-
o the plaintiff. We were of opinion
the act of the defendants was
with knowledge of the contract
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the defendants at the expense of
laintiff; was done from a wrong
e, and would therefore justify a
g that it was done in that sense.
remained nevertheless the question
ier there was any evidence to be
a jury against the defendants Hall
letcher, it being objected that Pear-
vas not a servant of the plaintiff.
ase was accurately within the autho-
f the case of *Lumley* v. *Gye* (1). If
ase was rightly decided the objec-
n this case failed. The only ques-
hen, which we took time to consider
whether the decision of the majority
Judges in that case should be sup-
l in a Court of error. That case
so elaborately discussed by the
d Judges who took part in it that
more can be said about it than
ier, after careful consideration, one
rather with the judgments of
ajority, or with the most careful,
d and able judgment of Sir John
dge. The decision of the majority
e seen on a careful consideration of
judgments to be founded upon two
s of reasoning: First, that wherever
does an act, which in law and in fact
ongful act, and such an act as may, as
ral and probable consequence of it,
ce injury to another, and which in
rticular case does produce such an
r, an action on the case will lie. This
proposition to be deduced from the
of *Ashby* v. *White* (10). If these
tions are satisfied, the action does
ie less lie because the natural and
probable consequence of the act complained of is an act done by a third person, or because such act, so done by the third person, is a breach of duty or contract by him, or an act illegal on his part, or an act otherwise imposing an actionable liability on him. It has been said that the law implies that the act of the third party, being one which he has freewill and power to do, or not to do, is his own wilful act, and therefore is not the natural or probable result of the defendant's act. In many cases that may be so, but if the law is so to imply in every case, it will be an implication contrary to manifest truth and fact. It has been said that if the act of the third person is a breach of duty or contract by him, or is an act which it is illegal for him to do, the law will not recognise that it is a natural or probable consequence of the defendant's act. Again, if that were so held in all cases, the law would in some refuse to recognise what is manifestly true in fact. If the judgment of Lord Ellenborough in *Vicars* v. *Wilcocks* (11) requires this doctrine for its support, it is, in our opinion, wrong. We are of opinion that the propositions deduced above from *Ashby* v. *White* (10) are correct. If they be applied to such a case as *Lumley* v. *Gye* (1), the question is, whether all the conditions are by such a case fulfilled. The first is that the act of the defendants which is complained of must be an act wrongful in law and in fact. Merely to persuade a person to break his contract may not be wrongful in law or fact, as in the second case put by Sir John Coleridge (12). But if the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act if injury ensue from it. We think that it cannot be doubted that a malicious act, such as is above described, is a wrongful act in law and in fact. The act complained of in such a case as *Lumley* v. *Gye* (1), and which is complained of in the present case, is therefore, because

(10) 1 Sm. L.C. (8th ed.) 264.

(11) 2 Sm. L.C. (8th ed.) 553; 8 East, 1.
(12) 3 E. & B. at p. 247.

malicious, wrongful. That act is a persuasion by the defendant of a third person to break a contract existing between such third person and the plaintiff. It cannot be maintained that it is not a natural and probable consequence of that act of persuasion that the third person will break his contract. It is not only the natural and probable consequence, but by the terms of the proposition, which involves the success of the persuasion, it is the actual consequence. Unless there be some technical doctrine to oblige one to say so, it seems impossible to say correctly in point of fact that the breach of contract is too remote a consequence of the act of the defendant. The technical objections alluded to above have been suggested as the consequences of the judgment in *Vicars* v. *Wilcocks* (11). But that judgment, when so used or relied on, seems to us to be disapproved of in the opinions given in the House of Lords in *Lynch* v. *Knight* (13), and seems to us, when so used, to be unreasonable. In the case of *Lumley* v. *Gye* (1), and in the present case, the third condition is fulfilled, namely, that the act of the defendant caused an injury to the plaintiff, unless again it can be said correctly that the injury is too remote from the cause. But that raises again the same question as has been just discussed. It is not too remote if the injury is the natural and probable consequence of the alleged cause. This is stated in all the opinions in *Lynch* v. *Knight* (13). The injury is in such a case, in law as well as in fact, a natural and probable consequence of the cause, because it is in fact the consequence of the cause, and there is no technical rule against the truth being recognised. It follows that in *Lumley* v. *Gye* (1), and in the present case, all the conditions necessary to maintain an action on the case are fulfilled.

Another chain of reasoning was relied on by the majority in *Lumley* v. *Gye* (1), and powerfully combated by Sir John Coleridge. It was said that the contract in question was within the principle of the Statute of Labourers; that is to say, that the same evil was produced by the same means, and that as the statute made such means, when employed in the case of master and servant, strictly so called, wrongful, the common law ought to treat similar means employed with regard to parties standing in a similar relation as also wrongful. If in order to support *Lumley* v. *Gye* (1) it had been necessary to adopt this proposition, we should have much doubted, to say the least. The reasoning of Sir John Coleridge upon the second head of his judgment seems to us to be as nearly as possible, if not quite, conclusive. But we think it is not necessary to base the case upon this latter proposition. We think the case is better supported upon the first and larger doctrine; and we are therefore of opinion that the judgment of the Queen's Bench Division was correct, and that the principal appeal must be dismissed.

LORD SELBORNE, L.C.—There was also a cross appeal by the plaintiff against the defendant Pearson, who succeeded before the Queen's Bench Division in getting the rule for a new trial discharged or refused as to himself, while it was made absolute as to the other defendants.

Pearson was the workman, who, having a special knowledge or skill in the glazing of bricks, which gave a peculiar and exceptional value to his services, contracted with the plaintiff to work for him exclusively, if required so to do, during a certain period of time (the plaintiff being reciprocally bound to employ no other person in the same kind of work during the same period), and was afterwards induced by the other defendants to break that contract.

The relief asked against him in the action was injunction. An *interim* injunction was granted before the trial, and the case went down for trial against all the defendants at the same time, and upon the same issues of fact. The effect of leaving the verdict to stand in Pearson's favour would be to entitle him to judgment in the action, which cannot be right if his contract with the plaintiff was broken in the manner alleged; and if, upon the evidence given at the trial, that question of fact could properly be now determined in Pearson's favour, it is impossible that, upon the same evidence, it

(13) 9 H.L. Cas. 577.

could also be right to order a new trial against the other defendants.

We think, therefore, that the plaintiff's appeal must be allowed, and that there ought to be a new trial as to all the defendants. But as, when the proper time comes to give final judgment, the consequences of a verdict for the plaintiff will not necessarily be the same as to Pearson and as to the other defendants, we think that the Judge at the trial ought to give such directions to the jury as will enable the Court, if the plaintiff should succeed, to deal with the particular case of this defendant as may be just. For this purpose they ought to be directed, in the event of a verdict for the plaintiff, to find specially the amount of damages which they think ought to be awarded against Pearson—first, in the event of the Court thinking his case a proper one for an injunction and for damages; and, secondly, in the event of the Court thinking it a proper case for damages only, and not also for an injunction. (See Lord Cairns's Act (21 & 22 Vict. c. 27. s. 2), and the Judicature Act of 1873 (36 & 37 Vict. c. 66. ss. 24 (sub-s. 1) and 76).) The cases of *Hills* v. *Croll* (14), *Dietrichsen* v. *Cabburn* (15) and *Lumley* v. *Wagner* (16), and the authorities in equity as to covenants in restraint of trade within certain limits of time or place, may possibly require to be considered before the case as to Pearson (in the event of a verdict being found against him)is finally disposed of.

Appeal of the defendants Hall and Fletcher dismissed. Appeal of the plaintiff allowed.

Solicitors—Smiles & Co., agents for Prescott, Stourbridge, for plaintiff; Brownlow & Howe, agents for Harwards, Shepherd & Mills, Stourbridge, for defendants.

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(14) 2 Philli. 60; 1 De Gex, M. & G. 627 *n*; 14 Law J. Rep. Chanc. 444.

(15) 2 Philli. 52.

(16) 1 De Gex, M. & G. 604, 627; 21 Law J. Rep. Chanc. 898.

[IN THE EXCHEQUER DIVISION.]

1881. March 7. } M'MAHON *v.* FIELD.

Contract—Measure of Damages—Remoteness.

The defendant contracted to find stabling for the horses of the plaintiff, a horse dealer, during the fair at R. The plaintiff sent some horses to the stables, but the defendant turned them out, and while going to other stables they caught cold and were thereby depreciated in value:—Held (*upon the authority of* Hobbs *v.* The London and South Western Railway Company, 44 Law J. Rep. Q.B. 49; Law Rep. 10 Q.B. 111), *that damages for depreciation so caused were too remote, and could not be recovered.*

Case heard on further consideration.

The plaintiff was a horse dealer, residing in Ireland. The defendant was an innkeeper at Rugeley, who had contracted to provide stabling for twelve horses during the fair to be held at Rugeley, on Monday, the 1st of May, 1880, and the following days. The plaintiff sent nine horses to Rugeley on the day appointed, which were put into the defendant's stables, but shortly afterwards were turned out and ultimately taken to stabling outside Rugeley. This was an action for damages, occasioned by the defendant's breach of contract in not finding stabling for the plaintiff's horses.

The statement of claim alleged that the plaintiff's horses were kept standing exposed to the weather while he was engaged in finding stable accommodation for them. That through such exposure some of the horses caught cold. The plaintiff claimed damages in respect of loss of market and depreciation consequent on his horses catching cold, and also in respect of the expense he was put to in finding other stabling.

The action was tried at the Chester Winter Assizes, January, 1881. The jury found in answer to questions put to them by the Judge, first, that there had been a breach of contract; second, that the cold in the plaintiff's horses was the result of the defendant's breach of contract; third, that the plaintiff was entitled to 50*l.*

damages in respect of the loss consequent upon the cold in the horses; fourth, that the defendant knew that the plaintiff hired the stables for the purpose of his business as a horse dealer at the horse fair at Rugeley, and that the plaintiff would not be able to obtain other stables in Rugeley equally suitable for his business; and, fifth, that the plaintiff was entitled to 25*l.* damages in respect of loss consequent upon his not having the use of the defendant's stables for the time of the fair.

The question whether the damages assessed by the jury in respect of loss consequent on the cold caught by the horses was or was not too remote, was reserved for further consideration in London, and was now argued.

McIntyre and *Marshall*, for the plaintiff, distinguished the case of *Hobbs* v. *The London and South Western Railway Company* (1), relied on by the defendant at the trial, and argued that in this case it was reasonable that the parties at the time of contract should have contemplated that such loss as had happened might result from a breach of the contract. They cited *Hadley* v. *Baxendale* (2), *Sneesby* v. *The Lancashire and Yorkshire Railway Company* (3), *Wilson* v. *The Newport Dock Company* (4), *Smeed* v. *Foord* (5) and *Burrows* v. *The March Gas Company* (6).

B. T. Williams and *Higgins*, for the defendant, were not called on.

FRY, J.—The jury have found, first, that there was a breach of agreement; secondly, that the cold in the plaintiff's horses was the result; and they have assessed damages in respect of that at 50*l.* They have necessarily and naturally not found whether or not the cold was the result of breach of contract alone. It is for me to consider how far it is the natural or immediate result, and whether it is not too remote. If the question had been free from decision I should probably have held that those who break a contract must take the consequences of that breach, and an accident which happens after that and concurs with it in producing loss is not an excuse for or release from the consequences.

That does not appear to be the law. The case of *Hobbs* v. *The London and South Western Railway Company* (1) has been pressed upon me, and I am unable to find any practical distinction between that case and the present. There the illness of the plaintiff's wife was the result in the first place of breach of contract by the defendant; in the second place, of the physical condition of the plaintiff's wife; and, in the third place, of the physical state of the night in which she had to take a walk. In the present case the loss through the horses catching cold was the result, in the first place, of the breach of contract; in the second place, of the physical condition of the horses; and, in the third place, of the state of the weather. Further than that, if I examine the judgments of the learned Judges who were present, I find that case is substantially the same as this. There the Lord Chief Justice, having just referred to other accidents that might have taken place on the road home, said, "In either of those cases the injury is too remote. I think that is the case here: it is not the necessary consequence, it is not even the probable consequence, of a person being put down at an improper place, and having to walk home, that he should sustain either personal injury or catch cold. That cannot be said to be within the contemplation of the parties so as to entitle the plaintiff to recover, and to make the defendants liable to pay damages for the consequences." Now if that is the true exposition of the law, it seems to me I am bound to find that it is not the necessary or probable consequence of the horses being turned out of the stables, that in going to neighbouring stables they should catch cold. There was no reason for supposing that the horses would be particularly susceptible to catch cold at the time.

(1) 44 Law J. Rep. Q.B. 49; Law Rep. 10 Q.B. 111.
(2) 23 Law J. Rep. Exch. 179; Law Rep. 9 Exch. 341.
(3) 43 Law J. Rep. Q.B. 69; 45 ibid. Q.B. 1; Law Rep. 9 Q.B. 26; ibid. 1 Q.B. D. 42.
(4) 35 Law J. Rep. Exch. 97; Law Rep. 1 Exch. 177.
(5) 1 E. & E. 602; 25 Law J. Rep. Q.B. 178.
(6) 39 Law J. Rep. Exch. 33; Law Rep. 5 Exch. 67.

rule is further illustrated by what by Mr. Justice Archibald in the se: "With regard to what might result of the walk home, the wet the condition of health, the state plaintiff herself, all those things ot have been in the contemplation parties when they made the con- If that be the sound view of the lso am bound to hold that there t in contemplation of the parties ime of the contract the particular m of the horses or the existence nd when the horses were turned

low that case, because it is an au- , not because it is satisfactory to nd. Therefore I should be very the case were taken to the Court eal, and the Court of Appeal would at I am wrong.

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s—Hamlin & Grammer, agents for J. P. right, Chester, for plaintiff; Paterson, & Bloxam, agents for R. Armishaw, ey, for defendant.

THE COMMON PLEAS DIVISION.]

). } CORRY v. THE GREAT WESTERN RAILWAY COMPANY.

ways Clauses Consolidation Act, 8 & 9 *Vict. c.* 20), *s.* 68—*Liability npany to fence off Adjoining Land.*

plaintiff was tenant from year to year in land, part of which was acquired defendant railway company under statutory powers. The railway com- greed with the plaintiff's landlord consideration of a certain sum to be y the company to him, the landlord waive all his right to accommodation including the obligation imposed by to fence off the land occupied by ntiff from the railway. A fence, ng of posts and rails, a ditch and a t hedge, were, however, put up by endants between their land and that d by the plaintiff, but the defendants ed to keep the same in good repair.

In consequence of this neglect, a cow belonging to the plaintiff fell into the ditch and was killed:—Held, *that the agreement between the landlord and the company did not avail to take away the statutory obligation on the company to fence for the benefit of the occupier, and that the death of the cow being due to the state of non-repair of the post and rails the company were liable.*

This was a case stated by the learned Judge of the County Court at Yeovil, of which the facts were as follows:—

The plaintiff, tenant from year to year to John Gooden of a farm called Lower Farm, sued the defendants for damages for the loss of a cow belonging to him caused by the dangerous state of a certain ditch of the defendants' separating the railway of the defendants' from land in the occupation of the plaintiff. This ditch was made by the defendants at the time of the construction of their railway, at which time the plaintiff was tenant to John Gooden, and had till within three years of the date of the accident, but not since, been cleared out by them from time to time. At the time of the accident it was in a dangerous and defective state, and the plaintiff's cow was found dead therein on the 20th of July, 1879, its death being the result of injuries received by it owing to the defective and dangerous state of the ditch. The defendants on the trial tendered in evidence a conveyance from Gooden to the defendants of the land required for their railway at the spot in question, and also a deed of release accepting a certain sum in compensation for the right to have all fences, &c., kept in repair by the defendants. The Judge refused to admit these two deeds, but in the Special Case it was provided that either party was to be at liberty to refer to the conveyances and release, as well as to any of the special Acts relating to the defendants' railway. The Judge gave judgment for the plaintiff on the ground that the defendants having made the ditch for the purposes of their railway, and having been in possession of it ever since, were bound to fence and maintain it in such a manner that it should not be dangerous to cattle using the adjoining land.

R. S. Wright, for the defendants.—There being no obligation on the company, apart from prescription, which is not here alleged, except that imposed by the statute, to fence off the plaintiff's land, the proviso in section 68, sub-section 1, enures to the benefit of the defendants, as by the indenture offered in evidence at the trial it was expressly stipulated that the sum paid by the company was to be "in full compensation for all right, title or claim to have any posts, rails, hedges, ditches, mounds or other fences or works made or maintained by the company for separating the lands taken," and for "protecting such lands from trespass, or the cattle of the owners or occupier thereof from straying thereout." The right of a tenant from year to year is limited for the purposes of compensation by sections 119-122 of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), to the period of one year and the period required for a notice to quit—*Ex parte Farlow* (1), *Ex parte Palmer* (2) and *Syers* v. *The Metropolitan Board of Works* (3)—and the tenant could not acquire a more extensive right as against the railway company than his landlord had. The fence put up was originally sufficient to protect the plaintiff for the duration of his right under the Lands Clauses Consolidation Act, 1845.

Petheram, for the plaintiff.—The right of a tenant to have his land fenced as against the railway is not a subject of compensation under the Act, but he can at any time compel the company to fence by *mandamus*. The case of *Lawrence* v. *Jenkins* (4) is a direct authority that the defendants having made a ditch, &c., for the plaintiff's benefit, and until recently maintained and repaired it, there is a sort of spurious easement thereby created in favour of the plaintiff, and he has a right to have it continued.

DENMAN, J.—I am of opinion that, on the evidence before us, the decision of the County Court Judge ought to be affirmed. It is a peculiar case, not free from difficulty. When the railway was first formed, the company, being bound under the statute to make a proper fence to separate the land taken by them from the adjoining lands not taken, and sufficient to protect the lands not taken from trespass and to prevent the cattle of the owners thereof straying, cut a ditch and planted a quickset outside the ditch, and there on their own land they fixed some posts and rails, as the quickset was not enough to prevent cattle straying. In the course of time the defendants' neglect allowed the posts and rails to rot away, and the ditch became dangerous, there being no protection for cattle inclined to stray. The death of the cow is found by the case to have been caused by the dangerous state of the ditch. One of the causes of danger was that the ditch, having been allowed to become choked up with brambles, formed a kind of a trap for the cattle. The practical question in the case is, Was the dangerous state of the hedge and ditch due to the absence of posts and rails, and were the company bound to maintain such posts and rails, and consequently, failing to do so, liable for the consequences? Section 68 of the Railway Clauses Consolidation Act, 1845, expressly puts on the company the duty of making and maintaining a sufficient fence to protect the cattle of the owner or occupier of the lands adjoining their railway from straying thereout. This it is evident they have not done, and they are liable. But the counsel for the defendants relies on the proviso at the end of section 68 to exonerate the defendants. This proviso is as follows: "Provided always that the company shall not be required to make such accommodation works in such a manner as would prevent or obstruct the working or using of the railway, nor to make any accommodation works, with respect to which the owners and occupiers of the lands shall have agreed to receive and shall have been paid compensation instead of making them." It was argued that the deeds referred to preclude the plaintiff from making any such claim as this, because the owner of the land had received compensation for the not making the fence and

(1) 2 B. & Ad. 341.
(2) 9 Ad. & E. 463.
(3) 36 Law Times, 277.
(4) 42 Law J. Rep. Q.B. 147; Law Rep. 8 Q.B. 274.

maintaining the same, and the plaintiff being only tenant from year to year could not have a more extensive right as regards the making and maintaining fences than such a tenant would have in the case of compensation under the Lands Clauses Consolidation Act, 1845. This sounds reasonable and plausible, but is, I think, too argumentative. It would not be fair to deprive the plaintiff of his remedy because his landlord had entered into an agreement with the company whereby he received compensation for waiving his rights. The company have therefore, I think, failed to make out their defence clearly, and I think the judgment given in the County Court must be affirmed.

LINDLEY, J.—This question is by no means free from doubt. It is not stated whether the posts and rails in question were erected by the defendants in pursuance of the Railways Clauses Consolidation Act or not; but that Act imposed on the company a duty to put up proper fences to separate their land from adjoining lands, and protect them from trespass or the straying of cattle from such adjoining lands; and it is therefore not too strong a presumption to assume that it was so. The plaintiff then was tenant from year to year of land adjoining that taken by the company, and, as such, entitled under the 68th section of the Act to have a sufficient fence erected by the company to keep his cattle from straying. He never lost that right by the acceptance of compensation in its stead, and therefore the proviso in the 68th section does not apply. The company on taking the land made a fence, which fence being once made, the plaintiff was entitled to have kept up by the company. But for how long? If he were entitled to have it maintained up till now he would be justified in his claim. But it is said he must be considered to be in the position of a tenant who had come in after the land had been taken, and such a one it is contended would only be entitled to have the fence maintained for so long as he had a legal right to remain in the occupation of the land as such tenant as against his landlord. This would be, in my opinion, straining the words of the statute to say that a right to have his land protected by a fence can be lost by an occupier, if his landlord enters into an agreement with the company to accept compensation instead of insisting on the fulfilment of their statutory obligation to fence. I think it is quite consistent with the true construction to hold that the occupier is not prejudiced by the agreement made by the landlord. There is not, as far as I can see, any question of prescriptive right in this case as in *Lawrence* v. *Jenkins* (4), but the right is entirely statutory. When the deeds are admitted, as I think they ought to be, they do not, however, shew that the plaintiff was in any way compensated. I am therefore of opinion that this appeal should be dismissed with costs, but as it is a matter of great importance, I think there should be leave to appeal from our judgment.

Appeal dismissed with costs. Leave to appeal.

Solicitors—Warry, Robins & Burges, agents for Ffooks, Sherborne, Dorset; R. R. Nelson, for defendants.

[IN THE COURT OF APPEAL.]

(*Appeal from the Queen's Bench Division.*)

1880. Dec. 8, 9. 1881. Jan. 14. } THE QUEEN *v.* HUTCHINS.

Estoppel—Res Judicata—Public Health—Highway Repairable by Inhabitants at large—Whether Decision of Justices as to Character of Street conclusive—Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 150—11 *&* 12 *Vict. c.* 43.

[For the report of the above case, see 50 Law J. Rep. M.C. 35.]

[IN THE COURT OF APPEAL.]

1881. March 18. } SEAL *v.* CLARIDGE.*

Bills of Sale—Attestation—Insufficiency of, if by Solicitor who is also Grantee—41 & 42 Vict. c. 31. s. 10.

A solicitor who is the grantee of a bill of sale cannot also be the attesting solicitor of that bill of sale so as to satisfy the requirements of the Bills of Sale Act, 1878 (41 & 42 *Vict.* c. 31), *s.* 10.

Appeal from the judgment of Huddleston, B., at the trial without a jury.

Interpleader issue.

The claimant, Seal, was the holder of a bill of sale of which one Johnson was the grantor; the defendant was the execution creditor. The bill of sale was duly registered; but the grantee of the bill of sale was also the solicitor who had attested it. Huddleston, B., ruled that this was not a good attestation (1).

It appeared that Johnson was away from home on a visit when an auctioneer went to take possession on behalf of Seal and found a clerk packing up some things. The auctioneer told him not to remove them, and left a man there. Johnson afterwards returned; he had two keys, one of which he kept himself and the other was kept by his clerk—he used to go in and out as he liked. He did not sleep there because he did not like the company of the sheriff's man who took possession under the defendant's execution. Huddleston, B., found that the goods were in the apparent possession of Johnson, and gave a verdict for the defendant.

The plaintiff appealed.

Dugdale, for the plaintiff.—The first question is, whether a solicitor who is the grantee of a bill of sale can also attest it; and then, whether the goods were in the apparent possession of Johnson at the time of the seizure.

The old practice as to warrants of attorney and *cognovits* supports this attestation—*Tidd's Practice* (2)—for there it is stated that the plaintiff's attorney could also subscribe the warrant as attorney for the defendants, and that was done until new rules were made to alter the practice—*Mason* v. *Kiddle* (3). It is clear that the attestation is but a formal matter and that registration is the important matter, for in *Davis* v. *Goodman* (4) it was held that non-attestation does not avoid a bill of sale as between grantor and grantee; and in *Ex parte The National Mercantile Bank* (5) the validity of the bill of sale was not affected by the omission of the attesting solicitor to explain the bill of sale.

The second question is, whether these goods were in the apparent possession of the grantor within the interpretation clause of the statute (6). It is submitted that they were not, and that the facts bring the case within the principle of *Ex parte Jay* (7) and *Robinson* v. *Briggs* (8).

Graham and *Eustace Smith*, for the respondent.

[LORD SELBORNE, L.C.—We only wish to hear argument as to the question of attestation.]

Attestation is a term well-known to the law. Till quite modern times, no

* *Coram* Lord Selborne, L.C.; Baggallay, L.J.; and Bramwell, L.J.

(1) 41 & 42 Vict. c. 31. s. 8: "Every bill of sale to which this Act applies shall be duly attested and shall be registered under this Act. . . ."

Section 10: "A bill of sale shall be attested and registered under this Act in the following manner: 1. The execution of every bill of sale shall be attested by a solicitor of the Supreme Court, and the attestation shall state that before the execution of the bill of sale the effect thereof has been explained to the grantor by the attesting solicitor."

(2) 9th ed. p. 549.

(3) 5 Mee. & W. 513.

(4) 49 Law J. Rep. C.P. 344; Law Rep. 5 C.P. D. 128.

(5) 49 Law J. Rep. Bankr. 62; Law Rep. 15 Ch. D. 42.

(6) 41 & 42 Vict. c. 31. s. 4: "Personal chattels shall be deemed to be in the 'apparent possession' of the person making or giving a bill of sale so long as they remain or are in or upon any house, mill, warehouse, building, works, yard, land or other premises occupied by him, or are used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by or given to any other person."

(7) 43 Law J. Rep. Bankr. 122; Law Rep. 9 Chanc. App. 697.

(8) 40 Law J. Rep. Exch. 17; Law Rep. 6 Exch. 1.

interested party could be called as a witness, and therefore no interested party could attest a deed. In *Coles* v. *Trecothick* (9) Lord Eldon said that where a party signs as—what he cannot be—a witness, he cannot be understood to sign otherwise than as a principal, so that in this case the bill of sale has not been attested at all. In *Freshfield* v. *Reed* (10) a person who was to signify her consent to a demise by a writing duly attested was held not to have done so by being party to the deed of demise. The handwriting of a subscribing witness who was interested could not be proved so as to prove the deed—*Swire* v. *Bell* (11). The general policy of the statute shews that what is required is an independent witness.

LORD SELBORNE, L.C.—We are against the appellant on both points. The point as to possession, with which I will deal first, raises a question of fact to be settled, having regard to the words, "possession or apparent possession of the person making such bill of sale," in section 8 of the Bills of Sale Act, and to the definition of "apparent possession" given in section 4 of the same Act. In the case now before the Court, the goods comprised in the bill of sale were in a house which was, and which continued to be, the residence of the grantor, to and from which he went at his pleasure, of which he kept the keys by himself or his clerk, and, in short, which he used and enjoyed as he chose. He, indeed, slept elsewhere because he preferred to do so for a reason which he gave. Had, then, more than formal possession been given to anyone else? It appears that the auctioneer put a person into the house, but no act is mentioned as having been done by him in connection with that position, save that he told the clerk of the grantor not to remove any of the things in the house, so that I am of opinion nothing more than formal possession had been taken by or given to any other person.

With regard to the other point raised—that is, as to the sufficiency of the attestation—I was at first surprised that no case was cited containing a decision as to the validity of an attestation by a party to a deed. This, however, shews that the common sense of mankind has been opposed to the notion that a party to a deed can also be a witness to the same deed. I am not myself inclined to rely on the old rules of law as to the incompetency of parties interested to give evidence, as they had been expressly abolished by statute before the Act of Parliament now under consideration was passed. What, however, is the meaning of the word "attestation," considered apart from the statute? Surely the very words *ad testari* imply the presence of a witness standing by who is not a party to the deed to be witnessed. I think that this view is corroborated by the fact that attestation is not necessary except when required by some deed creating a power or by some statute. Can it be of any advantage to require attestation, if such attestation is to be but the repetition of the signature of the party to the deed? This view is also corroborated by the judgment of the Court of Exchequer in *Freshfield* v. *Reed* (10) (for I do not rely upon the observation of Lord Eldon in *Coles* v. *Trecothick* (9),) where it was held that a power requiring a consent in writing duly attested was not satisfied by the person testifying her consent by being a party to an indenture of demise.

Such, then, being the natural sense of the term "attestation," we find that the Bills of Sale Act requires every bill of sale to be "duly attested," and the execution of every such bill must be attested by a solicitor. I am of opinion that the word "duly" means that there should be an independent witness competent and proper to attest. It was admitted that a solicitor granting a bill of sale could not attest his own execution of the bill of sale, but it was said that it was otherwise in the case of a grantee. It appears to me plain on the face of it that the solicitor who is to attest the bill of sale has to undertake a duty for the grantor and to furnish a security against fraud. Can it be said that an attestation, not by an independent witness, but by the person who has, if anyone has, an interest in fraud or

(9) 9 Ves. Rep. 234, at p. 250.
(10) 9 Mee. & W. 404.
(11) 5 Term Rep. 371.

malpractice, affords any security whatever? These remarks do not apply to this or any particular case; but they are considerations which would govern legislation on this subject, and it is clearly inconsistent with such considerations that the party to a deed should attest the execution of a deed which is for his own benefit. The Legislature has further required the residence and description of the witness to be stated, and this further confirms the view that a real effective attestation, such as is naturally meant by the word, is the attestation emphatically required by the Legislature.

BAGGALLAY, L.J.—I agree. Two cases have been cited in the decision of which I took part, and I will briefly state what I consider those cases to have settled. *Davis* v. *Goodman* (4) decided that registration and attestation were not necessary to make bills of sale effective as between grantor and grantee. In *Ex parte The National Mercantile Bank* (5) three objections were taken. With the first and the third we are not to-day concerned, and the second—which was that the bill of sale was not explained to the grantor—was rejected because there was an attestation clause stating that the effect of the deed had been duly explained by the attesting solicitor; and it was held that the Court could not go behind the clause and behind the Act so as to enquire into the nature of the explanation given.

BRAMWELL, L.J.—I am of the same opinion.

Judgment affirmed.

Solicitors—J. W. Sykes, for plaintiff; Indermaur & Co., agents for A. Peet, Birmingham, for defendant.

[IN THE COURT OF APPEAL.]

(*Appeal from the Exchequer Division.*)

1881. March 18. MARSDEN AND UXOR *v.* THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.*

Practice—Costs—Order depriving of—Application for—Appeal from—Alternative Jurisdiction of Judge and Court—Rules of Court, Order LV.

The plaintiffs, after a trial with a jury, recovered 5l. beyond 100*l. paid into Court. The Judge immediately gave judgment for the plaintiffs for* 105*l. without costs. Counsel on both sides were present. No application was made, and no cause was shewn. Counsel for the defendants intended to apply to deprive the plaintiffs of costs had not the Judge anticipated him.*

The Exchequer Division rescinded the order:—

Held (*by the Court of Appeal*), *that the appeal from the order of the Exchequer Division was not an appeal from an interlocutory order; that the appeal (if any) from the order of the Judge was to the Court of Appeal, and not to the Divisional Court.* Held *also (reversing the judgment of the Exchequer Division), that the jurisdiction given by Order LV. to the Judge or the Court is an alternative and not an appellate jurisdiction, and that the circumstances of the case shewed a substantial compliance with the requirements of Order LV. as to application at the trial.*

Appeal from the Exchequer Division.

Action by the plaintiffs for damages for injuries sustained by the female plaintiff through the negligence of the defendants.

At the trial before Brett, L.J., a verdict was found for the plaintiffs for 5*l.* over and above a sum of 100*l.* which the defendants had paid into Court. Brett, L.J., at once made an order that each party should pay their own costs. No application was made by the defendants on the subject, and no cause was shewn; but counsel on both sides were present, and the counsel for the defendant would, but for the fact that he was anticipated

* *Coram* Lord Selborne, L.C.; Baggallay, L.J.; Bramwell, L.J.

by the learned Judge, have applied for an order depriving the plaintiffs of costs.

The plaintiffs appealed to the Exchequer Division, which rescinded the order of Brett, L.J., and ordered that the plaintiffs should recover their costs of the action.

The defendants appealed.

Aspland (with him *Gully*), for the defendants.

French, for the plaintiffs.—There is a preliminary objection to the hearing of this appeal. The order of the Exchequer Division was an interlocutory order, and was made in May, 1880, so that this appeal is too late; and it relates to an order made in February, 1880, so that more than a year has elapsed since the order was made by Brett, L.J. *Smith* v. *Cowell* (1), *Collins* v. *Welch* (2).

[SELBORNE, L.C.—We think the appeal must proceed. This was not an independent subsequent application to vary something arising out of the judgment, but it was an application to alter the final judgment itself, and it is not an appeal on an interlocutory matter.]

Aspland, for the defendants.—The order was made under Order LV. (3), and Brett, L.J., had jurisdiction to make it—*Collins* v. *Welch* (2); the circumstances in this case were similar to the circumstances of that case, and *Turner* v. *Heyland* (4) decided that there need be no application at all.

[SELBORNE, L.C.—We are, of course, bound by *Collins* v. *Welch* (2), and shall follow it.]

If, then, the Judge at the trial had jurisdiction to make the order, then such an order is an order as to costs to be made at the discretion of the Judge; and by the provisions of section 49 of the Judicature Act, 1873, there can be no appeal, as no leave has been obtained. *Myers* v. *Defries* (5) supports this view, for the reasoning which in that case led to the conclusion that there was no appeal from the Court supports the contention that there was no appeal here from the Judge.

[BRAMWELL, L.J.—Is it not the fact that there are now two alternative tribunals as there were under the old County Court Act, by which there were independent powers in the Judge who tried the cause, and, if he did not do so, in the Court to certify for costs?]

If there was any appeal from the order of Brett, L.J., the appeal lay to this Court and not to the Divisional Court.

[BRAMWELL, L.J.—I think that we have said here that save in certain specified cases the appeal from a judgment of a Judge is to this Court, unless the rules give it to the Divisional Court.]

French, for the plaintiffs.—The application to the Divisional Court was rightly made, as being an appeal from Brett, L.J., at the trial.

[SELBORNE, L.C.—Here judgment had been signed. How could the Divisional Court alter that?]

In *Baker* v. *Oakes* (6) the application was made to the Divisional Court.

[SELBORNE, L.C.—In that case the order appears to have been made by a Judge at chambers.]

The Judge who tried the cause was applied to, and as the application was not made at the trial, it was held to be unavailing. In the present case there was no application made at all. In *Collins* v. *Welch* (2) there was a discussion in Court, but in the present case no counsel addressed the Judge, and it has never been decided that an application must not at least in substance be made.

[SELBORNE, L.C.—It is clear that the counsel for the defendants intended to apply, but he was anticipated by Lord Justice Brett.]

No cause was shewn, and there was in fact no good cause here, so that the

(1) *Ante*, Q.B. 38; Law Rep. 6 Q.B. D. 75.

(2) 49 Law J. Rep. C.P. 260; Law Rep. 5 C.P. D. 27.

(3) Rules of Court, Order LV.: "Provided that where any action or issue is tried by a jury, the costs shall follow the event, unless, upon application made at the trial for good cause shewn, the Judge before whom such action or issue is tried, or the Court, shall otherwise order."

(4) 48 Law J. Rep. C.P. 535; Law Rep. 4 C.P. D. 432.

(5) 48 Law J. Rep. Exch. 446; Law Rep. 4 Ex. D. 176.

(6) 46 Law J. Rep. Q.B. 246; Law Rep. 2 Q.B. D. 171.

second branch of Order LV. (3) has not been satisfied.

[SELBORNE, L.C.—There is no distinction between this case and *Collins* v. *Welch* (2).]

LORD SELBORNE, L.C.—One point is sufficient to dispose of this case, although, as other points have been raised in argument, it may be necessary to explain our view of those also. That point is, that the Judge at the trial did not merely express his opinion by an order as to costs, but actually gave judgment in the action for the sum of 105*l.* without costs; and no authority has been cited from which we can gather that the Divisional Court is enabled to reverse that judgment or to vary it by making an order inconsistent with it, while that order stands uncancelled on the record. The application, therefore, should be made to the Court of Appeal. It appears indeed that the practice has been to apply to the Divisional Court in the first instance, for in the case of *Collins* v. *Welch* (2) that course was taken, and it is not clear that there is any distinction between the two cases; but the point was not taken in *Collins* v. *Welch* (2). *Myers* v. *Defries* (5) determines that there is an alternative power given to the Judge or the Court, not indeed to overrule each other, but to disallow costs which would otherwise, by the effect of Order LV., be given to the winning party. If the Judge has not exercised any jurisdiction in the matter, then the Divisional Court can do so; but if the Judge has exercised his jurisdiction the thing is done—it has, in the words of the order, been "otherwise" ordered; the Divisional Court will not then repeat the order, and if that order is wrong the application must be to the Court of Appeal. In the present case, however, the application is not to the alternative jurisdiction of the Court, but the application is to alter a final judgment. I would add, in the first place, that *Collins* v. *Welch* (2) settles that, in the circumstances of this case, where a Judge anticipates an application which would otherwise be made to him, and where counsel are present and are prepared to make an application, the condition of Order LV. is substantially fulfilled. I agree with the decision in *Collins* v. *Welch* (2), and I am bound by it. The question is then raised, whether good cause must be shewn. It is not necessary or convenient to determine whether in any circumstances there could be an appeal on costs under this order and those words; if there could be, I am of opinion that the *onus probandi* would be on the party which alleged that the Judge had exercised the powers conferred by the order without good cause, and not on the other party. The appeal must be allowed.

BAGGALLAY, L.J., and BRAMWELL, L.J., concurred.

Appeal allowed.

Solicitors—H. G. Field, agent for T. Etty, Liverpool, for plaintiffs; Clarke, Woodcock & Ryland, agents for A. Grundy & Sons, Manchester, for defendants.

[IN THE QUEEN'S BENCH DIVISION.]

1881. March 9. THORPE AND OTHERS *v.* BESTWICK.

Will—Attesting Witness—Incompetency subsequent to Execution.

Where an attesting witness subsequently to the execution of the will marries a devisee, the devise is not void under the 15*th section of the Wills Act.*

This was an action for the possession of a messuage and land, of which Jeremiah Bestwick died seised in fee on the 29th of July, 1868. By his will dated the 26th of December, 1865, he devised the messuage and land to Ann Rebekah Wolstenholme, her heirs and assigns. On the 18th of June, 1868, Ann Rebekah Wolstenholme married the plaintiff, Henry Thorpe, and on the 26th of January, 1870, she conveyed the messuage and land to the use of the plaintiff, Henry Thorpe, his heirs and assigns. Subsequently Henry Thorpe mortgaged the messuage and land to the other plaintiffs.

The statement of defence, among other matters, set up that the plaintiff, Henry Thorpe, was one of the attesting witnesses

e execution of the will of Jeremiah wick, that at his death the marriage subsisting, and consequently the e to Ann Rebekah Wolstenholme d to the defendant as heir-at-law of niah Bestwick.

ie plaintiffs demurred to these allega-

aham (*Birch* with him), for the plain-—The question is, whether a devise woman is void by reason of her mar- to an attesting witness subsequently e execution of the will. The Wills (7 Will. 4. & 1 Vict. c. 26. s. 15) pro- that "if any person shall attest the ution of any will to whom or to whose or husband any beneficial devise, y, estate, interest, gift or appoint- of or affecting any real or personal e . . . . shall be thereby given or , such devise . . . . shall, so far only oncerns such person attesting the ution of such will, or the wife or hus- of such person, . . . be utterly null void." At the time of Thorpe attest- he will the devisee was not his wife, his subsequent marriage cannot affect revious competency. The 24th section not affect the question. It provides t every will shall be construed with ence to the real estate and personal e comprised in it, to speak and take t as if it had been executed imme- ly before the death of the testator s a contrary intention is shewn." section has reference to the pro- dealt with, not the objects to be fited—*Bullock* v. *Bennett* (1). He also *Jarman on Wills*, vol. i. p. 65; v. *Jolliffe* (2), *Brogram* v. *Winder* *Holdfast* v. *Dowsing* (4).

Firth, for the defendant, relied on on 24, and on section 14, which pro- that "if any person who shall attest execution of a will shall at the time ie execution thereof or at any time wards be incompetent to be admitted tness to prove the execution thereof, will shall not on that account be lid." This implies that although the will would not be invalid the devise would be invalid on a witness becoming incompetent after the execution. The contrary interpretation of the Act would let in the mischief intended to be excluded by the Legislature. A man might influence a testator to benefit a woman whom he intended to marry, or he might be privy to the will being antedated so that he should not be competent to be a witness.

No reply was heard.

MATHEW, J.—The policy of the Wills Act in depriving an attesting witness of benefits under the will is clear and obvious. Wills are not allowed to be supported by the testimony of interested persons. At the time of the attestation the witness took no benefit and was not interested. Subsequently he married a person benefited, and I am asked to set aside the bequest. I find in the Act no provision requiring me to do so. The only section at all countenancing the proposition is section 24, which is as to the property of the testator only and not as to attesting witnesses. My judgment must, therefore, be for the plaintiffs with costs.

Judgment for plaintiffs.

Solicitors—Peacock & Goddard, agents for Clark & Huish, Derby, for plaintiffs; Watson, Sons & Room, for defendants.

[IN THE QUEEN'S BENCH DIVISION.]

1880. Nov. 13. EYTON (*appellant*) *v.* THE OVERSEERS, ETC., OF MOLD (*respondents*).

The Rating Act, 1874 (37 & 38 *Vict. c.* 54), *s.* 4, *sub-s.* (*a*)—*Valuation of Land used as a Plantation—Assessment of Sporting Rights.*

[For the report of the above case, see 50 Law J. Rep. M.C. 39.]

(1) 24 Law J. Rep. Chanc. 512.
(2) 1 W. Black. 365.
(3) 2 Ves. jun. 635*a*.
(4) 2 Str. 1253.

[IN THE COMMON PLEAS DIVISION.]

1881. March 4. } LYONS *v.* TUCKER.*

Bills of Sale Act, 1878 (41 & 42 *Vict.* c. 31), *s.* 10 — *Priority — Registered and Unregistered Bills of Sale—Seizure.*

The provision in section 10 *of the Bills of Sale Act*, 1878, *as to the priority of bills of sale, applies only where there has been a bankruptcy or execution, and does not determine the relative rights of the holder of an unregistered bill of sale and the holder of a registered bill of sale in the absence of bankruptcy or execution. Such rights are unaffected by the statute.*

This was an appeal by way of motion from a decision of the Judge of the County Court of Devonshire, holden at Plymouth, the following being shortly the facts:—

On the 4th of October, 1880, one Stanger executed a bill of sale over certain goods in favour of the defendant, which, however, was never registered.

On the 8th of November, 1880, the said Stanger executed another bill of sale in favour of the plaintiff over the same goods as those subject to the bill of sale in favour of the defendant. This second bill of sale was duly registered on the day of its execution.

On the 26th of November, 1880, the defendant seized Stanger's goods under the powers of his bill of sale.

On the 27th of November, 1880, the plaintiff gave notice to the defendant that he claimed the goods as holder of a registered bill of sale.

The plaintiff sued the defendant in the County Court and the learned Judge decided that the defendant was entitled to the goods as against the plaintiff. The plaintiff obtained a rule *nisi* to set aside the judgment of the learned County Court Judge, and enter judgment for the plaintiff, against which

A. Charles shewed cause.—Section 10 and section 8 (1) must be read together—*Davis* v. *Goodman* (2). The sole result of these two sections is, that an unregistered bill of sale is invalid as against certain persons only, namely, trustees in bankruptcy and execution creditors, and that registered bills of sale are to take priority according to the date of their registration, instead of as formerly from that of their execution. Even if this were not so, yet the common law doctrine of perfecting title by taking possession would yet enable the defendant to resist the plaintiff's claim—*Ex parte The National and Mercantile Bank; in re Haynes* (3).

Under the old Act priority of registration was not a test at all. The 10th section should be read "two or more registered bills of sale." The object of the enactment is to regulate the priorities of grantees *inter se* as against certain specified persons only.

R. S. Wright, in support of the rule.—

* See *Conelly* v. *Steer* (next case).

(1) Section 8: "Every bill of sale to which this Act applies shall be duly attested and shall be registered under this Act within seven days after the making or giving thereof, and shall set forth the consideration for which such bill of sale was given, otherwise such bill of sale as against all trustees or assignees of the estate of the person whose chattels or any of them are comprised in such bill of sale under the law relating to bankruptcy or liquidation, or under any assignment for the benefit of the creditors of such person, and also as against all sheriffs' officers and other persons seizing any chattels comprised in such bill of sale in the execution of any process of any Court authorising the seizure of the chattels of the person by whom or of whose chattels such bill has been made, and also as against every person on whose behalf such process shall have been issued, shall be deemed fraudulent and void so far as regards the property in or right to the possession of any chattels comprised in such bill of sale which at or after the time of filing the petition for bankruptcy or liquidation, or of the execution of such assignment or of executing such process (as the case may be), and after the expiration of such seven days, are in the possession or apparent possession of the person making such bill of sale (or any person against whom the process has issued under or in execution of which such bill has been made or given as the case may be)."

Section 10: "In case two or more bills of sale are given, comprising in whole or in part any of the same chattels, they shall have priority in the order of the date of their registration respectively as regards such chattels."

(2) 49 Law J. Rep. C.P. 101, 344; Law Rep. 5 C.P. D. 128.

(3) 49 Law J. Rep. Bankr. 62 (*per* Bramwell, L.J., p. 66); Law Rep. 15 Ch. D. 42.

The object of the Act was to apply to bills of sale provisions similar to those in the Land Registry Acts. *In re Wright* (4), *Davis* v. *Goodman* (2), and *Ex parte The Mercantile Bank; in re Haynes* (3) are not in any way in point. The section does not say "registered bills of sale," and it is a strong thing to say it should be read "registered."

The following judgments were delivered (on March 18) by

GROVE, J.—This case turns on the 10th section of the Bills of Sale Act, 1878. On the 4th of October, 1880, one Stanger executed a bill of sale in favour of the defendant Tucker. On the 8th of November, 1880, he executed a second bill of sale over the same goods to the plaintiff Lyons. On the 26th of November Tucker took possession under his bill of sale, which he had not registered, whereas Lyons had registered his on the 8th of November. The plaintiff claimed the goods as being holder of a registered bill of sale, and having the property in them under the clause in question. The County Court Judge thought that he was not entitled, and gave judgment for the defendant. A rule *nisi* was obtained by the plaintiff. The paragraph in question is at the end of the 10th section of the aforesaid Act: "In case two or more bills of sale are given, comprising in whole or in part any of the same chattels, they shall have priority in the order of the date of their registration respectively as regards such chattels." "A transfer or assignment of a bill of sale need not be registered." It is argued on behalf of the plaintiff that the clause does not say two or more registered bills of sale, and that therefore unregistered bills of sale are postponed to those that are registered, although, under the former, the goods may have been seized and taken possession of. My first impression on reading the section was in favour of the plaintiff, as it certainly appeared at first sight strange that a first registered bill of sale should have priority over a second registered bill of sale, but that a registered bill of sale should not have precedence over an unregistered bill. But in the course of the argument much beyond the mere words was shown to be important, and I have come to the conclusion, after thinking it over very carefully, that this clause of section 10 does really apply only to the case of two or more registered bills of sale and their priorities *inter se*; and I think that the County Court Judge was right, and for the following reasons:—

The Bills of Sale Act, 1878, speaking generally, only provisionally limits the effect of bills of sale when unregistered as against certain classes of persons, and does not abolish or render void all unregistered bills of sale, nor destroy the power of conveying property by bills of sale. This we see from the 8th section (1).

Therefore, what is intended by the Act is, that bills of sale, unless registered, though not in general invalid by reason of their non-registration, are void as against the persons named in section 8, namely, trustees in bankruptcy, sheriffs' officers and execution creditors.

Now, if we were to construe this Act as required by the plaintiff's contention, we should really be extending the Act, not confining the scope of the Act to the particular persons named in section 8 as those against whom alone an unregistered bill of sale is void, and should make it invalid as against other parties. I do not understand the use of the word "fraudulent" in section 8. "Void," I think, would have sufficed. The document being *bona fide*, the word "fraudulent" seems misplaced, for if it were fraudulent the Act is not required at all. But as the word is here, I take it it must mean that bills of sale are fraudulent if they are not registered as against certain persons. We are asked to pronounce this bill of sale, which is indubitably *bona fide*, to be void as against a subsequent bill of sale, although it has been carried out after the registration of the later bill of sale by seizure of the property comprised in each, before this Act, and although the grantee of the first bill would have had a valid title as against all the world. But is this Act indirectly to take away that title, and is registration

(4) 43 Law J. Rep. Chanc. 66; Law Rep. 16 Eq. 41.

to compel the title of the first grantee to be held void? The words of the section do not go so far. Had they been "in case two or more registered bills of sale," they would support our view; but to adopt the other view would render it necessary to read "in case two or more bills of sale," as if it were two or more registered or unregistered bills of sale. But the word "their," in the further part of the section, would not apply if we did not construe the preceding part as if the word "registered" only were inserted. I do not decide this case, however, on the grammatical meaning of the clause, because I think that would be putting a narrow construction, and it might lead to consequences more formidable on the one side than the other. There being, therefore, nothing in this Act forbidding the construction of the clause in favour of the defendant, let us examine the decisions bearing on the matter.

The decision of the Court of Appeal in *Davis* v. *Goodman* (2) will help us. The question in that case was, whether the first clause of the 10th section (5) was mandatory. It was argued that under section 10 all bills of sale are invalid when the provisions of the sections were not fully complied with, but the Court of Appeal held that section 10 must be read with section 8, the object of which was to give a limited avoidance only of bills of sale, and not to render invalid bills of sale generally, but only in certain cases as against particular persons, namely, trustees in bankruptcy, sheriffs' officers, and execution creditors. Carrying out the principle of that decision, the clause I am discussing only applies as against those persons; and, in short, that decision tends to shew that in deciding as we are deciding in this case we are only adopting that principle. Inconveniences have been pointed out by both sides as likely to arise from the construction contended for by the other. It was said on the part of the defendant that if the plaintiff's construction be correct a fraud might be committed by granting a bill of sale, say, on Monday, to one grantee, who would have seven days in which to register, and on the next day granting a second bill of sale by forthwith registering which the grantee might get priority over the grantee of the first bill of sale, which after all might be registered within the prescribed period of seven days. There would thus be no default by the grantee of the first bill of sale. But this argument might be carried further. Suppose a bill of sale be granted on Monday, a second granted and registered on Tuesday, and the first grantee take possession on Wednesday, having no notice of the second, and having still four days in which to register, he would yet find himself defeated by the registration on Tuesday. The argument *ab inconvenienti* might be carried still further. The second bill of sale might be simply a fraudulent one within the intention of the grantor, and give the debtor an opportunity of getting his money twice over on the same goods, which might be a temptation to grantees to wink at fraud on the part of the grantor, which, to my mind, is a strong reason for the way in which we are now deciding.

There are some arguments of the same kind on the other side, but it is sufficient to say that extravagant hardship is not likely to accrue, nor is there anything strong enough to induce us to read this section contrary to the grammatical sense and to the decision in *Davis* v. *Goodman* (2). The strongest argument, it appears to me, for the construction we are putting on the section is, that it is difficult otherwise to see what is the object of this clause of section 10. It is nearly always impossible to arrive at the true meaning of a statute without a knowledge of its history and the evil it aims at remedying. This Act was no doubt intended to meet difficulties that previous enactments had failed to grapple with. Before it was passed twenty-one days was the limit of time for registration, and parties by keeping their bills of sale unregistered, by allowing the time to run

(5) Section 10, sub-section 1: "The execution of every bill of sale shall be attested by a solicitor of the Supreme Court, and the attestation shall state that before the execution of the bill of sale the effect thereof has been explained to the grantor by the attesting solicitor."

nearly out, and then by taking a fresh one, were able to keep a secret bill of sale always running, which was valid for twenty days. This is partly provided against by section 9 of the new Act (6). Again, this Act was intended to enable sheriffs' officers and trustees in bankruptcy to know at once who the persons were who have the priority where two deeds are registered, and would therefore only operate as against sheriffs' officers and trustees, who have only to look at registered bills of sale. The intention of the Act, then, I take it, is to require registration, and to give sufficient characteristics to a registered in relation to an unregistered bill of sale, but only in the two cases I have mentioned. In this case the priority of the defendant's bill of sale and the subsequent possession of the goods obtained by him give the prior title. I think the County Court Judge, therefore, was right in giving judgment for the defendant.

LINDLEY, J.—I am of the same opinion. This is a new question, and of great importance. It is shortly this, whether the provision, "in case two or more bills of sale are given, comprising in whole or in part any of the same chattels, they shall have priority in the order of the date of their registration as regards such chattels," is intended to alter the former positions of the holders of registered and unregistered bills of sale under all circumstances or is confined to the cases of trustees in bankruptcy, sheriffs' officers and execution creditors as specified in section 8 of the Bills of Sale Act of 1878. The words, if taken alone, might be construed either way, in the absence of any reason for preferring one construction to the other, and in fact somewhat tend to the construction that they apply to registered bills of sale only. Still, if there was nothing more, I should yet hesitate to say that that was all that was meant. We must look carefully at the statute, and see whether there be anything to be got from the rest of the Act, and not alone from the section in question. After having gone carefully through the statutes since the argument of the case, I have come to the conclusion, having regard also to the judgment in the case of *Davis* v. *Goodman* (2), that unless the words are so plain that we are forced to another conclusion, we must read them as not altering the law as between holders of bills of sale, whether registered or unregistered, except in the cases mentioned in section 8. The Bills of Sale Act, 1878, as shewn by the preamble, did not contemplate any alteration in the priority of a registered bill of sale, and no words in the Act, other than those under discussion, can lead one to suppose that more was intended than an extension of the Act of 1854, without alteration of the scope of that Act, as is shewn also by the decision in the Court of Appeal. Starting with that idea, it is no less difficult to give the clause a wide construction, such as contended for by the plaintiff, than if one approached it from a different point; and our decision appears to be right from a consideration of the cases decided in respect of bills of sale. I have looked at some which were decided before the Act, and some which have been decided since the Act became law. In the first class of cases to which I will refer there was a question of priority between the holder of a registered and the holder of an unregistered bill of sale, where, however, there was no seizure. First in date was a holder of an unregistered bill of sale, then a holder of a registered bill of sale, then an execution creditor. The question was, Who had priority? and it was decided that the registered bill had the superior title, then the execution creditor, then the unregis-

(6) Section 9: "Where a subsequent bill of sale is executed within or on the expiration of seven days after the execution of a prior unregistered bill of sale and comprises all or any part of the personal chattels comprised in such prior bill of sale, then if such subsequent bill of sale is given as a security for the same debt as is secured by the prior bill of sale or for any part of such debt, it shall, to the extent to which it is a security for the same debt or part thereof, and so far as respects the personal chattels or part thereof comprised in the prior bill, be absolutely void, unless it is proved to the satisfaction of the Court having cognisance of the case that the subsequent bill of sale was *bona fide* given for the purpose of correcting some material error in the prior bill of sale, and not for the purpose of evading this Act."

tered bill of sale. There had been no seizure. This was the case of *Richards* v. *James* (7).

In *Ex parte Payne* (8) the trustee in bankruptcy claimed to stand in the place of the grantee of a bill of sale, and so take precedence of the holder of a subsequent valid bill of sale. But this was held to be impossible. The next question of priority occurred in *Ex parte Cochrane* (9). There there was, first, an unregistered bill of sale; second, a registered bill of sale; third, seizure by the holder of the unregistered bill; fourth, bankruptcy. That is to say, there was the same order as to date as in this case, but, in addition, there was a bankruptcy. The priorities were decided to be—first, the unregistered bill, under which the goods had been seized; second, the registered bill; third, bankruptcy. That is an important decision. We are asked to say in this case where there is no bankruptcy that the priorities shall be—first, the registered bill of sale; second, the unregistered bill. I think that we cannot do so without holding that the Act of 1878 gave priority to a registered bill over an unregistered one in all circumstances, which I think it did not. For these reasons it appears to me that the decision of the County Court Judge was right, and that this rule should be discharged with costs.

Rule discharged with costs. Leave to appeal, on security for costs satisfactory to the Master being given within a week.

Solicitors—Morgan, Ponsonby & Gemmell, agents for Rundle, Devonport, for plaintiff; Aldridge, Thorn & Morris, agents for Square & Bridgman, Plymouth, for defendant.

(7) 36 Law J. Rep. Q.B. 116; Law Rep. 2 Q.B. 285.

(8) Law Rep. 11 Ch. D. 539.

(9) 45 Law J. Rep. Bankr. 122; 46 ibid. 38; Law Rep. 3 Ch. D. 324; 4 ibid. 23.

[IN THE COURT OF APPEAL.]

1881. March 18, 19.

CONELLY *v.* STEER.*

Bills of Sale—Priority of competing Bills of Sale—Registered and unregistered—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 10.

The provision in section 10 *of the Bills of Sale Act*, 1878, *as to the priority of bills of sale, applies to all competing bills of sale in all cases in which registration is necessary. It is a provision independent of section* 8 *of the Act, and applies equally in such cases whether there has or has not been a bankruptcy or an execution, and whether there are or are not two or more registered bills of sale*:—So held *by the Court of Appeal.*

Appeal from the judgment of Bowen, J., given on further consideration after trial with a jury.

The plaintiff was the holder of an unregistered bill of sale, dated the 24th of January, 1879, granted by Croston. On the 21st of February, Croston assigned the goods comprised in the bill of sale to William Steer by means of an inventory and receipt which were duly registered as a bill of sale. On the 28th of February, William Steer assigned the above goods to the defendant, H. Steer, by a document which was also duly registered as a bill of sale. On the 5th of March, the plaintiff proceeded to seize the goods comprised in his bill of sale, but found that the defendant, H. Steer, had removed some of the goods and claimed to remove the remainder, whereupon the plaintiff brought an action for conversion. The statement of defence alleged that the bill of sale under which the plaintiff claimed was not registered, and was therefore void. Bowen, J., gave judgment in favour of the defendant.

The plaintiff appealed.

Gully and *Crompton*, for the appellant. —The Bills of Sale Act, 1878, does not apply, because there has been no bankruptcy nor any execution intervening. The scope of the Act of 1878 is not wider than that of the earlier statutes on bills

* *Coram* Lord Selborne, L.C.; Baggallay, L.J.; and Bramwell, L.J.

of sale. Section 10 (1) must be read in connection with section 8, as was decided in *Davis* v. *Goodman* (2). The object of the statute was not to prevent frauds upon all parties without any reference to bankruptcy or an execution. The title does not define the class of creditors intended to be protected. The words in the penultimate clause of section 10 (1) apply only to the case of two or more registered bills of sale; they have no reference or application to an unregistered bill—*Lyons* v. *Tucker* (3).

[BRAMWELL, L.J.—It would have been more strictly accurate to say in *Davis* v. *Goodman* (2) that the earlier part of section 10 (1) must be construed with section 8 (4).]

It is submitted that the clause in question, being contained in the same section as the provisions as to attestation, must receive the same construction as those provisions, and therefore that the clause is not applicable to the present case, in which there has been neither an act of bankruptcy nor an execution.

Ambrose and *Bigham*, for the defendants, were not called on.

LORD SELBORNE, L.C.—We are all clearly of opinion that the judgment of Mr. Justice Bowen was correct. *Davis* v. *Goodman* (2) does not affect this case. It was there held that as between grantor and grantee there was nothing in the Bills of Sale Act which required attestation and registration. That is true: the Act provides for a system of attestation and registration, the only consequences of neglecting which are mentioned in sections 8 and 10 (1). In section 10 (1) there are substantially three clauses: the first relates to the manner in which bills of sale are to be attested and registered, and that clause, therefore, is connected with section 8. It consists of three sub-sections, and only that part of section 10 (1) was considered in *Davis* v. *Goodman* (2). Then come two independent clauses, of which the first is the one with which we are now concerned. The sole question raised is that which Mr. Justice Grove appears in *Lyons* v. *Tucker* (3) to have decided in favour of the contention of the appellants in the present case: it is, whether the clause which provides that in case two or more bills of sale are given they are to have priority in order of the date of their registration only contemplates cases in which two or more registered bills of sale have been given. I understand that Mr. Justice Grove thought that the words "the date of their registration respectively" required that there should be more than one registered bill of sale. We are unable to agree with that view. The rule of interpretation is, that perplexity is not to be introduced by the consideration of singular or plural words, when by *reddendo singula singulis* effect can be given to the manifest intention of the statute. The good sense of the thing is that the date of registration should in every such case as this determine the priority of a bill of sale when there are competing bills. This clause is one tending to prevent frauds on creditors; and it would in fact be to nullify that intention to say that an unregistered bill of sale is to prevail over a subsequent registered bill of sale. The appeal must be dismissed.

BAGGALLAY, L.J.—I concur.

BRAMWELL, L.J.—I understand from my brother Lindley that he would have given the same interpretation to the Act as that which we give but for the fact that he understood that the Court of Appeal had decided that the protection of the Bills of Sale Act, 1878, was limited to the same persons as were intended by the prior statutes. I concur in the judgment of the Lord Chancellor.

Judgment affirmed.

(1) 41 & 42 Vict. c. 31. s. 10: "A bill of sale shall be attested and registered under this Act in the following manner:—

"In case two or more bills of sale are given, comprising in whole or in part any of the same chattels, they shall have priority in the order of the date of their registration respectively, as regards such chattels."

(2) 49 Law J. Rep. C.P. 344; Law Rep. 5 C.P. D. 128.

(3) *Ante*, C.P. 322.

(4) See 49 Law J. Rep. C.P. 344 (at p. 345), judgment of Bramwell, L.J.

Solicitors—T. Parker, agent for Parker & Stocks, Manchester, for plaintiff; Pritchard, Englefield & Co., agents for Boote & Edgar, Manchester, for defendant.

[IN THE COURT OF APPEAL.]

(*Appeal from the Queen's Bench Division.*)

1881. Feb. 16. March 11. } ELLIS *v.* DESILVA.*

Practice—Award—Costs to follow Event —Meaning of "Event."

Where costs are to follow the event the word should be read distributively, as if it were "events."

Where an action, in which the defendant counter-claimed, and all matters in difference were referred by an order providing that costs should follow the event, unless otherwise ordered, and the arbitrator awarded that a certain balance was due from the plaintiff to the defendant,—

Held (*affirming the judgment of the Queen's Bench Division*), *that the arbitrator ought to have found the issues specifically, and that the award must be referred back to him for that purpose.*

This was an action in which the plaintiff sued for the balance of a builder's account. The defendant set up various defences, and delivered a counter-claim for penalties for delay and damages. The action, and all matters in difference, were referred to arbitration by an order, made by consent, which provided "that the costs of the said action and of the reference and award shall follow the event, unless, upon application made at the reference for good cause shewn, the arbitrator shall otherwise order."

The arbitrator made and published an award, of which the material part was as follows: "I find and award that there is due from the plaintiff to the defendant the sum of 3*l.* 2*s.* 6*d.* in respect of the said action, and in respect of all matters in difference between them."

The Divisional Court (Manisty, J., and Bowen, J.) made an order, referring back the award to the arbitrator, with directions to find specifically the issues between the parties.

The defendant appealed from this order.

* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Brett, L.J.

Bigham, for the defendant.—The award is sufficient. Its true meaning is that the arbitrator has found all the issues in favour of the defendant. After taking the claims on both sides into consideration, he finds that the defendant is entitled to recover a balance. In delivering judgment in this Court in *Chatfield* v. *Sedgwick* (1), Jessel, M.R., said, "The plaintiff, a builder, sued the defendant for work done and money lent. The defendant, a greengrocer, set up a counter-claim for greengrocery supplied. It was referred to the Master substantially to find which of the parties was indebted to the other, and to what amount. The Master found that the greengrocer owed the builder 16*l.* 1*s.* 5*d.*, and that the builder owed the greengrocer 23*l.*, so that on the whole the builder owed the greengrocer 6*l.* 18*s.* 7*d.* That was the event which the costs of the action were to abide. The greengrocer was the winning party, and ought to have his costs." That is exactly in point in the present case. *Stooke* v. *Taylor* (2), being the judgment of a Divisional Court, is not binding here, and the Court may take the view taken by Field, J., who dissented in that case.

H. Sutton, for the plaintiff.—The award, not having found the issues, is invalid for uncertainty—*Kilburn* v. *Kilburn* (3). In any case it can be sent back under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 7. An award might possibly be upheld which shewed incidentally how the arbitrator had dealt with the issues, but that is not the case here. *Cole* v. *Firth* (4) shews the proper form of order as to costs. The word "event" should be taken distributively—*Myers* v. *Defries* (5), decided on Order LV., the words of which are in substance identical with the words of this order of reference.

Bigham replied.

Cur. adv. vult.

(1) Law Rep. 4 C.P. D. 459.

(2) 49 Law J. Rep. Q.B. 857; Law Rep. 5 Q.B. D. 569.

(3) 13 Mee. & W. 671; 14 Law J. Rep. Exch. 160.

(4) Law Rep. 4 C.P. D. 301.

(5) 49 Law J. Rep. Exch. 266; Law Rep. 5 Ex. D. 180.

Ellis v. *Desilva* (*App.*), *Q.B.*

BRAMWELL, L.J. (on March 11).—In this case the claim, the counter-claim and all matters in difference were referred to arbitration. There was a general clause in the order of reference that costs were to abide the event unless otherwise ordered. The arbitrator found simply that a balance was due to the defendant. This may mean many different things: it may mean that the plaintiff had no cause of action; it may mean that, although the plaintiff had a cause of action, still that the counter-claim of the defendant was of greater amount; or it may mean many other things. Now, it is said that the award is bad, and that the word "event" should be taken distributively, because the word "ovent" should be read "events," and then it is said that the arbitrator has not found the events. The Divisional Court so held and referred the award back. Then there has been an appeal. We cannot deny that the general practice has been to put that interpretation which the Divisional Court and the plaintiff have put on this word. Then it is said that here the word "event" means one single event. But we are of opinion that the plaintiff is in the right, and that the reason of the thing is that the word "event" should be taken distributively, and that the practice is as I have stated it to be. There is no reason for distinguishing between this and other cases on account of any peculiar circumstances, so that this appeal must be dismissed.

BAGGALLAY, L.J.—I have nothing to add.

BRETT, L.J.—I agree. I do not think we need say how the costs are to be taxed.

Appeal dismissed.

Solicitors—Chester & Co., agents for Wright, Becket & Co., Liverpool, for plaintiff; W. W. Wynne & Son, agents for T. & T. Martin, Liverpool, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1881. March 22, 23. THE MIDLAND COUNTIES INSURANCE COMPANY *v.* SMITH AND WIFE.

Policy—Insurance against Fire—Wilful destruction of Property by Wife of Assured—Rights of Insurers—Action founded on Felony.

An insurance company had granted a fire policy to S., and during the currency of the policy S.'s wife feloniously burnt the property insured. The company, not admitting any claim on the policy, brought an action against S. and his wife for the damage done by the act of the wife:—Held, *first, that the action could not be maintained as the insurer has no rights other than those of his assured, and can only enforce those in the name of the assured, and after admitting the claim on the policy; secondly, that the action for the felony was maintainable without shewing that the felon had been prosecuted.*

Semble, *that a felonious burning by the wife of the assured without his privity is covered by the ordinary fire policy.*

This was a demurrer to a statement of claim.

The statement of claim alleged as follows:—

1. By a policy of insurance dated the 26th of June, 1880, the plaintiffs for the consideration therein mentioned and subject to the conditions indorsed thereon, agreed with the defendant Charles Smith, that if certain property therein described should be destroyed or damaged by fire at any time between the 21st of June, 1880, and the 24th of June, 1881, the plaintiffs would pay or make good all such loss or damage, &c.

2. On the 25th of October, 1880, while the said policy was in force, goods insured thereby were in the dwelling-house, No. 20 Tundle Street, Hull, referred to in the said policy.

3. On the said 25th of October the defendant Mary Smith, knowing the premises, and being, by the direction and with the consent of the defendant Charles Smith, in sole charge and control of the said dwelling-house and the goods insured by the policy and in and upon the

said dwelling-house, and maliciously purposing and intending to burn and damage by fire such property insured, and to injure the said company, and to create a claim on the said policy against the said company, wilfully lit or caused to be lit fires in the said dwelling-house, and thereby caused such property insured to be and the same was damaged and in part destroyed by the said fires. Such property so destroyed and damaged was, or included, that specified in the said policy, and the defendant Charles Smith has made a claim upon the plaintiffs, which said claim arises from the said acts of the defendant.

4. By means of the premises the plaintiffs have incurred trouble and expense in investigating the said claim, and have become liable thereto, if any such liability exists.

The defendants demurred to the statement of claim.

Cyril Dodd appeared for the defendant in support of the demurrer.

Waddy and *L. Colvile Jackson* supported the statement of claim.

The arguments are fully stated in the judgment of the learned Judge, delivered on the following day as follows:—

WILLIAMS, J.—This action is one of an extraordinary and, so far as I am aware, of an unprecedented character. The questions of law involved in the case, which was argued before me yesterday, arise upon demurrer to the statement of claim, and I now proceed to give judgment.

The facts, which for the purposes of the argument, are assumed to be true, are as follows: The plaintiffs (an insurance company) granted to the defendant Charles Smith a policy of fire insurance, dated the 26th of June, 1880, by which they agreed with him that if certain property in a certain house should be destroyed or damaged by fire they would pay or make good all such loss or damage. During the currency of the policy the defendant Mary, the wife of the defendant Charles Smith, having been left by him in charge of the house and property insured, did, with the malicious intention of destroying the insured property, and of injuring the insurance company and of creating a claim upon the policy, wilfully set fire to and destroy the house and the insured property. Charles Smith, the assured, then made a claim upon the policy against the company. The company thereupon brought this present action against Smith and his wife to recover damages for the loss which the company alleged they had sustained or might sustain through the wrongful and felonious act of the defendant Mary if the defendant Charles made good his claim upon his policy.

I was informed in the course of the argument, although these facts do not appear formally before me, that the defendant Charles had before this present action brought an action against the company upon the policy to recover the amount of his loss, and that in that action the company disputed their liability on the ground that the loss having been caused by the arson of the wife was not covered by the policy, and that they had also set up a counter-claim for damages against Smith and his wife, who was brought in as a party to the action upon the same ground; that that action went down to trial, and the learned Judge before whom the cause came on for trial adjourned the proceedings in order to enable the company to test the validity in law of their contention in a separate and distinct manner before proceeding to try the question of arson. The present action was then commenced. The questions, however, for determination in this action must depend exclusively upon the facts set forth in the statement of claim, and the issues of law raised by the demurrer.

The company in support of their case started with the general principle that "every husband is liable for the wrongful acts of his wife," and that, as the defendant Mary had wrongfully injured and destroyed the insured property, and had caused the damage upon which a claim upon the policy had been based, they, as the insurers of the property, had a right to sue her and her husband for the damage and injury so done by her, and not the less so because the husband happened to

be himself the assured, whom they had agreed to indemnify. In substance the contention of the company came to this, that they ought not to be called upon to pay to the assured the amount claimed without being entitled concurrently to claim damages from him for the loss caused by the act of his wife, for which he is answerable.

The defendants by their demurrer to this claim raised two main issues of law. In the first place they said that the company were not in a position to maintain any action for the alleged damage done to the goods, because they were not the owners of the goods, nor had they sufficient interest therein to enable them to maintain an action; that their only right as insurers would be to avail themselves of such rights and remedies as were vested in their assured after they had admitted his claim, and been subrogated to his rights in relation to the subject of insurance; and that even if they had been subrogated to the rights of the assured they could only sue in his name, and could not maintain an action in their own name, and therefore that no such action could be maintained in the present case, because the assured had no right of action against his own wife.

In the next place the defendants contended that this action, being based upon an act which on the face of the statement of claim amounted to a felony, could not be maintained, because it was not shewn that the rights of the public law had been vindicated by a prosecution of the felon.

Upon the first ground of demurrer the defendants are, in my judgment, clearly entitled to judgment, both upon principle and upon authority. It appears to me that the insurance company have no right of action under the circumstances for the damage done to the goods by the defendant Mary. At the time when the damage was done to the goods the company had no property or interest in the goods sufficient to sustain any action for damage done to them. No right or interest in the goods could accrue to the insurance company until they had acknowledged the claim under the policy, and by so doing entitled themselves to the benefit of any claims and causes of action vested in the assured; but it seems that even up to this moment the insurance company dispute the claim, and deny the right of the assured to demand an indemnity under the policy. But, further, it seems to me equally clear that if they had done everything to entitle themselves to the benefit of such a claim, it could only be enforced in the name of the assured, and for the purpose of enforcing his rights, and inasmuch as he could have no such claim or right against his wife it follows that in no possible view of the case is the plaintiffs' claim sustainable.

The case of *Simpson* v. *Burrell* (1) is in point upon this question. In that case Burrell was the owner of two ships, one of which negligently ran down and sank the other with a valuable cargo. Burrell's underwriters upon the sunken ship paid him for a total loss, and so were subrogated to all his rights. A claim was made by the owners of the cargo in the sunken ship against Burrell as the owner of the ship in fault for the value of their goods, and Burrell as the owner of the ship in fault paid into Court the whole value of that ship at 8*l.* per ton as the limit of his liability under the Merchant Shipping Acts, to be rateably divided among all who had sustained loss and damage by the ship being negligently run down and sunk. Thereupon Burrell's underwriters upon the sunken ship, who had paid for a total loss, claimed to come in and share with the rest the money paid in by the ship in fault, but the House of Lords (reversing the decision of the Lords of Session in Scotland) decided that they had no such right, and the reasoning in that case is directly applicable to the present. Lord Chancellor Cairns said, "The view of the Lord President, therefore, appears to be that, after payment by the underwriters as on a total loss, there is effected by some independent operation of law a transfer of whatever (if anything) can be recovered in specie of the thing insured, and by reason of the transfer of the thing insured, an independent right in the underwriters to maintain in their own

(1) Law Rep. 3 (Scotch) App. Cas. 279.

name, and without reference to the person assured, an action for the damage to the thing insured, which was the cause of the loss. I am not aware of any authority for the view of the case thus taken. I know of no foundation for the right of the underwriters, except the well-known principle of law that where one person has agreed to indemnify another he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss."

Lord Penzance said, "The learned counsel for the underwriters contended that they, by virtue of the policy which they entered into in respect of this ship, had an interest of their own in her welfare and protection, inasmuch as any interest or loss sustained by her would indirectly fall upon them as a consequence of their contract, and that this interest was such as would support an action by them in their own names and behalf against a wrongdoer. This proposition virtually affirms a principle which I think your Lordships will do well to consider with some care, as it will be found to have a much wider application and signification than any which may be involved in the incidents of a contract of insurance. The principle involved seems to me to be this, that where damage is done by a wrongdoer to a chattel, not only the owner of the chattel, but all those who by contract with the owner have bound themselves to obligations which are rendered more onerous, or have secured to themselves advantages which are rendered less beneficial by the damage done to the chattel, have a right of action against the wrongdoer, although they have no immediate or reversionary property in the chattel, and no possessory right by reason of any contract attaching to the chattel itself, such as by lien or hypothecation. This, I say, is the principle involved in the respondents' contention. If it be a sound one, it would seem to follow that if by the negligence of a wrongdoer goods are destroyed, which the owner of them had bound himself by contract to supply to a third person, this person, as well as the owner, has a right of action for any loss inflicted upon him by their destruction. But if this be true as to injuries done to chattels, it would seem to be equally so as to injuries to the person. An individual injured by a negligently driven carriage has an action against the owner of it. Would a doctor, it may be asked, who had contracted to attend him and provide medicines for a fixed sum by the year, also have a right of action in respect of the additional cost of the attendance and medicine cast upon him by the accident? And yet it cannot be denied that the doctor had an interest in his patient's safety. In like manner, where an actor or singer, bound for a term to a manager of a theatre, is disabled by the wrongful act of a third person, to the serious loss of the manager, can the manager recover damages for that loss from the wrongdoer? Such instances might be indefinitely multiplied, giving rise to rights of action which in modern communities, where every complexity of mutual relations is daily created by contract, might be both numerous and novel." See also the cases of *Randal* v. *Cockran* (2), *The North of England Insurance Association* v. *Armstrong* (3), *Stewart* v. *The Greenock Marine Insurance Company* (4), *Davidson* v. *Case* (5), *Mason* v. *Sainsbury* (6), *Yates* v. *White* (7).

This action cannot, therefore, in my judgment, be maintained, nor is there any substantial injustice in such a result, because, as it seems to me, the insurance company are in this dilemma: the loss and damage caused by the wrongful act of the wife either is or is not a loss which the company have agreed to indemnify the husband against. Now, if it is such a loss, an attempt by the company to enforce against the husband a return indemnity or reimbursement is at variance with the very substance of their undertaking to indemnify him; if, on the other hand, the loss by reason of its having

(2) 1 Ves. sen. 97.
(3) 39 Law J. Rep. Q.B. 81; Law Rep. 5 Q.B. 44.
(4) 2 H.L. Cas. 159; 1 Macq. H.L. 328.
(5) 8 Price, 542; 5 M. & S. 79.
(6) 3 Dougl. 61.
(7) 4 Bing. N.C. 272; 5 Sc. 640.

from the act of the wife is not
i the risks and losses covered by the
, then this action is as wholly mis-
ved, unnecessary and unfounded as
loss had been caused by any other
ot covered by the policy.

truth the real and substantial con-
n on the part of the insurance
ny is, that the loss in question
g been caused by the wilful act of
ife of the assured, although acting
it the privity of her husband, is
loss covered or insured against by
olicy. That question might be
in the action brought by the as-
against the company upon the
, but it does not arise, and, indeed,
not be raised, so as to receive a
g and judicial determination in such
ion as the present. As, however, the
on has been fully and ably argued
me, and as the parties have ex-
d a desire to elicit an opinion upon
int, I have no hesitation in saying
appears to me to be upon principle
tly clear and free from doubt that
a loss would be covered by an
ry policy against loss caused by
Under such a policy the company
be liable for every loss caused by
less the fire itself were caused and
ed by the wilful act of the assured
for some one acting with his privity
onsent. In order to escape from
sibility for such a loss as the pre-
ie company ought to introduce into
olicy an express exception.

second point raised by the de-
r, namely, that an action cannot be
ained to recover damages for a
ful act amounting to a felony
the public right has been first vin-
d by a prosecution of the felon, has
present view of the case ceased to
terial, but as the case may go to the
of Appeal, I think it better not to
he point over wholly unnoticed.

history of the question shews that
at different times and by different
rities been resolved in three distinct
First, it has been considered that
rivate wrong and injury has been
ly merged and drowned in the public
, and therefore no cause of action
rose or could arise; secondly, it
was thought that, although there was no actual merger, it was a condition precedent to the accruing of the cause of action that the public right should have been vindicated by the prosecution of the felon; thirdly, it has been said that the true principle of the common law is that there is neither a merger of the civil right nor is it a strict condition precedent to such right that there shall have been a prosecution of the felon; but there is a duty imposed upon the injured person not to resort to the prosecution of his private suit to the neglect and exclusion of the vindication of the public law. In my opinion, this last view is the correct one, and I shall now shortly refer to the authorities upon each view. In support of the first view is the declaration of the Judges in the case of *Higgins* v. *Butcher* in the year 1606. The action was brought by the plaintiff against the defendant for damages for assaulting and beating his wife to death. In the report in Yelv. 89, it is stated that Mr. Justice Tanfield, with the concurrence of Justices Fenner and Yelverton, said, in giving judgment for the defendant, "If a man beat the servant of J. S., so that he dies, the master shall not have an action against the other for the battery and loss of service, because the servant dying of the extremity of the battery it is now become an offence to the Crown, being converted into felony, and that drowns the particular offence and private wrong offered to the master before, and his action is thereby lost." The report in Noy, 18, says, "By the Court that action will not lie, for the king only is to punish felony, except the party brings an appeal." The point, however, was not strictly necessary for the decision of the case, because the action was personal only to the wife, and abated with her death.

In *Markham* v. *Cobbe* (8) Sir William Jones in 1626 held that "after conviction upon an indictment for felony the action did not lie, because it is found to be felony by the verdict and inquest, and the party shall not be admitted now to make that trespass" (9); but Justices Doderidge and Whitelock were in favour

(8) W. Jones, 147; Noy, 82.
(9) Noy, 82.

of the plaintiff, because the plea did not aver that the plaintiff had given evidence upon the prosecution so as thereby to have entitled himself to restitution upon conviction under the statute 21 Hen. 8. c. 11.

In support of the second view there are a vast number of *dicta* of Judges of the highest authority, but little or nothing of decisive authority. In *Dawkes* v. *Coveneigh* (10), in 1652, which was an action for damages after the conviction of the defendant for breaking the house of Dawkes and taking 250*l.*, Chief Justice Roll, denying that the trespass was drowned in the felony, said, "This is after conviction, and so is here no fear that the felon shall not be tried; but if it were before conviction the action would not lye for the danger the felon might not be tried, and there is no inconvenience if the action do lye."

Sir Matthew Hale's Treatise upon the Pleas of the Crown (11), published after his death, in 1681, in treating of the three means of restitution of goods stolen—namely, first, by appeal of robbery; second, by statute 21 Hen. 8. c. 11; and third, by course of common law—says of the last that after conviction trover lies, but that if a man feloniously steal goods, and before prosecution by indictment the party robbed brings trover it lies not, for so felonies should be treated; and for this he cites *Dawkes* v. *Coveneigh* (10) and *Markham* v. *Cobbe* (8), above referred to. The case of *Hudson* v. *Lee* (12), in 1589, seems to be a still earlier example of an action having been maintained for felony. In *Crosby* v. *Leng* (13), decided in 1810, the plaintiff brought his action for that which proved to be a felonious assault, for which the defendant had been previously indicted, tried and acquitted. There was a verdict for the plaintiff, subject to the opinion of the Court upon the question whether, after an acquittal, an action lay; and Lord Ellenborough, in giving judgment in the plaintiff's favour, said, "The policy of the law requires that before the party injured by any felonious act can seek civil redress for it the matter should be heard and disposed of before the proper criminal tribunal in order that the justice of the country may be first satisfied in respect to the public offence. If the acquittal be shewn either in pleading or by evidence to have been obtained by collusion, it would be put aside, and the objection would still remain." The defendant, however, could not have set up his own felony by way of plea in bar, as was decided in *Lutterell* v. *Reynell* (14).

It may not be immaterial to notice that in the year 1819, by statute 59 Geo. 3. c. 46, the writ of appeal of felony, which was the ancient process by which the private suitor sought redress for his individual injury, was abolished on account of the oppressive nature of the proceedings under it. In the case of *Gimson* v. *Woodfull* (15), which was an action of trover for a mare stolen from the plaintiff by one from whom the defendant bought her, Chief Justice Best nonsuited the plaintiff, saying, "I am of opinion that the plaintiff has done nothing that he ought to have done—I take the law to be this—you must do your duty to the public before you seek a benefit to yourself, and then there is no necessity for a civil action." This case, which was decided in the year 1825, is an express decision in point, but it was as a decision overruled in *White* v. *Spettigue* (16). In 1827 the question was discussed in the Court of King's Bench in the case of *Stone* v. *Marsh* (17), which was an issue out of Chancery, directed to try the right of the plaintiffs, the proprietors of some bank stock, against the defendants, who had innocently received the proceeds through a power of attorney forged by Fauntleroy for the transfer of the stock. Lord Tenterden, in giving judgment in the plaintiff's favour, said, "Can the House set up this felony as an answer to the plaintiff's claim? In general a man cannot defend against a demand by shewing on his part that it arose out of his

(10) Styles, 346.
(11) 1 Hale, P.C. 546.
(12) 5 Coke Rep. 43*a*.
(13) 12 East, 409.
(14) 1 Mod. 282.
(15) 2 Cr. & Ph. 41.
(16) 13 Mee. & W. 603; 14 Law J. Rep. Exch. 99.
(17) 6 B. & C. 551; 5 Law J. Rep. K.B. (o.s.) 201.

isconduct according to the maxim, › allegans suam turpitudinem est dus.'" There is, indeed, another ' the law of England, namely, that . shall not be allowed to make a the foundation of a civil action— at he shall not maintain a civil to recover from a third and inno- erson that which has been felonі- taken from him, but that he shall e the felon; and it may be admitted e shall not sue others together with lon in a proceeding to which the is a necessary party, and wherein im appears by his own shewing to nded on the felony of the defendant. ule is founded on public policy, requires that offenders against the all be brought to justice; and for reason a man is not permitted to n from prosecuting an offender by ing back stolen property or any equi- or composition for a felony, with- it, and of course cannot be allowed intain a suit for such a purpose.

1845 the case of *White* v. *Spettigue* was tried before Lord Cranworth. was an action of trover brought by itor against a bookseller, who had ntly purchased and afterwards sold n books which had been stolen from aintiff. The learned Judge told the hat there was no evidence to show tole the books, and the property in ods being originally in the plaintiff not be taken out of him by any act hird party; and he directed them to or the plaintiff, unless they believed lefendant received them knowing to have been stolen, in which case ght would then merge in the felony, he plaintiff would not be entitled to er. The jury having found for the iff, the defendant moved for a new on the ground of misdirection, citing m v. *Woodfull* (15) as directly in ; and Lord Cranworth, in expressing sent from the ruling in *Gimson* v. *full* (15), as being too general, said, ink the true principle is, that where a nal, and consequently an injurious act ds the public has been committed, is also a civil injury to a party, party shall not be permitted to seek s for the civil injury to the prejudice of public justice and to waive the felony, and go for the conversion." It was also considered that under the pleas, which were "not guilty" and "not possessed," the point was not open to the defendant, and Lord Cranworth concluded by saying, "With respect to what I said at the trial, that if the defendant had been the guilty receiver of the books he would be entitled to the verdict, I must retract that and suspend my judgment on that point, as I entertain some doubt whether I was correct." This case, although it overrules *Gimson* v. *Woodfull* (15) as a decision, leaves the point under discussion undetermined. The next reported decision seems to be *Wellock* v. *Constantine* (18) in 1863, which was an action by the plaintiff, a young woman, "for that the defendant assaulted and forcibly violated her person and debauched her, whereby she became pregnant." The case came on for trial before Mr. Justice Willes, when, after the plaintiff's evidence proving the forcible connection, it was objected by the defendant that the action was not maintainable, and the learned Judge so ruled, stating, "If a rape was proved that could not form the subject of a civil action but the plaintiff must proceed criminally, and if the connection took place with the consent of the plaintiff no action would lie." A rule *nisi* for a new trial having been obtained was afterwards discharged, Chief Baron Pollock saying, "The ground upon which the nonsuit proceeded was that after it appearing the civil wrong complained of, for which a civil remedy was sought by action, involved a charge for felony the proper course was not to proceed with the trial but to prosecute for the criminal offence." Baron Bramwell concurred, but Baron Martin dissented from this decision. This is a very strong and decisive decision, because, bearing in mind that the declaration stated on the face of it that the injury complained of amounted to a felony and the only plea was "not guilty," even the doctrine of merger would scarcely seem to justify a Judge at *nisi prius* in nonsuiting a plaintiff upon the mere issue of not

(18) 2 Hurl. & C. 146; 32 Law J. Rep. Exch. 285.

guilty; but the nonsuit was upheld and the decision was affirmed.

The question arose again in a very similar form in the case of *Wells* v. *Abrahams* (19) in 1872. This was an action of trover for a brooch—pleas, "not guilty" and "not possessed." At the trial before Mr. Justice Lush, the evidence shewed a felonious taking. After a verdict for the plaintiff, the defendant having obtained a rule *nisi* for a new trial upon the ground that the act complained of proved to be a felony, and therefore that the action would not lie, this rule was discharged upon the ground that the Judge, as a mere commissioner of *nisi prius*, could only try the issues joined, and had no power to direct a verdict for the defendant against positive and affirmative evidence in favour of the plaintiff. Lord Chief Justice Cockburn said, "No doubt it has been long established in the law of England that where an injury amounts to an infringement of the civil rights of an individual, and at the same time to a felonious wrong, the civil remedy—that is, the right of redress by action—is suspended until the party inflicting the injury has been prosecuted. But although this is the rule, it becomes a different question when we have to consider how it is to be enforced. It may be that if a person neglecting his duty to prosecute for an offence committed against him were to bring an action instead of prosecuting, the Court might be called upon to intervene and to prevent the plaintiff obtaining by judgment and execution the fruits of the action thus improperly brought." Mr. Justice Blackburn was of the same opinion, and said, "While the law throws the prosecution of criminal offences on private individuals, it may be in some cases that the civil remedy is suspended until there has been a prosecution for the felony. If an action were brought against a defendant and it was stated by the Attorney-General on behalf of the Crown that criminal proceedings were pending and the action was brought with the intention of compromising the felony, the Court might, in the exercise of its summary jurisdiction, stay proceedings in the action until the felony had been tried." His Lordship, after reviewing the authorities, expressed his disapproval of the nonsuit in *Wellock* v. *Constantine* (18) and stated that that case could not be treated as an authority. Mr. Justice Lush assented upon the ground that the Judge at *nisi prius* could only try the issues joined, and that it was not competent to him to interpose and stop the case in the manner suggested; that if the declaration disclosed that which made it bad on demurrer or in arrest of judgment that would not justify the Judge at the trial in stopping the case. This case, although it actually decided no more than that a Judge of *nisi prius* had no power to do more than decide the issues joined upon the record, tended strongly in the direction of proving that practically a civil action for damages might be maintained for a wrongful act amounting to a felony. The defendant could not plead his felony; the Judge could only try the issues raised upon the pleadings, and there is no instance on record of the Attorney-General or the Crown having interposed to stop the action. This position of the question is somewhat altered by the Judicature Act: the Judge of *nisi prius* is no longer a mere commissioner to try issues, but by that Act (36 & 37 Vict. c. 66. s. 29) every Judge acting under the ordinary commissions constitutes a Court of the High Court of Justice. In this uncertain state of the law the question was once more discussed in the case of *In re Shepherd; ex parte Ball* (20), in 1879, when the doctrine that it was a condition precedent to the enforcing the civil remedy that the felon should have been first prosecuted, if it ever had any foundation, was finally exploded. The question arose in the bankruptcy of one Shepherd, who had been a clerk in the banking house of Willis & Co., and had embezzled about 7,000*l.* of their moneys. Willis & Co. had neglected to prosecute and had given the felon an opportunity for escape. Shepherd was made a bankrupt, and

(19) 41 Law J. Rep. Q.B. 306; Law Rep. 7 Q.B. 544.

(20) 48 Law J. Rep. Bankr. 57; Law Rep. 10 Ch. D. 667.

shortly afterwards Willis & Co. became bankrupt, and Ball, having been appointed their trustee, brought in a proof upon Shepherd's bankruptcy for the 7,000*l.*, and the question was, whether it could be allowed on account of the felony. The Lords Justices held that the trustee in bankruptcy against whom no charge of neglect to prosecute could be brought was entitled to prove for the debt. Lord Justice Bramwell said, "The law upon this subject is in a remarkable state. For 300 years it has been said in various ways by Judges, many of the greatest eminence, without intimating a doubt, except in one instance, that there is some impediment to the maintenance of an action for a debt arising in this way. The doubt is that of Mr. Justice Blackburn in *Wells* v. *Abrahams*" (19); and the Lord Justice points out that there are "only four possible ways in which the impediment can arise: first, that no cause of action arises at all out of a felony; second, that it does not arise till prosecution; third, that it arises on the act but is suspended; fourth, that there is neither defence to nor suspension of the claim by or at the instance of the felon debtor, but that the Court on its own motion or at the instance of the Crown may stay proceedings till public justice is satisfied." But the Lord Justice points out the difficulties in the way of each theory, and finally suggests that there is a great deal to justify Mr. Justice Blackburn's doubt. Lord Justice Baggallay agreed with the result, and laid down the following propositions as resulting from the authorities: first, that a felonious act may give rise to a maintainable action; second, that the cause of action arises upon the commission of the offence; third, that notwithstanding the existence of the cause of action, the policy of the law will not allow the person injured to seek civil redress if he has failed in his duty of bringing or endeavouring to bring the felon to justice; fourth, that this rule has no application to cases in which the offender has been brought to justice at the instance of some other person or in which prosecution is impossible by reason of the death or escape of the felon; fifth, that the remedy by proof in bankruptcy is subject to the same principles of public policy as those which affect an action. The resolutions laid down by Lord Justice Baggallay appear to me to be sound and logical and to be fully supported by the authorities when closely examined. The question in the present case arises upon demurrer to the statement of claim, by which all that appears is that the plaintiffs are suing for damages for an injury caused by the felonious act of the defendant Mary. The only question therefore is whether such an action is *prima facie* maintainable, or whether upon the face of the claim it ought to be finally and conclusively rejected. In my judgment upon this demurrer, the action may be maintainable in fact. There is nothing to shew whether the plaintiffs have or have not neglected to prosecute the felon, and it is consistent with this demurrer that the felon may in fact have been convicted, and as it seems clear to me that the prosecution of the felon is not an absolute condition precedent to the accruing of the cause of action, the statement of claim is *prima facie* sufficient so far as the present point is concerned. But as, in my opinion, the action is, upon the first point, not sustainable, the judgment upon this demurrer must be for the defendants.

Demurrer allowed.

Solicitors—Swann & Co., agents for Tweed, Stephen & Dashper, Lincoln, for plaintiffs; John Cotton, agent for G. Martinson, Hull, for defendants.

[IN THE COURT OF APPEAL.]

1881. March 10. } WILKINSON AND COMPANY *v.* UNWIN.*

Bill of Exchange—Prior Indorser—Consideration—Parol Agreement—Guarantee—Statute of Frauds—Right of Holder who is Prior Indorser of Bill to sue Intermediate Indorser—Circuity of Action.

The plaintiffs having supplied goods to E., drew two bills of exchange upon him for the price. E. accepted the bills, and the plaintiffs indorsed them to the defendant, who, in pursuance of a verbal agreement to become surety for E., in respect of the price of the goods, re-indorsed them to the plaintiffs, who, as indorsees of the bills, sued the defendant:—Held (*affirming the judgment of* BOWEN, J.), *that the plaintiffs could set up the verbal agreement to shew that the defendant could not have sued them as prior indorsers, and that, as no circuity of action would result, the plaintiffs were entitled to maintain their action.*

Appeal from a judgment of Bowen, J., after trial with a jury.

Action to recover on two bills of exchange indorsed by the defendant to the plaintiffs.

Statement of claim:—

1. Wilkinson & Co., on the 27th of July, 1878, by two bills of exchange, now overdue, directed to one Edwin Unwin, required the said Edwin Unwin to pay to their order 51*l.* 13*s.* 4*d.* and 60*l.* respectively, as to the 51*l.* 13*s.* 4*d.* three months, and as to the 60*l.* four months after date; and the said Wilkinson & Co. indorsed the said bills to the defendant, who indorsed the same to the plaintiffs, and the said bills were duly presented for payment and were dishonoured.

2. Before and at the time of the making of the bills by the plaintiffs, and the indorsement thereof by the defendant, one Edwin Unwin had requested the plaintiffs to supply him with goods and to give him some credit for the price thereof by taking bills, and it was agreed between the plaintiffs and Edwin Unwin that in such case he would procure his mother, the defendant, to indorse and become surety as indorser to the plaintiffs of the said bills so as to insure due payment for the goods.

3. The plaintiffs supplied goods to the amount of the said bills, and gave the credit accordingly, and in pursuance and performance of the said agreement drew and indorsed the two bills before mentioned, and the defendant, for the accommodation of Edwin Unwin, indorsed the same to the plaintiffs with the intent of thereby becoming surety for due payment as indorser to the plaintiffs.

4. Edwin Unwin, after the said indorsement by the defendant, in further pursuance of his agreement, delivered the said bills so indorsed to the plaintiffs; but the said bills were dishonoured, though duly presented for payment, and no part of the price of the said goods or of the said bills has been paid.

5. The defendant had due notice of dishonour, but if due notice was not given, the plaintiffs say they used all due and reasonable diligence in endeavouring to find the defendant to give her notice of dishonour, but were nevertheless unable to find her address before the 30th of December, 1878, when they gave her notice accordingly.

6. The plaintiffs also claim the amount of the said bills as money due from the defendant to the plaintiffs upon accounts stated between them.

7. The plaintiffs claim 111*l.* 13*s.* 4*d.*, together with interest thereon to judgment.

Statement of defence:—

1. The defendant denies paragraphs 1, 2, 3, of the statement of claim, and further says that Wilkinson & Co., mentioned in the 1st paragraph as drawers and indorsers to the defendant of the said bills, are none other than the plaintiffs.

2. If it was agreed between the plaintiffs and Edwin Unwin, as in the 2nd paragraph alleged (which the defendant does not admit), the defendant had no notice of such agreement at the time when she indorsed the said bills. The defendant indorsed the said bills in the ordinary way and to the ordinary extent incident to such indorsement, as appears on the said bills and no further, and without any intention to forego any rights

* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Brett, L.J.

nedies ordinarily incident to such
ement as against prior parties to
id bills; and the defendant submits
ıe is entitled as against the plain-
ı such drawers and first indorsers
ressaid to be indemnified by them
pect of her liability (if any) upon
d bills.

The defendant denies the allegations
4th paragraph of the statement of
and each of them, and further says
ıe price of the said goods or of the
ills, or part thereof, has been paid to
aintiffs.

n answer to paragraph 5 of the
ent of claim, the defendant denies
ıe had due notice of dishonour of
d bills or either of them, or that
aintiffs used all due and reasonable
ıce in endeavouring to find the
ant to give such notice, or that
ere unable to find her address as
ı alleged.

n answer to paragraph 6 of the
ent of claim, the defendant denies
he amount claimed or any sum of
whatever is due from the defendant
plaintiffs on account stated or in
her manner whatsoever.

e was joined on the statement of
).

the trial, in answer to questions
them by the learned Judge, the
und that the plaintiffs had shewn
ligence in trying to find out the
ant's address, and to give her notice
onour; that the defendant did not
r name on the bill with the ordinary
on, but that she had agreed with
aintiffs to become surety for them
price of the goods supplied to
Unwin, and put her name on the
become surety to the plaintiffs,
at no payment on account of the
d been made by the defendant.
n these findings, Bowen, J., after
consideration, entered judgment
plaintiffs.
defendant appealed.

rton, for the defendant.—The de-
could have sued the plaintiffs on
dorsement to her, the considera-
r that indorsement being the ad-
l credit obtained by having the
defendant's name on the bill. Therefore the plaintiffs cannot recover from the defendant on her indorsement, the test being whether or not "circuity of action" would result from a prior indorser suing, as indorsee, the intermediate indorser. Further, the plaintiffs cannot set up the parol agreement by the defendant to become surety for Edwin Unwin, as it is an agreement inconsistent with the primary intendment of the written contracts (the two bills), according to the law merchant—*Bishop* v. *Hayward* (1) and *Britten* v. *Webb* (2). The cases which will be relied on for the plaintiffs—*Wilders* v. *Stevens* (3), *Smith* v. *Marsack* (4) and *Morris* v. *Walker* (5)—were really decided on points of pleading, and neither *Bishop* v. *Hayward* (1) nor *Britten* v. *Webb* (2) were cited in them; also the agreement, being one of guaranty, is void by the Statute of Frauds, because not in writing—*Steele* v. *M'Kinlay* (6). The latter case is directly in point. He also referred to *Matthews* v. *Bloxsome* (7), *Seabury* v. *Hungerford* (8), *Hall* v. *Newcome* (9) and *Abrey* v. *Crux* (10).

Goodman, for the plaintiffs, was not required to argue.

BRAMWELL, L.J.—I am of opinion that this judgment must be affirmed. There are many cases which decide that if a man indorses a bill, and after subsequent indorsements again becomes the holder of the bill, he can maintain no action against the intermediate indorsers because he would himself be liable to them in consequence of his antecedent indorsement.

But there are several other cases which have decided that, if the holder of the bill would not have been liable by virtue

(1) 4 Term Rep. 470.
(2) 2 B. & C. 483.
(3) 15 Mee. & W. 208; 15 Law J. Rep. Exch. 108.
(4) 6 Com. B. Rep. 486; 18 Law J. Rep. C.P. 65.
(5) 15 Q.B. Rep. 589; 19 Law J. Rep. Q.B. 400.
(6) Law Rep. 5 App. Cas. 754.
(7) 33 Law J. Rep. Q.B. 209.
(8) 2 Hill, N. Y. Rep. 80.
(9) 3 ibid. 233.
(10) 39 Law J. Rep. C.P. 9; Law Rep. 5 C.P. 37.

of his antecedent indorsement to the indorser he is suing, he may maintain his action because no circuity of action will result. He may maintain his action against the indorser, notwithstanding the prior indorsement, if such circumstances can be shewn to exist that the indorser who is being sued could not have maintained his action on the bill against the holder as prior indorser. To my mind that is most clearly the case here. The statement of claim alleges that the bill was indorsed by the defendant with the intention of becoming surety for the price of the goods supplied to Edward Unwin, and the defendant states in her statement of defence that she indorsed the bills in the ordinary way, and without any intention to forego her right and remedy against the plaintiffs, as indorsers. The jury have found that is not true.

It is clear, if that finding is right, that beyond all doubt the defendant could have had no right of action against the plaintiffs. It is clear that, if the plaintiffs had indorsed this bill to X, who had sued the defendant upon it and made her pay, she could have maintained no action against the plaintiffs, if the finding of the jury is true. If so, the rule I have referred to applies: there would be no circuity of action; and, as indorser, she would have to pay the plaintiffs on the bill. It is objected that an argument such as the plaintiffs rely on could only be shewn by a memorandum in writing. I am entirely of a different opinion. It would be so if the agreement were executory, because no action could be brought unless the agreement were evidenced in writing so as to satisfy the Statute of Frauds. But the plaintiffs are not suing on an executory agreement, but upon something executed and done. There is nothing in the Statute of Frauds to say such an agreement must be in writing. The only misgiving I have had in the case is, whether my judgment may not be inconsistent with some things that were said in *Steele* v. *M'Kinlay* (6). But I am satisfied that it was not the intention of the House of Lords in that case to overrule the three cases of *Wilders* v. *Stevens* (3), *Smith* v. *Marsack* (4) and *Morris* v. *Walker* (5); and I am also satisfied that it was not their intention to say that the obligation upon a bill could be got rid of by shewing that it was given in pursuance of an agreement which could not be enforced because not in writing.

BAGGALLAY, L.J.—In this case the defendant does not object to any improper admission or rejection of evidence; the objection is, that upon the finding of the jury the defendant is entitled to judgment. The bills in question were drawn by the plaintiffs upon Edwin Unwin, indorsed by the plaintiffs to the defendant and indorsed by her to the plaintiffs.

Under these circumstances, the position and the rights of the parties cannot be better described than in *Byles on Bills* (13th ed. p. 157): "If a bill be re-indorsed to a previous indorser, he has, in general, no remedy against the intermediate parties, for they would have their remedy over against him, and the result of the action would be to place the parties in precisely the same situation as before any action at all." That is the ordinary rule and it is to prevent circuity of action. *Prima facie*, therefore, the plaintiffs would have no right of action against the defendant, she having her remedy over against them; but then Byles points out an exception—"But where a holder has previously indorsed, and the subsequent intermediate indorser has no right of action or remedy on that previous indorsement against the holder, there are cases in which the holder may sue the intermediate indorser." And then he cites *Wilders* v. *Stevens* (3), *Smith* v. *Marsack* (4) and *Morris* v. *Walker* (5). No doubt in all those cases the suretyship or agreement set up was held sufficient to entitle the plaintiff to recover. But in all of the cases the agreement was simply alleged as an existing agreement; nothing was said as to whether or not it was in writing. The cases, therefore, do not decide more than that the agreements, in writing, could have been set up as a defence.

Those cases, therefore, differ from this, and from the case of *Steele* v. *M'Kinlay* (6), which, in my opinion, does not overrule them. The agreement by which the guarantee in that case was entered into was not in writing, and the agreement was held void by statute. I confess I thought for some time that it was difficult to avoid applying the decision on the

n that case to this case, though no there is some difference between

But it appears to me clear that e concluded by the verdict of the i this case. They found that the ant indorsed the bills with the f becoming surety to the plaintiffs e price of the goods supplied to . Unwin.

here were any improper rejection ission of evidence that would be a l for a new trial, but so long as the t stands we are bound by it. Upon round, without entering into a dis- of the principle of *Steele* v. *lay* (6), I am of opinion that this should be dismissed.

TT, L.J.—The defendant is sued as er of a bill to the plaintiffs, as they obtained a verdict and judgment t him, as indorser. *Prima facie* it necessary to prove any considera- r the bill, if the relation of indorsee dorser is once established. A diffi- is raised here, and it is said that aintiffs cannot recover as indorsees t the defendant as indorser, be- the plaintiffs themselves are pre- indorsers of the bill. If there was g else, that would be a fatal objec- But there are cases to shew that an destroy that difficulty. The lty is founded on the "circuity of " which would result if the pre- indorser sued the intermediate er; and the difficulty is destroyed . shew that no circuity of action result. The three cases, of which s v. *Stevens* (3) is the first, shew at case was not decided on a ques- urning upon the forms of pleading ; it was decided on a question of atile law raised by the pleadings, a raised, no doubt, on demurrer.

Alderson says, "The replication ves the objection founded on cir- f action, which is the only objec- the plaintiff's right to recover in tion." That case has been adopted ince. Therefore, the moment you y the objection founded on circuity on the defendant is liable as in- to the plaintiffs. Now, you can y it by shewing that no considera- r the bill was originally given by the plaintiffs to the defendant. In *Morris* v. *Walker* (5) it was held that the prior indorser of a promissory note, who had become the holder, could sue the intermediate indorser, because it was proved by evidence that the bill was an accommodation bill, and that no consideration passed in respect of it to the plaintiff. Therefore, if no consideration was given here, the objection founded upon circuity of action is destroyed. It is said that the only evidence to shew want of consideration was the evidence of the defendant's promise to be surety, and it is alleged that it could only be proved for this purpose by proving a promise in writing. It is said that the promise must be in writing when required to be proved, not for the purpose of enforcing the agreement, but in order to prove the fact of the promise *aliunde*, and for another purpose—that is, to shew the consideration for the bill. The Statute of Frauds does not say so, and there is the further objection that parol evidence of the guarantee was admitted at the trial, and a verdict given upon it; and the defendant ought to have gone to a Divisional Court to get rid of that verdict instead of coming here to ask that judgment be entered for her. But I am of opinion that the fact was as well proved by parol as by written evidence. It is said also that *Wilders* v. *Stevens* (3) and the other two cases were wrongly decided, because *Britten* v. *Webb* (2) was not cited in them. In the latter case and in *Bishop* v. *Hayward* (1) the law was taken to be that, when circuity of action would result, the intermediate indorser could not be held liable. *Wilders* v. *Stevens* (3), *Smith* v. *Marsack* (4) and *Morris* v. *Walker* (5) are referred to in *Byles on Bills* as not overruling *Britten* v. *Webb* (2) and *Bishop* v. *Hayward* (1), but as distinguished from them.

In *Steele* v. *M'Kinlay* (6), in the House of Lords, the defendant was indorser of the bill to the plaintiff, but could not be sued as indorser for want of due notice of dishonour, or some other cause not appearing in the report. The plaintiff, being unable to sue as indorsee, tried to fix the defendant with liability as a co-acceptor or as a guarantor. The House of Lords held that he was not a co-

acceptor, and that he was not a guarantor, so that the contract of guaranty could be enforced, because there was no evidence of the contract in writing. No question with regard to circuity of action arose there. That case, therefore, does not apply to this, and does not control us. The question before us has been decided as part of the law merchant for many years.

I am of opinion that Mr. Justice Bowen's judgment was quite right, and that this appeal should be dismissed.

Judgment affirmed.

Solicitors—G. & W. Webb, for plaintiffs; Wm. Moon, for defendant.

[IN THE QUEEN'S BENCH DIVISION AND THE COURT OF APPEAL.]

1881. March 11, 30, 31. } CLARKE *v.* BRADLAUGH.*

Parliamentary Oaths Act, 1866 (29 *Vict. c.* 19), *ss.* 4 *and* 5—*Promissory Oaths Act*, 1868 (31 *&* 32 *Vict. c.* 72)—*Evidence Amendment Act*, 1869 (32 *&* 33 *Vict. c.* 68), *s.* 4—*Right of a Member of Parliament to Affirm instead of taking the Oath—Penalty for sitting without taking the Oath—By whom to be recovered.*

Members of the Houses of Parliament are required by 29 *Vict. c.* 19 *to take an oath before sitting or voting, and section* 5 *provides that if any member of the House of Peers votes or sits without taking the oath, he shall be subject "to a penalty of* 500*l. to be recovered by action in one of Her Majesty's Superior Courts at Westminster, and that if a member of the House of Commons votes or sits without taking the oath, he shall be subject to a like penalty." By section* 4, *"Quakers and every other person for the time being by law permitted to make a solemn affirmation or declaration instead of taking an oath," may on taking their or his seat in Parliament make an affirmation in a form prescribed by the Act, instead of taking the oath. The Evidence Amendment Act*, 1869 (32 *&* 33 *Vict. c.* 68), *provides that a person called to give evidence in a Court of justice shall, if he objects to take an oath, and if the presiding Judge is satisfied that the taking of an oath would have no binding effect upon his conscience, make a promise and declaration instead.*

To an action by a common informer for a penalty alleged to have been incurred by the defendant, a member of the House of Commons, who had sat and voted without having taken the oath, the defendant pleaded that he was a person on whose conscience an oath would have no binding effect, and that he had made an affirmation pursuant to the provisions of the Parliamentary Oaths Act, 1866.

The plaintiff demurred:—

Held (*by the Court of Appeal*), *that the penalty could be recovered by a common informer; that the defendant was not entitled to make an affirmation instead of taking the oath; and that the provisions of the Evidence Amendment Act*, 1869 (32 *&* 33 *Vict. c.* 68), *are confined to witnesses, and do not apply to the taking an oath by members of Parliament as a qualification for sitting in either House.*

Cross appeals from the judgment of Mathew, J., on a demurrer by the plaintiff to the defendant's statement of defence, and on a demurrer by the defendant to the plaintiff's reply.

The judgment of Mathew, J., sets out sufficiently the arguments and the pleadings.

Sir H. Giffard and *Kydd*, for the plaintiff.

The defendant, in person.

MATHEW, J. (on March 11).—In this action the plaintiff, by his statement of claim, sought to recover a penalty alleged to have been incurred by the defendant by reason of his having sat and voted in the House of Commons without having made and subscribed the oath appointed to be taken by members of the House of Commons according to the Parliamentary Oaths Act, 1866, as altered by the Promissory Oaths Act, 1868.

In his statement of defence the defendant alleged that, "at the time of the committing of the alleged offence in the statement of claim mentioned, he was a

* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Lush, L.J.

-ks v. Bradlaugh (App.), Q.B.

ı who, when called to give evidence r Court of justice, would object to n oath, and upon whose conscience h, if taken, would have no binding so as to be entitled and permitted ke a promise or declaration on the ing Judge being satisfied that the ; of an oath would have no binding as aforesaid."

defendant further alleged that sitting and voting in the House of ıons he had made and subscribed a ı affirmation in the form prescribed ı Parliamentary Oaths Act, 1866, as l by the Promissory Oaths Act, and that the same was received by ırk at the table of the House as the duly appointed and authorised to ister oaths to witnesses and to l members of the said House.

statement of defence set out at length the proceedings in Parlia- with reference to the defendant's The defendant, it would seem, in st instance insisted upon his right irm, but the House declined to t him to affirm. The defendant offered to take the oath, and the on of his right to do so was referred ommittee. The committee advised he defendant should be permitted rm, with a view to his having his ory rights determined.

ı statement of defence set out the tion of the House of the 2nd of 1880, in the following terms: ; every person returned as a mem- this House who may claim to be a ı for the time being by law per- l to make a solemn affirmation or ation instead of taking an oath, henceforth (notwithstanding so of the resolution adopted by this ı on the 22nd day of June last as ı to affirmation) be permitted with- uestion to make and subscribe a ı affirmation in the form prescribed ɜ Parliamentary Oaths Act, 1866, ered by the Promissory Oaths Act, subject to any liability by statute."

ı defendant then alleged that after d House had so resolved as aforesaid, fendant again presented himself at ble of the said House, and claimed a person for the time being by law tted to make a solemn affirmation instead of taking an oath, and thereupon the defendant duly made and subscribed a solemn affirmation in the form prescribed by the Parliamentary Oaths Act, 1866, as altered by the Promissory Oaths Act, 1868.

The plaintiff demurred to so much of the statement of defence as alleged, as an answer to the plaintiff's claim, that the defendant had made the affirmation referred to in his statement of defence.

The plaintiff replied further that the defendant was a person who by want of religious belief was not entitled to make and subscribe a solemn affirmation.

To this reply the defendant demurred on the ground that the statutes under which he claimed the right to affirm did not require that the person making and subscribing the affirmation should possess or profess any religious belief.

These demurrers were set down on the 10th of February, 1881, and came on for discussion before me on Monday last, the 7th of March, and I have now to deliver judgment.

The case was argued by Sir Hardinge Giffard for the plaintiff, and by the defendant in person.

The case for the plaintiff was shortly this: The defendant by the Parliamentary Oaths Act, 1866, was bound to subscribe the oath thereby appointed, and was not entitled to affirm; and the defendant was challenged to point out any later enactment which enabled him to substitute an affirmation for the oath. The defendant at once admitted that the Oaths Act of 1866 would not have entitled him to make an affirmation, but in an argument which in vigour and clearness left nothing to be desired, the defendant contended that the legislation relating to oaths which followed the Act of 1866 relieved him from the disability imposed by that statute.

The defendant's contention on this point may be stated thus:—

The Act of 1866, contained in the 4th section an exemption in favour of Quakers and any other persons "for the time being by law permitted to make a solemn affirmation or declaration instead of taking an oath." When the Act passed, the defendant was not a person permitted by law to make an affirmation instead of

taking an oath, but that privilege was acquired by virtue of the statutes 32 & 33 Vict. c. 68, and 33 & 34 Vict. c. 49. These enactments, it was said, created a new class of persons, of whom the defendant was one (namely, persons permitted to affirm because an oath would have no binding effect on the conscience), and who were relieved of the obligation to take an oath. It followed that these persons were intended by the Legislature to enjoy the exemption in section 4 of the Act of 1866. In other words, as the defendant contended, the object of the Acts of 1869 and 1870 was to amend the Act of 1866, and to extend the exemption in section 4 of that statute to the class of persons represented by the defendant; and it was urged that in order to give effect to this supposed intention of Parliament the Acts must be read and construed together as if they were one Act.

In order to decide whether this contention of the defendant is well founded in point of law, it becomes necessary to examine the provisions of the Acts of 1869 and 1870, which are respectively entitled, the "Evidence Further Amendment Act, 1869," and the "Evidence Amendment Act, 1870."

In the first place, the statutes contain no express provision that the persons thereby entitled to affirm are also to be entitled to affirm under the Act of 1866; and it seems difficult to understand, if the Legislature intended to make a change in the law in an important matter, which affected both Houses of Parliament, that this intention should not be expressed in clear and decisive language. There is nothing of this in the statutes; and nothing to shew an intention that they should have any other operation than that described in the Acts themselves. What their object was, is well explained in the preamble to the Act of 1869, which is as follows:—

"Whereas the discovery of truth in Courts of justice has been signally promoted by the removal of restrictions on the admissibility of witnesses, and it is expedient to amend the law of evidence with the object of still further promoting such discovery."

This being the preamble, the statute proceeds to enact that if any person called to give evidence in any Court of justice, whether in a civil or criminal proceeding, shall object to take an oath, or shall be objected to as incompetent to take an oath, such person, if the presiding Judge is satisfied that the taking of an oath would have no binding effect upon his conscience, shall make a promise and declaration to tell the truth, and shall be liable, for false evidence, to be tried and convicted for perjury.

It seems to me perfectly clear that the Acts were intended to remove restrictions upon the admissibility of witnesses, with a view of promoting the discovery of the truth, and that they had no other object.

Further, the Acts do not, as was contended by the defendant, create a class of persons for the time being by law permitted to make an affirmation instead of an oath. They only provide that a person may be enabled or, as it would seem, required, to give evidence in a Court of justice, when the presiding Judge has satisfied himself that the person is one upon whose conscience an oath would have no binding effect.

Again, the Acts have an operation less general than that of the Act of 1866, inasmuch as they do not apply to Scotland; and this result would seem to follow from the attempt to read the Acts together, that the representatives of Scotch constituencies objecting to take an oath for the reasons given by the defendant would remain subject to a disability from which persons of the same class in other parts of the United Kingdom had been relieved.

I see no grounds whatever for supposing that the Legislature intended that the Acts of 1869 and 1870 should qualify the Act of 1866, or that all these statutes should be read together as if they were one Act. It seems to me to be only necessary to place the enactments side by side to see that they have no such relation to each other as was asserted by the defendant; and that it is impossible to attribute to the Legislature the intention to blend the Acts together in one scheme of legislation.

Many difficulties in which the defendant's contention involves him were pointed out in the course of the case, and none of those difficulties seemed to me

ve been satisfactorily met. Thus, the improbability was pointed out ne Legislature would attempt to deal ds with matter of civil procedure, natter affecting the constitution, the lant attempted to shew that the ge of sitting in either House of ment was analogous to what he the privilege of giving evidence in rt of justice. The argument only l to indicate the difficulty of the lant's position. No one who was o choose his words, and had a ence for accuracy of expression, speak of the discharge of the all- tant and most anxious duty of a s as "a privilege." Again, when s shewn that no person was per- l to make an affirmation under the f 1869 unless there had been an y by the presiding Judge which the of Commons had no means of g, the defendant had no better r to offer than that the words "pre- Judge" in the Act of 1869 must ten to include either the House of ons or any duly appointed clerk of ouse of Commons. But to adopt s mode of construing Acts of Par- t would not be to interpret but to them. The contention was equally s that the investigation which the was bound to make under the ice Act must be taken to have made by the House of Commons s result in the defendant's favour, son of the order of the 2nd of 880, and of his being permitted to an affirmation under that order. seems very clear that the House mmons declined to pronounce any n upon the question whether the ant was entitled to affirm in lieu ing the oath. I have come to the sion that the defendant has failed blish that the effect of the Evi- Acts was to relieve him of the ity imposed by the Parliamentary Act of 1866, and that the de- to the statement of defence must re be allowed.

re remains for consideration the n whether the reply is bad on rer. The matter of the reply does pear to be relevant to what turned out to be the defendant's contention. But, as I understand, the plaintiff suggests by this pleading that the Parliamentary Oaths Act, 1866, must be construed as if it contained a proviso that none but persons of religious belief were or could be entitled to the benefit of the enactment in section 4 of that statute.

I have considered with the attention it deserved the very earnest argument addressed to me upon this point by Sir Hardinge Giffard, but I am unable to adopt his contention. There seems to be no escape in a Court of law from the short answer of the defendant, that the statute contains no such words. It was said that I ought to hold that the plaintiff's reply set forth what Parliament must have intended; but I should be reluctant to attribute to the Legislature the intention to make important rights dependent upon the solution of the question whether or not a particular individual could be accurately described as a "person of religious belief." Upon the whole record judgment must be entered for the plaintiff, the defendant being entitled to such costs as may be attributable to the subordinate issue upon which he has been successful.

Judgment for the plaintiff.

Both the plaintiff and the defendant appealed.

Sir H. Giffard and *Kydd*, for the plaintiff (on March 30).—There are here two appeals, so that the whole question on the record is open, and it would seem that since the case of *Churchward* v. *The Queen* (1), where there are cross demurrers, the plaintiff should begin.

[BRAMWELL, L.J.—That was not the practice in the Exchequer.]

No; but *Churchward's Case* (1) is more recent than *Hill* v. *Cowdery* (2).

[BRAMWELL, L.J.—It is surely right that the defendant should begin, as he has been held to be without defence to the action. LUSH, L.J.—This is a case in which the whole burden is on the defendant, and he ought to begin.]

(1) Law Rep. 1 Q.B. 173.

(2) 1 Hurl. & N. 360; 25 Law J. Rep. Exch. 286.

The *Defendant*, in person.—It is submitted that the plaintiff cannot maintain this action. Section 5 of 29 Vict. c. 19 (3) gives a penalty, but it does not give it specifically to any person, and unless a statute specifically gives an individual a right to sue for a penalty the Crown alone can sue—*Hawkins's Pleas of the Crown*, book ii. c. 26, s. 17; *Rastall's Entries*, 226.

[LUSH, L.J.—The Crown does not recover by action.]

The words "by action" are not found after the words "a like penalty," and even if they were they would not give a common informer the right to sue. The words of the statute are different from those of Geo. 1. c. 13, on which *Miller* v. *Salomons* (4) was decided.

[BRAMWELL, L.J.—Was this objection taken in the Court below?]

It was mentioned, but was not pressed. The statement of defence contains three grounds of defence: first, that the defendant is a person permitted by law to make an affirmation, pursuant to the provisions of 29 Vict. c. 19. s. 4 (3), as altered by the Promissory Oaths Act, 1868. Section 4 (3) includes other oaths besides the Parliamentary oaths; it is an enabling section, and contains the words "for the time being," which include all persons afterwards particularised in section 4 of the Evidence Amendment Act, 1869 (5).

[BRAMWELL, L.J.—The Act of 1869 only applies to witnesses.]

There are no restrictive words in the section, and the suggestion that the Evidence Amendment Act, 1869, does not apply to Scotland does not assist the argument, for the limitation applies only to place and not to persons—*The Queen* v. *Brackenridge* (6).

The provisions of 34 & 35 Vict. c. 83, which enables the House of Commons and any committee to administer oaths, enabled a witness, who objected to make an oath, to make an affirmation; and that statute also gives the means of interpreting the words "presiding Judge" in section 4 of the Evidence Amendment Act, 1869 (5), and this view is further supported by the provisions contained in the Evidence Further Amendment Act, 1870 (33 & 34 Vict. c. 49). The statement of defence then shews that the presiding Judge—that is, the Speaker—and the House of Commons have, in fact, allowed the defendant to affirm, and further proceeds to set out the report of a Committee and a resolution of the House.

[BRAMWELL, L.J.—Is that properly before us—and how can it be relevant?]

It is not contended that the resolution of the House gives the defendant any legal position which he would not have without it. The defendant has also demurred to the reply of the plaintiff; the plaintiff is not entitled to reply that the defendant is prevented "by want of

(3) 29 Vict. c. 19. s. 4: "Every person of the persuasion of the people called Quakers, and every other person for the time being by law permitted to make a solemn affirmation or declaration instead of taking an oath, may, instead of taking and subscribing the oath hereby appointed, make and subscribe a solemn affirmation in the form of the oath hereby appointed, substituting the words 'solemnly, sincerely and truly declare and affirm' for the word 'swear,' and omitting the words 'so help me God;' and the making and subscribing such affirmation, with such substitution as aforesaid, by a person hereby authorised to make and subscribe the same, shall have the same effect as the making and subscribing by other persons of the oath hereby appointed."

Section 5: "If any member of the House of Peers votes by himself or his proxy in the House of Peers, or sits as a peer during any debate in the said House, without having made and subscribed the oath hereby appointed, he shall for every such offence be subject to a penalty of five hundred pounds, to be recovered by action in one of her Majesty's Superior Courts at Westminster; and if any member of the House of Commons votes as such in the said House, or sits during any debate after the Speaker has been chosen without having made and subscribed the oath hereby appointed, he shall be subject to a like penalty for every such offence, and, in addition to such penalty, his seat shall be vacated in the same manner as if he were dead."

By 31 & 32 Vict. c. 72 the form of oath is altered.

(4) 7 Exch. Rep. 475; 21 Law J. Rep. Exch. 161; in error, 8 Exch. Rep. 778; 22 Law J. Rep. Exch. 169.

(5) 32 & 33 Vict. c. 68. s. 4: "If any person called to give evidence in any Court of justice, whether in a civil or criminal proceeding, shall object to take an oath or shall be objected to as incompetent to take an oath, such person shall, if the presiding Judge is satisfied that the taking of an oath would have no binding effect on his conscience, make the following promise and declaration: 'I solemnly promise and declare that the evidence given by me to the Court shall be the truth, the whole truth, and nothing but the truth.'"

(6) 37 Law J. Rep. M.C. 86; Law Rep. 1 C.C.R. 133.

ious belief" from affirming. The tion does not depend upon religious f.

BRAMWELL, L.J.—This appears to be aterial, so that it is not necessary gue that point.]

r *H. Giffard* and *Kydd*, for the plain--Before the passing of 29 Vict. c. 19 nembers of the House were required ke three oaths: that Act substituted gle oath. The oath is not adminis- by anyone; the obligation is on the ber, and is absolute and universal. e statute had ended at section 3 the ction given by previously existing tes would have been cancelled; and ers, Moravians, Separatists and se- s from those bodies would have been ved of rights which they had prior 366. Section 4 (3) was, therefore, sary. The words "for the time ;" without doubt prevent the opera- of that section from being confined sses of persons existing at the time e passing of that Act, and shew that egislature contemplated the possible ng into existence of other classes of ns, who might be permitted to ı; but the section contemplates a ous affirmation, while section 4 of Evidence Amendment Act, 1869 (5), mplates a promise and declaration person of no religious belief. An nation is as much a religious act as aking an oath; the form itself shews the difference in principle is the tion of the final adjuration. The ssion was made to a religious objec- o take an oath, not to an absence of ous belief. The Legislature has not e Evidence Amendment Act, 1869 created a new class of persons en- l to make a solemn affirmation, and Act of 1870 (33 & 34 Vict. c. 49) nly passed in order to extend the sions of the Act of 1869 to arbi- ns. The provisions of the Evidence of 1869 (5) are not appropriate to ase of a member of the House g his seat. There is in the House residing Judge, and the general inery is inappropriate. The pro- s of that Act are intended to be ed to witnesses, otherwise provisions l have been inserted similar to those & 35 Vict. c. 83. The Act of 1869 only applies to England and Ireland. The question of admission to the Imperial Parliament cannot be affected by such a statute. The words of section 4 of the Parliamentary Oaths Act (3) refer to classes of persons permitted — as Quakers are permitted and entitled— generally and uniformly to make affirmations.

If the plaintiff is not entitled to maintain this action then no one can, for the section says that the penalty is to be recovered by action. The Crown does not sue by action, and certainly could not do so in any of the superior Courts, but only, if at all, by information in the Exchequer. There is a clear distinction between popular actions and actions given to persons aggrieved, as may be seen by reference to 4 Hen. 7. c. 20, where actions popular for penalties are spoken of and dealt with.

The *Defendant*, in reply, referred to 31 Eliz. c. 5, which provides that "all actions, suits, bills, indictments or informations" brought under statutes "whereby the forfeiture is or shall be handed to the Queen," are to be brought within a named time.

Cur. adv. vult.

BRAMWELL, L.J. (on March 31).—The first question is, whether a common informer—that is, the plaintiff in this case —can sue for this penalty. It is quite certain that where a penalty is enacted, and when nothing is said as to who is to sue for that penalty, and the penalty is not inflicted for the benefit of some aggrieved party, and the offence is not against an individual, but is general and public in its nature, and when the penalty is not appropriated in such a case, the penalty belongs to the Crown, and the Crown alone can sue for that penalty. I find this clearly put in *Comyn's Digest* (7): "So in all cases where a penalty or forfeiture is given by Act of Parliament, without saying to whom it shall be, or a limitation for a recompense for the wrong to the party, it belongs to the king."

In the statute now under consideration it is certainly not expressly stated in words to whom the penalty is given; it is

(7) "Forfeiture," C.

urged therefore by the defendant in this case that, unless there is something to shew by implication to whom the penalty belongs, it belongs to the Crown. The argument for the plaintiff is, that the penalty is given by implication to a common informer. This argument is founded on the words of section 5 of 29 Vict. c. 19, which says that if "any member of the House of Peers votes . . . . or sits . . . . without having made and subscribed the oath hereby appointed, he shall for every such offence be subject to a penalty of five hundred pounds, to be recovered by action in one of Her Majesty's superior Courts at Westminster." It is said that these words shew that the plaintiff can maintain this action, and that because the Crown does not sue by action. With regard to this point also, the note in *Comyn's Digest* (7) is of value, for it refers to the case of *The King* v. *Mabland* (8), where it was objected that there was a penalty of 20*s.* fixed and yet there was no appropriation of it; and the report proceeds, "Upon looking into the Act it appeared this offence was omitted out of the clause which gave the Bricklayers' Company power to sue for the penalties, and therefore the Court held that the 20*s.* per thousand was in the nature of a debt to the Crown where the unappropriated penalty would go, and was suable for in a Court of revenue and not by indictment." The note in *Comyn's Digest* (7) says that where a statute does not say how the penalty is to be recovered, "it must be sued for in the Exchequer." The argument for the plaintiff is that, inasmuch as it is enacted that the penalty is to be recovered by action in any of the Courts, it follows that it is not the Crown but a common informer who is to sue. I am convinced that this is so, and that this plaintiff is entitled to maintain this action. I should have doubted if the words of the section had stopped at the word "action," for then it might have meant generally any proceedings to be begun by writ, inasmuch as the word "action" is also *nomen generale*, which may be held to include all proceedings. An Act of Elizabeth was cited by the defendant to shew that the word "action" was used in relation to proceedings by the Crown. It does seem that word was there used together with the words "bills, suits, indictments, whereby the forfeiture is limited to the Crown." This, however, does not affect me much, for the draughtsman may well have used a variety of words to cover all contemplated possible cases. After the word "action" I find the following words in the statute now under consideration: "In one of Her Majesty's superior Courts at Westminster." Now, unless these words are to be held to give to the Crown a new exceptional and anomalous power to sue in some Court other than a Court of revenue, these words will prevent the action to be brought from being an action which the Crown could bring. I do not think that it was intended that the Crown should sue in the Court of Common Pleas —a Court which existed when this statute was passed—and if this be so, then the provision must apply to a common informer, or else the result would be that a penalty has been enacted and there would be no means of recovering it.

What I have said thus far is founded on the words of the statute applicable to peers. The statute proceeds to say, that a member of the House of Commons who may vote or sit without taking the oath "shall be subject to a like penalty." Now, strictly speaking, a like penalty would be a penalty of like amount. The defendant, however, has admitted that that which is true of a peer is also true of a member of the House of Commons. We should not rely upon this admission did we not think that it truly represents the law: we do not think that it was intended that a penalty incurred by a peer should go to one person, and a penalty incurred by a member of the lower House to another person—that is, to the Crown. A like penalty means a penalty with the same incidents and conditions attaching to it. I own that I have had doubts on this. It is not, I think, possible that the Legislature intended that there should be a penalty and no means of recovering it; but still we have to consider not what the Legislature did not intend, but what it has said and what it did intend; and although I have had doubt, I think that it did intend that the penalty incurred by a

(8) Str. 827.

ser of the lower House should be for in the same way as a penalty in- d by a peer—that is, by a common ner.

ow come to the other point raised e defendant, and I consider this part e case to be as plain a case as ever before a Court of justice; and I : that the defendant is not entitled ake an affirmation or declaration r the Evidence Amendment Act, Section 4 (3) of the Parliamentary s Act, 1866, is as follows: "Every n of the persuasion of the people l Quakers, and every other person he time being by law permitted to a solemn affirmation or declaration id of taking an oath, may, instead ring and subscribing the oath hereby nted, make and subscribe a solemn nation in the form of the oath hereby nted." Now it is admitted and it is that these words contemplated the ng into existence of a class of per- other than the classes then existing. obvious that the words "for the being" mean persons now existing o may hereafter exist. The ques- then, is reduced to this: Is the defen- one of a class of persons (for I : the words do not contemplate an idual *privilegium*) now permitted to a solemn affirmation or declaration? nk he is not. The defendant says he Act for the Further Amendment e Law of Evidence, 1869 (32 & 33 c. 68) (5) enacted that "if any n called to give evidence in any t of justice, whether in a civil or nal proceeding, shall object to take ath, . . . such person shall, if the ding Judge is satisfied that the g of an oath would have no binding on his conscience, make the fol- ng promise and declaration." Now lefendant is admittedly one of the of persons there described; but I f opinion that the class of persons described is not a class of persons itted to make a solemn affirmation eclaration instead of taking an oath n the meaning of the Parliamentary s Act, 1866. It is, I think, clear that lasses of persons there spoken of ersons who—as Quakers, Moravians Separatists and seceders from those bodies are—are permitted not to make a declaration on particular occasions for the purpose of giving evidence; but who are permitted on all occasions, in all places and for all purposes to make an affirmation or declaration. The defendant is not such a person. An example may illustrate my meaning. There is no case in which a Quaker, who would but for relieving statutes be bound to take an oath, cannot by the provisions of statutes passed in that behalf make an affirmation or declaration instead of taking the oath; but there are many cases in which the class of persons mentioned in section 4 of the Evidence Amendment Act, 1869 (5), must take an oath to qualify themselves to do certain acts. The only case in which they can affirm or declare is when they have to give evidence in a Court of justice or before a person qualified to administer an oath. Such persons, for instance, cannot serve on a jury on making an affirmation or declaration instead of taking an oath. It seems to me, therefore, that the Parliamentary Oaths Act, 1866 (29 Vict. c. 19), contemplated the then existing classes of persons, and the coming into existence of other classes of persons entitled on all occasions, in all places and for all purposes to make an affirmation or declaration instead of taking an oath; and I am of opinion that section 4 of the Evidence Amendment Act, 1869 (5), did not create such a class of persons. The defendant, therefore, is not entitled to affirm. Such an affirmation is not equivalent to an oath. He has, therefore, not satisfied the requirements of section 5 of the Parliamentary Oaths Act, 1866 (3), and he has incurred the penalty, inasmuch as he is not a person permitted to affirm.

The Parliamentary Oaths Act uses the word "permitted." That word has reference to those statutes which were passed in ease and exoneration of and for the benefit of persons to whom they applied. Section 4 of the Evidence Amendment Act, 1869 (5), says that every person "shall make" a promise or declaration. The defendant says that he is permitted, whenever he appears as a witness in his own cause. That is true; but the main object of the enactment was to ensure that the evidence of such a person as the

defendant should not be shut out because he has not taken, and cannot take, an oath. The difficulty raised as to the phrase "presiding Judge," &c., does not, I own, impress me. I feel that there may be a difficulty arising out of the fact that the Evidence Amendment Act, 1869, does not apply to Scotland, but that would shew that the Parliamentary Oaths Act does not apply to the defendant; for, else, Parliament would by an Act affecting the giving evidence before tribunals in two out of three parts of the United Kingdom have affected the general Imperial law in the case of a Scotch member. But it is needless to consider that further, for on the other ground I am of opinion that the statement of defence is bad. It becomes therefore unnecessary to decide any question as to the reply. The old rules of pleading at common law are abolished; but there was one of them which contained good sense, and is applicable now, and that is, that one cannot say that any reply to a bad statement of defence is itself bad—there cannot be a bad answer to a bad question. The defence here being bad, we cannot decide on the reply; it becomes simply immaterial, and our judgment must be that the statement of defence is bad; and we pronounce that the plaintiff is entitled to our judgment.

Baggallay, L.J.—The substantial question involved in the present appeal is, whether, at the time when the defendant presented himself at the table of the House of Commons and made and subscribed a solemn affirmation in the form prescribed by the Parliamentary Oaths Act, 1866 (3), as modified by the Parliamentary Oaths Act, 1868, he was a person for the time being permitted by law to make an affirmation instead of taking an oath within the intent and meaning of the 4th section of the first-mentioned Act. The defendant, in his able argument, has insisted that, according to the true construction of the section, the privilege thereby conferred of making and subscribing a Parliamentary affirmation instead of taking and subscribing a Parliamentary oath, is not limited to such persons as are permitted by law to affirm instead of taking an oath, for all purposes as to which, but for such permission, an oath could be required, but is extended to all persons who are permitted to affirm instead of taking an oath, for any one or more, though not for all purposes.

The circumstances of the defendant's case, as put by himself, will illustrate the proposition which he has so affirmed. He has contended that from and after the passing of the Evidence Amendment Act, 1869 (5), he was a person permitted by law to make an affirmation instead of taking an oath for the one purpose specified in the Act, namely, as a preliminary to his giving evidence in a Court of justice, in a criminal or civil proceeding; but that for other purposes, as, for instance, as a preliminary to serving as a juryman, he is not a person permitted by law to affirm instead of taking an oath. If the defendant's contention as to the construction of section 4 of the Act of 1866 (3) were well founded, there would be great force in his argument, that, having become entitled to affirm instead of taking an oath when called upon to give evidence in a Court of justice, he was entitled under the provisions of the section to make the Parliamentary affirmation instead of taking the Parliamentary oath.

But I am unable to adopt the construction of the section for which he has contended. It appears to me that, according to the reasonable meaning of the language used, the qualification for making the Parliamentary affirmation is a liberty, permitted by law, to affirm instead of taking an oath for all purposes and upon all occasions for and upon which an oath would otherwise be required. The section purports to deal with two classes of persons—the first consisting of every person of the persuasion of the people called Quakers, and the second of every other person for the time being by law permitted to make an affirmation instead of taking an oath. Now the former class were at the time when the Act passed permitted to affirm instead of taking an oath for all purposes whatsoever, as may be seen by reference to 3 & 4 Will. 4. c. 49 (9). Now, it appears to me to be the reasonable construction of

(9) 3 & 4 Will. 4. c. 49: "An Act to allow Quakers and Moravians to make an affirmation in all cases where an oath is or shall be required."

the section that the persons in the second class, who at the time of the passing of the Act were not permitted by law to affirm, but who might, for the time being—that is, at some future time—be so permitted, should be permitted to the same extent and for the like purposes as those in the first class were then permitted—that is, for all purposes.

The contention of the defendant as to the construction of the section in question being, in my opinion, unfounded, it follows that not being a person authorised by that section to make and subscribe a Parliamentary affirmation instead of taking a Parliamentary oath, he was bound before sitting and voting in the House of Commons to take and subscribe the Parliamentary oath prescribed by law; and that, having sat and voted without taking and subscribing the oath, he has incurred the penalty to recover which the present action has been brought. Upon the question whether the present plaintiff is entitled to sue for the penalty, I have nothing to add to what has been said by Lord Justice Bramwell; the reasons he has assigned for holding that the present plaintiff is entitled to sue are, to my mind, entirely satisfactory.

Various other questions were raised and discussed in the course of the arguments, and it might have been important to consider and dispose of such questions, had the Court been of opinion that the defendant's contention as to the construction of the Act of 1866 was well founded; but in the view which I have taken upon that question, it appears to me immaterial to consider the other questions which have been raised and discussed during the argument.

LUSH, L.J.—The first question on this appeal depends on section 5 of the Parliamentary Oaths Act, 1866 (3). It has been rightly admitted, and we agree with that admission, that the words "to be recovered by action in one of Her Majesty's superior Courts at Westminster" must be imported into the latter clause of the section, and that the words "like penalty" must mean a penalty with the same incidents and to be recovered in the same way. The Act does not in terms say to whom the penalty is to go, or who is to sue for it; and if the only words had been "by action," I should have been inclined to say it must belong to the Crown, for the word "action" might comprehend an information; but the words are "action in one of Her Majesty's superior Courts"—that is, in any one of them. Now, the Sovereign can, or could when this action was passed, only sue in the Exchequer; the Crown could not sue in the Queen's Bench or the Common Pleas; so that, as there is an option given to sue in any of the three Courts, it is, I think, necessarily implied that the action must be brought by a person capable of suing in any of the Courts—that is, by a subject, not by the Crown.

This brings me to the material question, whether the defendant is a person permitted to affirm. To construe the statute under consideration we must look at the law as it was when that statute was passed. By several Acts passed during the reign of William 4 and the early part of the present reign, members of certain religious bodies, as Quakers and Moravians, were permitted to affirm in all places and for all purposes. Then Separatists were given the same privilege; and later on, persons who had belonged to but had seceded from those bodies were included within the provisions of those Acts; so that there were four classes of persons who were permitted at all times, in all places and for all purposes to make a solemn affirmation instead of taking an oath. The Common Law Procedure Act, 1854, was also in force, which provided, by section 20, that "if any person called as a witness, or required or desiring to make an affidavit or deposition, shall refuse or be unwilling from alleged conscientious motives to be sworn, it shall be lawful for the Court, or Judge, or other presiding officer or person qualified to take affidavits or depositions, upon being satisfied of the sincerity of such objection, to permit such person, instead of being sworn, to make his or her solemn affirmation or declaration." The form of affirmation is then given.

If, then, the Legislature intended to give the same right to affirm to members of either House as it had given to a witness in an English Court of justice, no-

thing would have been easier than to say so in the very terms already existing in section 20 of the Common Law Procedure Act, to which I have referred. There was an obvious and direct way of effecting their object, if that was the object of the Legislature in passing the Parliamentary Oaths Act. There would then have been no need to refer to Quakers, for the words would have included all persons and embraced every case. That being the state of the law, the Parliamentary Oaths Act, 1866, enacts that "every person of the persuasion of the people called Quakers, and every other person for the time being by law permitted to make a solemn affirmation or declaration, instead of taking an oath, may" make an affirmation. Therefore, it is clear on the face of the statute that the Legislature did not adopt the words of the Common Law Procedure Act for the Parliamentary Oaths Act; and then, according to reason and every recognised course of construction, the words "every other person" must be understood to refer to persons in a like position to that occupied by Quakers —that is, to those persons who possess a perfect immunity from any obligation to take an oath on all occasions and in all places. I do not think that the Legislature intended to allow any person whosoever who may object to take an oath to make an affirmation in Parliament. I think the language of the statute points to quite a different conclusion.

Then we have to consider the effect of the Further Evidence Amendment Act, 1869 (5). That statute in effect extends the operation of the Common Law Procedure Act, and goes beyond it, for it gives the right or privilege, as it may be called, of making an affirmation to persons who avow that an oath would have no binding obligation on their consciences. But that Act is confined to witnesses giving evidence in a Court of justice in England or Ireland, whereas section 4 of the Parliamentary Oaths Act, 1866 (3) includes only such persons as are by law permitted in all places and at all times to affirm, and who have for all purposes an immunity from taking an oath. The defendant urged that section 4 of the Act of 1866 (3) was unnecessary, if it was only intended to protect Quakers and such other classes of persons as those to whom I have referred. I cannot agree with that argument, for section 3 of the Parliamentary Oaths Act, 1866, provides that "the oath hereby appointed shall in every Parliament be solemnly and publicly made and subscribed . . . . by every member of the House of Commons at the table in the middle of the said House, and whilst a full House of Commons is there duly sitting."

Now, if that section had remained unqualified, Quakers would have been excluded, for they, otherwise qualified to sit in Parliament, would have thus been disqualified, inasmuch as section 3 is absolute in its terms, so that it was clearly necessary to insert the saving clause in section 4 (3), and thus to preserve previously granted immunities. I have thus come to a clear opinion on both points raised on this appeal. I do not doubt but that the only persons admitted to affirm in Parliament are those who on all occasions and at all times throughout the United Kingdom are permitted to make an affirmation instead of taking an oath.

I agree that the reply thus becomes immaterial; that we are not called upon to give any opinion on an immaterial issue; and that it is right to decline to give any opinion, inasmuch as our decision on the statement of defence disposes of the whole question. The appeal, therefore, of the plaintiff must be dismissed.

Appeal dismissed. Judgment for plaintiff.

Solicitors—W. G. Stuart, for plaintiff; Lewis & Lewis, for defendant.

[IN THE HOUSE OF LORDS.]

1881. Jan. 14, 17, 18. THE MANAGERS OF THE METROPOLITAN ASYLUMS DISTRICT *v.* HILL AND OTHERS.

Nuisance—Statutory Authority to establish Hospitals—Power of Statutory Superior to Sanction an Act resulting in a Nuisance—Authority given by Statute, how to be pursued—Liability for Nuisance of Local Authority acting under direction of Local Government Board—Smallpox Asylum under Metropolitan Poor Act, 1867 (30 *Vict. c.* 6).

The appellants, a body incorporated under the Metropolitan Poor Act, 1867, *erected a smallpox hospital under powers conferred by that Act, and with the sanction of the Local Government Board. In an action for an injunction and damages by occupiers of neighbouring houses, it was found by a jury that the hospital was a nuisance:*—Held (*affirming the judgment of the Court of Appeal*), *that the Metropolitan Poor Act*, 1867, *did not authorise the appellants to create a nuisance, whether with or without the sanction of the Local Government Board.*

This was an appeal from an order of the Court of Appeal affirming a judgment of Pollock, B. The case is reported below, 48 Law J. Rep. Q.B. 562; 49 ibid. 228; Law Rep. 4 Q.B. D. 433.

The Metropolitan Poor Act, 1867, authorises the Poor Law Board, whose powers and duties as to the relief of the poor were transferred by the Local Government Board Act, 1871 (34 & 35 Vict. c. 70), to the Local Government Board, to provide for the formation of districts by combination of unions or parishes or unions and parishes in the metropolis, and to provide asylums for such districts "for reception and relief of the sick, insane and infirm."

Bodies of managers are to be constituted for each district, and are incorporated by the Act. Power is given to the Poor Law Board to direct the managers to purchase, or hire or build, and in either case fit up, a building or buildings for an asylum; and for these and other specified purposes the managers are given the same powers as guardians of unions in the metropolis, and their orders are made enforceable in like manner, and, like guardians, they are subject in the exercise of their powers and duties to the orders of the Poor Law Board. The compulsory powers of purchase under the Lands Clauses Act are made applicable for the enlargement of existing hospitals only. No express provision for special asylums for infectious patients is to be found in the Act, nor are they referred to except incidentally in section 69, which provides for the application of a fund raised under the Act by contributions from the several parishes in a district, called the common poor fund, and enumerates, among other heads of expenditure to be repaid out of that fund, expenses "for the maintenance of patients in any asylum specially provided under the Act for patients suffering from fever or smallpox."

The material sections are sections 5, 8, 15, 16 and 69.

The appellants, a body incorporated under the above provisions, built and maintained, by direction of the Local Government Board, a hospital for smallpox patients on land acquired for that purpose at Hampstead.

The respondents, residents at Hampstead, and owners of land in the neighbourhood of the hospital, brought their action in combination against the appellants claiming damages for the alleged nuisance, and an injunction to restrain the appellants from using the hospital for smallpox or other infectious diseases.

The jury found at the trial that the hospital was a nuisance *per se*, and also in the mode of bringing the patients to and fro, though they expressed their opinion that the internal arrangements were admirable, and that great praise was due to the authorities and everybody concerned therein.

On these findings the respondents claimed to have judgment entered for them, and an injunction.

The appellants contended that, assuming the nuisance, they were not liable—first, because they acted as mere servants of the Local Government Board; secondly, because their action in the matter had been only in execution of a duty cast upon them by statute; thirdly, because the

nuisance was one not actionable at common law.

On the 28th of January, 1879, Pollock, B., gave judgment for the respondents with costs, and granted an injunction.

The appellants moved for a new trial in the Queen's Bench Division, which, on the 22nd of May following, made an order granting a new trial and dissolving the injunction, and ordering that the costs of the first trial should abide the result of the second.

The respondents carried this order to the Court of Appeal, by whom an order was made, on the 18th of December, dismissing the appeal, on the condition that the present appellants should pay, within fourteen days after taxation, the costs of the former trial, or, in the alternative, allowing the appeal if the condition were not complied with.

The appellants also appealed against the judgment of Pollock, B., which was affirmed with costs by the Court of Appeal.

They then appealed to this House against both decisions of the Court of Appeal. A preliminary objection to the competency of the appeal against the order as to a new trial was raised by the respondents, on the ground that it was an appeal on a question of costs, but was overruled (49 Law J. Rep. Q.B. 745; Law Rep. 5 App. Cas. 582), when it was suggested by the Lord Chancellor that the printing of the evidence might be postponed till the question of law which might decide the result of the appeal had been determined.

It was accordingly arranged that the appeal from the judgment affirming that of Pollock, B., which would decide the question of the liability of the appellants in point of law, assuming the findings of the jury to be correct, should be first argued.

Sir J. Holker and *Willis* (*Anderson* and *Proudfoot* with them), for the appellants.—The Act gives power to erect and provide hospitals for the "sick," including, among other classes of sick, persons suffering from smallpox and other infectious diseases. Such hospitals must be proper hospitals, and the managers have discretion as to the conduct of the hospitals and the class of patients.

[LORD BLACKBURN.—No compulsory powers to buy are given, and there are no compensation clauses. Can such an Act authorise committing what is a nuisance to the surrounding neighbourhood?]

The principle is, that where the Legislature authorises a thing and gives a discretion as to the mode of doing it, and that discretion is exercised in a reasonable manner, the persons exercising it are not liable, though damage result to an individual—*The British Cast Plate Manufacturers* v. *Meredith* (1), *Boulton* v. *Crowther* (2), *The King* v. *Pease* (3), *The Caledonian Railway Company* v. *Ogilvy* (4), *Vaughan* v. *The Taff Vale Railway Company* (5), *The Hammersmith Railway Company* v. *Brand* (6), *Hawley* v. *Steele* (7). No doubt after the decision in *The Mersey Dock Trustees* v. *Gibbs* (8) it cannot be contended that there is any distinction as to civil liability between trustees who have a public duty to perform and private persons associated for profit, but the cases cited establish the principle contended for. *The Hammersmith Railway Company* v. *Brand* (6) is directly in point. In that case it was decided that the right of action for damages for a nuisance arising from noise and vibration caused by the user of a railway, was taken away by implication, since the Legislature must have intended user of the railway, and user without noise and vibration was impossible. In the present case it is clear that the Legislature authorised and intended reasonable and proper hospitals to be erected and used in a reasonable and proper way. To carry out the intention of the Legislature you must commit a nuisance, if the word "sick" includes smallpox patients, for the first finding of

(1) 4 Term Rep. 794.
(2) 2 B. & C. 703.
(3) 4 B. & Ad. 30.
(4) 2 Macq. H.L. 229.
(5) 5 Hurl. & N. 679; 29 Law J. Rep. Exch. 247.
(6) 38 Law J. Rep. Q.B. 265; Law Rep. 4 H.L. Cas. 171.
(7) 46 Law J. Rep. Chanc. 782; Law Rep. 6 Ch. D. 521.
(8) 35 Law J. Rep. Exch. 225; Law Rep. 1 H.L. Cas. 93.

the jury must be taken to mean that a smallpox hospital must, in the nature of things, and however well managed, be a nuisance.

[LORD WATSON.—In the cases cited a particular act was authorised to be done in a particular place, in a particular way; specific land was vested in the body creating the nuisance, and compulsory powers to buy were given.]

The act need not be obligatory; it is enough if it is authorised and a discretion is given which is reasonably exercised. The respondents will contend that where the Legislature merely authorises an act, it does not justify it if it amount to a nuisance. They will rely on *The Attorney-General* v. *The Proprietors of The Bradford Navigation* (9), *The Attorney-General* v. *The Colney Hatch Lunatic Asylum* (10), *The Attorney-General* v. *The Mayor of Leeds* (11), *Clowes* v. *The Staffordshire Potteries Waterworks Company* (12), *Geddis* v. *The Proprietors of The Bann Reservoir* (13).

But these cases may be distinguished. In *The Attorney-General* v. *The Mayor of Leeds* (11) the statute expressly forbade the creation of a nuisance; in the other cases the acts were either unnecessary or negligently done. Here the jury have expressly negatived negligence.

No doubt the Act is not clear, but it is necessary that there should be power somewhere to deal with these cases, and that smallpox patients should be received and properly treated, and the only proper treatment is isolation. No valid distinction can be drawn between cases where the Legislature has authorised a particular act in a particular place and where it has left the place open.

If anyone is responsible it cannot be the Managers of the Asylums District, for they are the mere servants of the Local Government Board. The alleged nuisance in this case is not actionable at common law. Persons who have charge of the sick are not liable for removing them along the highway, if the removal be necessary and be done in a proper manner—*The King* v. *Vantandillo* (14); an inoculating house is not a public nuisance—*Anonymous Case* (15), where Lord Hardwicke dismissed a bill to restrain the building of such a house, observing that the fears of mankind, although reasonable, will not create a nuisance. The writ *de leproso amovendo* may be noticed in this connection, which only applied where a leper appeared to be such by his voice and his sores (16), and where he exposed himself. The provisions of the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 126. sub-s. 1, which imposes a penalty for wilfully exposing infectious patients, negative any common law liability. The principle is that the proper treatment of the sick by persons having charge of them is not a nuisance at common law.

Smallpox patients are, it is true, only mentioned incidentally, but section 69 is not an afterthought—the provision for infectious patients was, in fact, the main object of the Act.

There is a distinction between erection and user. In erecting a hospital, the managers would be bound to respect the rights of others, and it is not necessary to contend that the Act would justify the blocking up of ancient lights—*Whitehouse* v. *Fellows* (17); but with regard to user the case is different. Here user necessarily involves a nuisance, and the inevitable result of an Act authorised by Parliament is not actionable—*The Hammersmith Railway Company* v. *Brand* (6). Moreover, the numbers admitted, the method of admission and all the arrangements are left wholly to the discretion of the Poor Law Board; and when the authority and discretion so given have been once exercised and reasonably and properly exercised, it is the same thing as if

(9) 35 Law J. Rep. Chanc. 619; Law Rep. 2 Eq. 71.

(10) 38 Law J. Rep. Chanc. 265; Law Rep 4 Chanc. 146.

(11) 39 Law J. Rep. Chanc. 711; Law Rep. 5 Chanc. 583.

(12) 42 Law J. Rep. Chanc. 107; Law Rep. 8 Chanc. 125.

(13) Law Rep. 3 App. Cas. 430.

(14) 4 M. & S. 73.

(15) 3 Atk. 750; *s.c. Baines* v. *Baker*, Amb. 158.

(16) Fitz. N.B. 534.

(17) 10 Com. B. Rep. N.S. 765; 30 Law J. Rep. C.P. 305.

the particular piece of land and the particular hospital were in a schedule to the Act. Independently, however, of the statutory protection contended for, a smallpox hospital is not a nuisance at common law—a proposition which is warranted by the cases cited above.

The Solicitor-General (*Sir F. Herschell*) and *Bompas* (*Finlay* with them), for the respondents.—There is no principle at common law justifying this nuisance. If an act done amounts to a nuisance, the person doing it cannot claim exemption from liability because it was done in the course of reasonable user of his property —*Bamford* v. *Turnley* (18), overruling *Hole* v. *Burton* (19); the only exception to this rule being acts necessary to the ordinary occupation of land or houses. Further, there is no statutory justification. The Metropolitan Poor Act, 1867, is not a sanitary Act, but a poor law Act. The Poor Law Board never were a sanitary authority till the constitution of the Local Government Board to replace the Poor Law Board by the Act of 1871 (34 & 35 Vict. c. 70). At that time the sanitary authority was the Secretary of State or the Privy Council, and by that Act the powers in those respects were transferred to the Local Government Board. The Act of 1867 merely followed up the provisions of 7 & 8 Vict. c. 101. s. 41. The Act contemplated several districts: the Poor Law Board made the whole metropolis into one.

It may be admitted that no action will lie where a particular act is authorised in a particular way in a particular place, though mischief may arise from it, and the cases cited on the other side may all be distinguished on this ground; but a general power must be construed differently from a specified power: here a general power is given, and it must be exercised without doing mischief.

The discretion as to the user of asylums and distribution of patients is vested in the managers, not in the Poor Law Board, who have no discretion except as to the number of the asylums. The necessary existence of hospitals for infectious patients was not contemplated.

Though a general power to do an act which anywhere and anyhow must be a nuisance may excuse the nuisance, yet even if any smallpox hospital must be a nuisance, you cannot have one under this Act. The *onus*, however, lies on the appellants to shew that any smallpox hospital must be a nuisance; the first finding of the jury only states that "the" hospital is a nuisance. A rule for misdirection was obtained because the abstract question was not left.

The case cited from Atkyns and Ambler (15) was a motion for an injunction, a proceeding in the nature of a *quia timet*; and in *Soltau* v. *De Held* (20), the meagre and unsatisfactory nature of the report is dwelt upon.

They also cited *The Attorney-General* v. *The Colney Hatch Lunatic Asylum* (10), *Clowes* v. *The Staffordshire Potteries Waterworks Company* (12), *Levingston* v. *The Lurgan Guardians* (21), *The Queen* v. *The Bradford Navigation Company* (22), *Jones* v. *The Festiniog Railway Company* (23), *Vaughan* v. *The Taff Vale Railway Company* (5)

Willis, in reply.

Cur. adv. vult.

THE LORD CHANCELLOR (LORD SELBORNE).—It must be assumed for the present purpose that the smallpox hospital which the appellants have established at Hampstead is in its actual position, and, independently of the particular way in which it is conducted, necessarily a nuisance to the neighbours; and the injunction which has been granted by the order appealed against, is against "using the plot of land mentioned in the statement of claim and buildings thereon as an hospital for smallpox or any other infectious or contagious disorders in such manner as to create a nuisance to the plaintiffs or either of them." The appellants are therefore obliged, in order to succeed in this appeal, to prove that they

(18) 3 B. & S. 62; 31 Law J. Rep. Q.B. 286.
(19) 4 Com. B. Rep. N.S. 334; 27 Law J. Rep. C.P. 104.
(20) 2 Sim. N.S. 133, at p. 148.
(21) Ir. Rep. 2 C.L. 202.
(22) 6 B. & S. 631; 34 Law J. Rep. Q.B. 191.
(23) 37 Law J. Rep. Q.B. 214; Law Rep. 3 Q.B. 733.

have statutory authority to create a nuisance for the purpose of and as incidental to the maintenance of a smallpox hospital in this place.

The appellants say that such authority has been given to them by the 5th, 7th and 15th sections of the Metropolitan Poor Act, 1867, and by orders of the Poor Law Board made pursuant thereto. As far as the orders of the Poor Law Board are concerned, they did undoubtedly direct the appellants to purchase the land in question at a specified price, and to build upon it an asylum for the reception of poor persons infected with or suffering from fever or smallpox, and I assume that the building as erected and fitted up on that land is in strict accordance with plans which the Poor Law Board has prescribed or approved.

The statute when examined is found to confer in general terms powers extending over a rather wide range of subjects. So far as relates to an hospital or asylum of this particular kind, there is nothing in it mandatory or imperative. Everything which it necessarily requires may be done, though no such hospital should ever or anywhere be established. The 5th section says, that "asylums to be supported and managed according to this Act may be provided under this Act for reception and relief of the sick, insane, or infirm or other class or classes of the poor chargeable in unions or parishes in the metropolis." The 6th section authorises the formation of districts, and the 7th requires that in each district so formed "there shall be an asylum or asylums as the Poor Law Board from time to time by order direct," leaving the class of poor persons for whom any such asylum may be provided entirely open. The 15th section enables the Poor Law Board from time to time by order to direct the managers "to purchase, or hire, or to build, and (in either case) to fit up a building or buildings for the asylum of such nature and size, and according to such plan and in such manner as the Poor Law Board think fit;" and the managers are required to carry such directions into execution. Subsequent clauses put the arrangements and conduct of any such asylum under the superintendence of the Poor Law Board. No compulsory power is given to acquire land or any interest in land for any asylum purposes. The Lands Clauses Acts are indeed incorporated by section 52, but section 53 expressly provides that so much of those Acts as relates to the purchase of land, otherwise than by agreement, shall not be put in force except for certain purposes not including these asylums. It appears incidentally from section 69 (which provides for the repayment of certain expenses therein specified out of the Common Poor Fund) that asylums might be "specially provided under this Act for patients suffering from fever or smallpox," but except in that way and from the fact that the general category of "sick" necessarily includes patients suffering from any kind of disease, there is no provision in the Act as to contagious or infectious disorders. If express words or necessary implication and intendment must be shown in order to authorise the Poor Law Board or any managers of an asylum to create a nuisance in the exercise of the discretionary powers given to them, I can find none in the statute.

The result is, first, that this Act does not necessarily require anything to be done under it which might not be done without causing a nuisance; secondly, that as to those things which may or may not be done under it, there is no evidence on the face of the Act that the Legislature supposed it to be impossible for any of them to be done (if they were done at all) somewhere and under some circumstances without creating a nuisance; and, thirdly, that the Legislature has manifested no intention that any of these optional powers as to asylums should be exercised at the expense of, or so as to interfere with, any man's private rights. The only sense in which the Legislature can be properly said to have authorised these things to be done is, that it has enabled the Poor Law Board to order and the managers to do them, if and when and where they can obtain by free bargain and contract the means of doing so.

If the Legislature had authorised some compulsory interference with private rights of property within local limits which it might have thought fit to define

for the purpose of establishing this asylum, to be used for the reception of patients suffering from smallpox or other infectious disorders, and had provided for compensation to those who might be thereby injuriously affected (in such cases and under such conditions as it might have prescribed), the present case might have been like *The King* v. *Pease* (3) and *The Hammersmith Railway Company* v. *Brand* (6). No person outside the statutory line of compensation, even if the use of the asylum in the manner authorised by the statute had been productive of serious damage to him, could then have obtained any relief or remedy upon the footing that what the statute authorised was a legal nuisance to himself or an actionable wrong. But the case is different when (as here) no interference at all with any private rights is authorised, and no place or limit of space is defined, within which the establishment of such an asylum is made lawful. Neither the Poor Law Board nor the managers could for this purpose have taken a single foot of ground or have interfered with any the most insignificant easement against the will of the plaintiffs, or of any other person to whom such land or easement might belong. No line is here drawn by the Legislature between interests which are and interests which are not proper subjects for compensation. Under these circumstances, I am clearly of opinion that the Poor Law Board and the managers had no statutory authority to do anything which might be a nuisance to the plaintiffs without their consent. I therefore move your Lordships to affirm the judgment of the Court below and dismiss this appeal.

LORD BLACKBURN.—In this case the respondents who were the plaintiffs below claimed in their writ damages for a nuisance arising from the use by the defendants of their hospital at Hampstead for smallpox and other infectious and contagious diseases, and for causing the assemblage in the neighbourhood of the plaintiffs' property of large numbers of persons suffering from smallpox or other infectious and contagious diseases, or having been recently in contact with persons so suffering, and from offensive smells and noises arising from the said hospital, and they asked for an injunction to restrain the defendants from using the said hospital as an hospital for patients suffering from smallpox or other infectious and contagious diseases.

The case came on for trial before Baron Pollock, when it was agreed that the amount of damages should be referred. His Lordship asked the jury five questions, which, with their answers, were as follows: 1st, Was the hospital a nuisance occasioning damage to the plaintiffs or either and which of them *per se*? 2nd, Or by reason of the patients coming to or going from the hospital?—*Answers*, 1st and 2nd: It was a nuisance to each of the plaintiffs *per se*, and by reason of the patients coming to or going from the hospital. 3rd, Assuming that the defendants were by law entitled to erect and carry on an hospital, did they do so with all proper and reasonable care and skill with reference to the plaintiffs' rights?—*A.* No. 4th, Assuming that the defendants were by law entitled to erect and carry on this hospital, did they do so with proper and reasonable care and skill with reference to the plaintiffs' rights?—*A.* No. 5th, Did the defendants use proper care and skill with reference to ambulances?—*A.* No; we consider the ambulances ought to have been disinfected before leaving the hospital.

On these findings Baron Pollock gave judgment for the plaintiffs, and afterwards granted an injunction, not in the terms prayed for, but only against using the hospital in such a manner as to create a nuisance to the plaintiffs or either of them. The defendants below, the now appellants, gave notice of appeal against this judgment. They also obtained in the Queen's Bench Division a rule which was made absolute for a new trial and for dissolving the injunction, costs reserved till after the new trial. Against this rule the plaintiffs appealed. The cross appeals were heard together in the Court of Appeal, when the order of the Queen's Bench Division was varied. Against this the defendants appeal to this House, and this has been called appeal No. 1. The defendants' appeal against the judgment

of Baron Pollock was dismissed with costs. Against this the defendants appeal, and this has been called appeal No. 2. The point on which the defendants principally relied in the appeal No. 2 was, that, as they contended, the Legislature had by the Metropolitan Poor Act, 1867, authorised the erection and maintenance of asylums for the reception of the sick poor chargeable in the metropolis, and with that object given power to the Poor Law Board to make the metropolis into a district, and to create a corporation to be called the Managers of the Metropolitan Asylums District, who were bound to obey the directions of the Poor Law Board; that the defendants were duly created by orders of the Poor Law Board; that all they had done in making and maintaining the hospital was *bona fide* done in obedience to the directions of the Poor Law Board and the Local Government Board, which has since been substituted for the Poor Law Board; and their contention was, that even if the maintenance of this hospital was a nuisance to the plaintiffs as owners and occupiers of adjoining property, such that if it had been maintained by private persons the plaintiffs would have been entitled to relief, the Legislature has thought fit for the public good to deprive them of that relief. This is a question of great public importance. It has been judged better to determine this question first.

In order to raise this question it must be assumed that the maintenance of this hospital on this plot of ground for the reception of so large a body of smallpox patients is necessarily a nuisance to the adjoining occupiers. But this must be without prejudice to the contention of the defendants, that the first two findings of the jury were not satisfactory. And it must also be without prejudice to the contention of the plaintiffs, that even if the construction of the Act be what the defendants contend and the plaintiffs deny, still the answers of the jury to the third, fourth and fifth questions of the Judge, if satisfactorily obtained, would entitle the plaintiffs to some relief. I now proceed to the discussion of the question thus raised.

I think that the case of *The Hammersmith Railway Company* v. *Brand* (6), in your Lordships' House, settles beyond controversy that where the Legislature directs that a thing shall at all events be done, the doing of which, if not authorised by the Legislature, would entitle anyone to an action, the right of action is taken away. It is enough to say that such was the unanimous decision of this House, but the reason briefly given by Lord Cairns seems indisputable. It is a *reductio ad absurdum* to suppose it left in the power of the person who had the cause of action to obtain an injunction, and so prevent the doing of that which the Legislature intended to be done at all events. The Legislature has very often interfered with the rights of private persons, but in modern times it has generally given compensation to those injured; and if no compensation is given it affords a reason, though not a conclusive one, for thinking that the intention of the Legislature was not that the thing should be done at all events, but only that it should be done if it could be done without injury to others. What was the intention of the Legislature in any particular Act is a question of the construction of the Act.

Before considering the terms of the Metropolitan Poor Act, 1867, it may be as well to consider what was the state of the law before it was passed. The successive Poor Law Acts had given powers for the relief of the poor chargeable, and power to raise money for those purposes, and a series of enactments had given powers to purchase sites for workhouses and to lodge and maintain the chargeable poor in those workhouses, and to raise money for that purpose. Those who had the management of such workhouses had thus the charge of a number of persons assembled together under circumstances that made it very likely that there should be sickness, and often contagious sickness, among them. I can, however, find no words in any of the Acts prior to 1844 alluding to that likelihood. There are a few words in the Poor Law Amendment Act, 1844, in the preamble to section 4, that shew that the attention of those who framed that Act had been called to the

likelihood of infectious disorders being communicated to the inmates in a workhouse; but there was no provision before the passing of the Metropolitan Poor Act, 1867, casting on the managers of a workhouse any special duties as to the management of the sick poor, nor any power to raise funds for any expenditure incurred for such an object further than was involved in the maintenance of the persons chargeable. It seems that the Legislature left the managers of a workhouse subject to the duties which the common law cast upon those having the charge of others, and did not see any necessity for providing them with extraordinary powers, or with the means of raising funds for extraordinary expenses. Those who have the charge of a sick person if he is helpless (whether the disease be infectious or not) are, at common law, under a legal obligation to do, to the best of their ability, what is necessary for the preservation of the sick person; and the sick person, if not helpless, is bound to do so for his own sake. When the disease is infectious there is a legal obligation on the sick person, and on those who have the custody of him, not to do anything which can be avoided which shall tend to spread the infection; and if either do so, as by bringing the infected person into a public thoroughfare, it is an indictable offence, though it will be a defence to an indictment if it can be shewn that there was a sufficient cause to excuse what is *prima facie* wrong—*The King* v. *Burnett* (24).

Take an extreme case: if a house in which a person ill of an infectious disorder lay bedridden took fire, and it was necessary to choose whether the sick person was to be left to perish in the flames, or to be carried out through the crowd at the risk or even the certainty of infecting some of them, no one could suppose that those who carried out the sick person could be punishable, and probably a much less degree of necessity might form an excuse; but still some excuse is required. It is not necessary here to determine what constitutes a sufficient excuse.

(24) 4 M. & S. 272.

Where those who have the custody of the person sick of an infectious disorder have not the means of isolating him from the other inmates, which is very commonly the case with the poor, and consequently those other inmates and the neighbours are exposed to the risk of infection, I think the inability to isolate him would form a sufficient excuse to be a defence to any indictment; and I think also, though I am not aware of any authority on the subject, that the neighbours could not maintain any action for the damage which they would in such a case sustain from the proximity of the infected person, it being a necessary incident to the use of property for habitations in town that contagious sickness may befall their neighbours. If those who have the charge of the infected person have the means of isolating him on the spot, they certainly do well to use them, and if it cannot be done on the spot, and they can either by their own means, or by the aid of charitable persons who have erected an hospital, find a place where he can be isolated so as to avoid the risk of infection, they will do well to use the means. I do not mean to express any opinion as to whether at common law they would or would not be responsible for not doing so; but there is no authority, and I think no principle, for saying that they are justified in removing him to a place where the neighbours would be exposed to contagion, though it may be that those neighbours would be fewer in number than the neighbours of the spot where the infection broke out—nor for saying that if that was done and the contagion was such as to amount to a real nuisance those neighbours might not maintain an action, and obtain an injunction to protect themselves against the importation of foreign infection. For though, as I have already said, I think it an incident to the use of a habitation in a town that the occupier must bear the necessary risks of the inmates of neighbouring habitations falling ill of a contagious disease, I do not think it an incident that he is to submit to his neighbours wilfully, though for very laudable motives, and not maliciously, bringing in contagion where it did not previously exist, if the

effect is not merely to alarm him but to injure him. This, I think, is borne out by the decisions on the subject of inoculation.

Inoculation was, it was well known, introduced into this country in the early part of the eighteenth century. It consisted in artificially communicating the smallpox in such a manner that the patient took it in a very mild form, but was as much a source of infection to others as if the disease had been taken in the natural manner. The introduction of the practice was vehemently opposed. In 1752 a case (15) came before Lord Hardwicke which is reported in two reports. I collect from the two reports that it was proposed by private persons to erect a building in Coldbath Fields to be used as an hospital for the reception of persons ill of the smallpox, and also for the reception of persons who were there to be inoculated. The plaintiff was, it appears, owner of building land in the neighbourhood, and gave evidence (of what seems very probable) that the fears of infection from the proposed hospital greatly deteriorated the letting value of his property. Lord Hardwicke refused to grant an injunction, saying, what is undoubtedly law, that loss arising from the fears of mankind, though reasonable, would not create a nuisance at law, and that before he could grant an injunction, he must be satisfied that what was proposed to be done would be a legal nuisance affecting the plaintiff's private rights. He is reported in Ambler to have said that he thought such a charity was "like to prove of great advantage to mankind; such an hospital must not be far from a town, because those that are attacked with that disorder in a natural way may not be in a condition to be carried far." This I think very true, and it is to be borne in mind when construing the Act now in question. Lord Hardwicke seems to have decided that the plaintiff made out no nuisance to his private rights, and that even if the maintenance of a place for the artificial propagation of smallpox was indictable, which seems not to have been Lord Hardwicke's opinion, that was a public and not a private nuisance.

In *The King* v. *Sutton* (25) in 1767, it was held that an indictment for maintaining a house for inoculating for the smallpox was not so plainly bad as to be quashed on motion. This is all that appears from the report, but from what Lord Ellenborough says in *The King* v. *Vantandillo* (14) it would appear that there had been much more discussion at the time.

In *The King* v. *Burnett* (24), in 1815, it was decided that though inoculation for the smallpox may be practised lawfully and innocently, yet it must be under such guards as not to endanger the public health by communicating this infectious disease. And I think, by necessary inference, it follows that to gather together in one spot patients suffering from infectious disease is lawful, but it must be under such guards as not to endanger the public health by communicating this infectious disease, and, as it seems to me, as not to produce injury to the rights of the owners of adjoining property by producing a nuisance to it.

If this be a correct view of the law, it is obvious that, however desirable it might be to erect and maintain asylums for the reception of the sick poor, it could not be done by any parochial authorities unless the authority of Parliament was obtained for raising funds for the purpose and authorising a public body to obtain a site for the asylum; and the Metropolitan Poor Act, 1867, certainly created such a body, and gave it powers to raise money, and without further powers this body could erect an asylum, provided it was done in such a manner as neither to endanger the public health nor to form a nuisance to private property. It is, for the reason given by Lord Hardwicke, necessary that the site of such an asylum should be not far from the places where the patients fall sick, and consequently in the case of the metropolis in an inhabited district.

I wish to express myself without prejudice to what I suppose will be one of the points to be decided in the appeal No. 1. If it be the fact that such an asylum must be a nuisance unless on a

(25) 4 Burr. 2116.

site so extensive as to keep all habitations at a considerable distance, it may be that such a site cannot be obtained at all in the neighbourhood of the metropolis, or only at a cost so enormous as to make it practically impossible. If this is the case it might be for the consideration of the Legislature, whether the certain danger of infection from leaving the infectious sick paupers where they fell ill exceeded that which would arise from a well-regulated hospital in another place to such an extent that it was for the public benefit that this latter risk should be run, and whether the rights of owners of property there should stand in the way of such a public benefit or should be made to give way with or without compensation.

In the Metropolitan Poor Act, 1867, there are provisions—sections 15, 16, 17, 18, 21, 28—putting everything under the control of the Poor Law Board, and thus affording a considerable and probably a sufficient security that any asylum made under that Act should be a well-regulated asylum, and should not be made in any place unless the Poor Law Board thought it a fit place. But the question, as I think, is, whether there is an intention shewn on the part of the Legislature to authorise the erection of an asylum where it is a nuisance to owners of the adjoining property if the Poor Law Board thought it a fit place, either mistakenly thinking the asylum would be no nuisance there, or perhaps rightly thinking that there was no other place in which it could be erected without being a greater nuisance than if erected there.

It is clear that the burthen lies on those who seek to establish that the Legislature intended to take away the private rights of individuals to shew that by express words or by necessary implication such an intention appears. There are no express words in this Act, and I think the weight of argument is rather against than in favour of such an implication. There is no power given to take land for a site otherwise than by agreement. For though the Lands Clauses Acts are incorporated by section 52, yet by section 53 so much of the Lands Clauses Acts as relates to the purchase of lands otherwise than by agreement, shall not be put in force except for the purpose of enlarging an existing workhouse.

The asylum, under this Act, must therefore be either made by, under section 18, converting a workhouse into an asylum, which is not the present case, or by erecting one on land purchased or hired by agreement. In *Clowes* v. *The Staffordshire Potteries Waterworks Company* (12), Lord Justice Mellish says, "If no compulsory powers were given for the purpose of purchasing lands upon which the works were to be built, it certainly seems extraordinary that compulsory powers should be given to take away the rights of other persons who have rights in the nature of easements over that land which they so purchased."

He was discussing the question whether the party grieved retained his right to an injunction or was compelled to seek for compensation. In the Metropolitan Poor Act, 1867, there is no compensation given, and the question is, whether the purchase by agreement of the site for the asylum gave the defendants power without compensation to do what would have been a wrong to the plaintiffs if done by the former owners, which adds additional force to the argument of Lord Justice Mellish when applied to the construction of this Act.

It is true that in section 7 it is said that "for each district there shall be an asylum or asylums as the Poor Law Board from time to time by order direct." But the construction of that is, I think, only that the managers shall make such asylums in obedience to the order of the Poor Law Board, if they can do so by exercise of the powers given them, and not to say that they must make them at all events so as to give them additional powers to make the asylums, by taking lands or injuriously affecting lands otherwise than by agreement. I am sensible of the great difficulty that there may be in finding sites for asylums under this Act, or hospitals under the Public Health Act, 1875, s. 131, unless further powers be given; but that must be for the consideration of the Legislature.

I do not understand that any other point is raised on the appeal No. 2, and if your Lordships take this view of the cou-

struction of the Metropolitan Poor Act, 1867, I think it will follow that the appeal No. 2 should be dismissed with costs.

LORD WATSON.—The only question falling to be determined in this appeal is whether, on the assumption that the first and second findings of the jury are well founded, the respondents are entitled to have an injunction restraining the appellants from using a building erected by them at Hampstead as an hospital for the reception and treatment of persons suffering from smallpox or other infectious disease, to the nuisance of the appellants, and also to recover damages from the appellants in respect of the injury which they have thereby sustained.

The first, and, according to the view which I take of the case, the more important of these two findings is to the effect that the "hospital was a nuisance *per se*, occasioning damage to the plaintiffs (respondents) and each of them." By these words I understand the jury to affirm that the hospital which the appellants have built upon the site acquired by them, with a view to its erection, cannot be used for the reception and treatment of persons suffering from smallpox without creating a substantial nuisance to the respondents as owners of certain neighbouring properties. I think it may be matter of reasonable inference, from the terms of the finding, that nuisance would necessarily be occasioned to the respondents by the use of any hospital for the special accommodation of smallpox patients on the same site, and similar in size and character to that which the appellants have built. But I do not understand the jury thereby to affirm the impossibility of erecting and using an hospital for the treatment of smallpox on a lesser scale, and according to a different plan, upon the site in question, or the impossibility of procuring elsewhere a suitable site upon which an hospital of the same plan and dimensions with that complained of might be erected and so used, without creating a nuisance in either case.

The second finding of the jury affirms that "nuisance was occasioned to the respondents by reason of the patients going to or coming from the hospital." The precise meaning the jury intended to convey by that finding may be doubtful. It may signify that, in the opinion of the jury, the conveyance of smallpox patients to and from the hospital would of itself, and in all circumstances, occasion nuisance, although they might be treated within its walls without creating any nuisance. Or it may simply mean that the provision made by the appellants for the entrance and exit of patients was defective, and that the nuisance thereby occasioned might be obviated by the adoption of a better arrangement. Owing to the shape in which this appeal comes before the House, I have no means of ascertaining for myself the true import of the finding, and the parties, as I understood, were not at one upon the point. But in the view which I have taken of the legal consequences of the first finding, the second appears to me to be immaterial, whatever its true meaning may be.

I consider myself bound to assume that the verdict of the jury was given according to the facts and in terms of the law, as correctly stated by the presiding Judge. I understood that so much was conceded by the counsel for the appellants, and that their argument was addressed to the House on the footing that the building which the appellants have erected at Hampstead cannot be used for the treatment of persons suffering from smallpox without occasioning that which is both in fact and law a nuisance to the respondents. In that case it seems to be clear that if the appellants acted in a private capacity, and without legislative sanction, they could not successfully impeach the judgment of Baron Pollock, confirmed by the Court of Appeal. That proposition I did not understand the appellants to contest, but they allege that in providing a smallpox hospital at Hampstead they did no more than carry out the orders of the Local Government Board, and they maintain that the board had full power under the Metropolitan Poor Act, 1867, to order the erection and use of the building for the treatment of smallpox, irrespective of any nuisance thereby occasioned.

In these circumstances, it was rightly represented on both sides of the bar that the legal issue before the House depends

upon the construction to be put upon the enactments of the statute of 1867. But I think it expedient, before dealing with the enactments of the statute in question, to consider shortly what kind or degree of statutory sanction is sufficient to justify the creation of a legal nuisance.

The judgment of this House in *The Hammersmith Railway Company* v. *Brand* (6) determines that where Parliament has given express powers to construct certain buildings or works according to plans and specifications upon a particular site and for a specific purpose, the use of these works or buildings in the manner contemplated and sanctioned by the Act cannot, except in so far as negligent, be restrained by injunction, although such use constitutes a nuisance at common law, and that no compensation is due in respect of injury to private rights unless the Act provides for such compensation being made. Accordingly the respondents did not dispute that if the appellants or the Local Government Board had been by the Metropolitan Poor Act, 1867, expressly empowered to build the identical hospital which they have erected at Hampstead upon the very site which it now occupies, and that with a view to its being used for the treatment of patients suffering from smallpox, the respondents would not be entitled to the judgment which they have obtained. The appellants do not assert that express power or authority to that effect has been given by the Act either to themselves or to the board, but they contend that, having regard to the nature of the public duties laid upon them and the necessities of the case, it must on a fair construction of the Act be held that the Legislature did intend them to exercise and did authorise them to exercise such power and authority under the direction and control of the Poor Law Board.

I see no reason to doubt that wherever it can be shown to be a matter of plain and necessary implication from the language of a statute that the Legislature did intend to confer the specific powers which I have above referred to, the result in law will be precisely the same as if these powers had been given in express terms; and I am disposed to hold that, if the Legislature, without specifying either plan or site, were to prescribe by statute that a public body shall within certain defined limits provide hospital accommodation for a class or classes of persons labouring under infectious disease, no injunction could issue against the use of an hospital established in pursuance of the Act, provided it were either apparent or proved to the satisfaction of the Court that the directions of the Act could not be complied with at all without creating a nuisance. In that case the necessary result of that which they have directed to be done must presumably have been in the view of the Legislature at the time when the Act was passed.

On the other hand I do not think that the Legislature can be held to have sanctioned that which is a nuisance at common law, except in the case where they have authorised a certain use of a specific building in a specified position, which cannot be so used without occasioning nuisance, or in the case where the particular plan or locality not being prescribed they have imperatively directed that a building shall be provided within a certain area and so used, it being an obvious or established fact that nuisance must be the result. In the latter case the *onus* in proving that the creation of a nuisance will be the inevitable result of carrying out the directions of the Legislature depends upon their making good these two propositions: in the first place that they are bound to obey the imperative order of the Legislature; and in the second place that they cannot possibly do so without infringing private rights. If the order of the Legislature can be executed without nuisance, they cannot, in my opinion, plead the protection of the statute; and, on the other hand, it is insufficient for their protection that what is contemplated by the statute cannot be done without nuisance, unless they are also able to shew that the Legislature has directed it to be done. Where the terms of the statute are not imperative but permissive, when it is left to the discretion of the persons empowered to determine whether the general powers committed to them shall be put into execution or not, I think the fair inference is that the Legis-

lature intended that discretion to be exercised in strict conformity with private rights, and did not intend to confer licence to commit nuisance in any place which might be selected for the purpose.

To return to the statute upon the terms of which the appellants seek to justify the nuisance which they must for the purposes of the present case be held to have established at Hampstead, the objects of the Act of 1867 are various, but they all relate to the relief of the legal poor within the metropolis, and include the establishment of district asylums "for reception and relief of the sick, insane or infirm or other class or classes of the poor chargeable in unions and parishes." So far as regards this last object, the Act seems to me to have been designed to supplement, if not to supersede, certain provisions of the 7 & 8 Vict. c. 101, which made it lawful for the Poor Law Commissioners, in the cases of London and each of five other large cities in England, to combine parishes and unions into districts for the purpose of providing and managing asylums for the temporary relief of the destitute homeless poor. The machinery enacted by the statute for carrying out that object is very similar to that which is provided in regard to asylums by the Act of 1867.

The clauses of the Act of 1867, so far as these relate to asylums, are not complicated or ambiguous. Section 5 declares in general terms that "asylums to be supported and managed according to the provisions of this Act may be provided for reception and relief" of the poor or classes of poor already mentioned, and in furtherance of that purpose it is declared by section 6 that "the Poor Law Board may from time to time combine into districts, unions, or parishes, or unions and parishes, in the metropolis." By section 7 it is imperatively enacted that "for each district there shall be an asylum or asylums as the Poor Law Board from time to time by order direct." These enactments are followed by clauses which provide for the constitution of a board of managers for each district formed under the Act. Then comes the 15th clause, which enacts that "the Poor Law Board may from time to time by order direct the managers to purchase or hire, or to build and (in either case) to fit up a building or buildings for the asylum, of such nature and size, and according to such plan and in such manner as the Poor Law Board think fit." I assume that the words of the preceding clause are sufficient to confer by implication the same powers in regard to the purchase of a site, which are expressly given in relation to the purchase of a building.

The other clauses requiring notice are the 17th, which empowers the managers to meet the expenses incurred in the execution of section 15 by borrowing, on the security of the poor-rates of the unions and parishes comprehended in their district, a capital sum to be repaid out of these rates by equal annual instalments not exceeding twenty, and also sections 16, 51, 52, 53. I shall not examine these four sections in detail, it being sufficient for the purposes of this case to state that their effect is to give the managers powers, first, to acquire lands and buildings for the purposes of section 15 by voluntary purchase, no compulsory powers being given except "for the purchase of lands for the purpose of enlarging a workhouse, hospital or school existing at the passing of this Act;" secondly, to acquire such lands and buildings by voluntary purchase from persons under legal incapacity; and, thirdly, to use certain short statutory forms of conveyance.

Such being the subject of the enactments of the statute of 1867 which have a material bearing upon the present question, I am unable to find in them anything to support the plea that the Legislature thereby intended to authorise in any case the creation of a nuisance. I assume that the Hampstead asylum has been erected in pursuance of the Act in this sense, that the procedure prescribed by the statute has been strictly followed both by the Local Government Board, who now stand in place of the Poor Law Board, and by the managers. There is no question as to the *bona fides* both of the board and the managers.

It is clear that they acted in the honest belief that all they did was for the benefit of the community, and within their statutory powers. But that will not avail

if the Act does not empower either of them or both in conjunction to erect an asylum to the nuisance of neighbouring proprietors. These powers appear to me to be from first to last permissive, and not imperative. Whether they shall be exercised at all, and, if so, to what extent and effect their exercise shall be carried, is left to the discretion of the Poor Law Government Board. No doubt the language of the section 7 is imperative, and that is a circumstance upon which the appellants were fairly entitled to argue in support of their contention.

But it is, in my opinion, a conclusive answer to their argument that, in the first place, the board is not bound to form a district; and, in the second place, if they do see fit to form a district in terms of section 6, they are under no statutory compulsion to establish an asylum for smallpox patients by reason of the provisions of section 7, but have ample means of satisfying these provisions by the erection and use of an asylum or of asylums which do not constitute a nuisance to anybody. So far as regards a smallpox hospital the discretion committed to the board is not limited to determining on what site, of what size, and according to what plan, it shall be built, but involves the duty of considering and determining whether it shall be built at all.

The appellants in support of their construction of the Act, founded strongly upon section 69, sub-section 2, which provides that expenses incurred for "the maintenance of patients in any asylum specially provided under this Act for patients suffering from fever or smallpox" shall be repaid out of the Common Poor Fund. But that provision is not meant to add, and cannot be held to add, to the powers previously conferred. It is not disputed that an asylum shall be provided and used for the treatment of smallpox patients, if no nuisance is thereby occasioned, and all that the Legislature have enacted by section 69 is that if and when such an hospital has been lawfully established the expense of maintaining patients in it shall be defrayed out of a common fund raised by contributions from all the parishes and unions comprised in the district and not by the parishes or unions to which they are severally chargeable.

The clauses in question belong to a class of enactments of which abundant examples are to be found in the statute book, the main object of which is to legalise the application of public rates to purposes which would otherwise be *ultra vires* of the bodies by whom these rates are administered. Such purposes are in themselves lawful, but it is not lawful to expend the money of the ratepayers upon them without the express sanction of Parliament.

And it appears to me that, in making provision with regard to asylums in the metropolis, the Legislature has done nothing more than is requisite to place the authorities to whom it has committed the execution of that part of the Act upon the same level as individuals in so far as the rights of third parties are concerned, but with the right, which individuals have not, to defray the costs by rates levied from the public.

I am accordingly of opinion that the judgments under appeal ought to be affirmed.

Mr. Willis.—I am instructed to make an application to your Lordships. I do not know whether I can make it now or when would be the proper time.

THE LORD CHANCELLOR (LORD SELBORNE).—I do not know what application it would be possible for counsel to make after the House has pronounced its final judgment.

Mr. Willis.—It has reference to the previous judgment upon appeal No. 1, which has nothing to do with the judgment your Lordships have just now pronounced. There came before your Lordships the question as to the competency of appeal No. 1. Your Lordships gave judgment in favour of the Metropolitan Asylums District Board, that the appeal could be properly brought on, but your Lordships reserved the question of the costs of appeal until a further day. Supposing the asylums board should be of opinion that they ought not to pro-

secute appeal No. 1, they would have no opportunity, except the present one, of asking your Lordships to deal with the question of costs in that appeal in which judgment was given in their favour.

THE LORD CHANCELLOR (LORD SELBORNE).—The learned counsel is mistaken. That appeal is perfectly distinct from the present one, and if it should be abandoned all the costs incident to it would of course be dealt with in the usual way.

Judgment appealed against affirmed, and appeal dismissed with costs.

Solicitors—Few & Co., for appellants; Bischoff, Bompas & Co., for respondents.

[IN THE QUEEN'S BENCH DIVISION AND THE COURT OF APPEAL.]

1881. March 7, 8, 31. SMALLEY AND ANOTHER *v.* HARDINGE.

Bankruptcy—Disclaimer of Onerous Property by Trustee — Lease — Sub-Lease — Rights of Sub-Lessee — Bankruptcy Act, 1869, *s.* 23.

A lessee who had granted a sub-lease of part of premises demised to him became bankrupt. The trustee of the bankrupt's estate obtained from the Court of Bankruptcy, after notice to the sub-lessee, leave to disclaim the interest of the bankrupt in the demised premises, and disclaimed such interest accordingly. The owner in reversion demanded of the sub-lessee possession of the premises comprised in the sub-lease, and, upon refusal by the sub-lessee, brought an action to recover possession:—Held (*by the Court of Appeal*), *that the action could not be maintained, inasmuch as a disclaimer is in such cases equivalent to a surrender.*

Appeal from the judgment of Mathew, J.

Demurrer to a statement of claim which in substance was as follows:—

1. The plaintiffs are the owners of the messuage, No. 90 New Bond Street, in the county of Middlesex.

2. By indenture of lease, dated the 30th of December, 1870, the plaintiff Smalley demised the said messuage to Frederick Jones for the term of sixty-one years less ten days, from the 25th of December, 1868, at a rent; and by that indenture Jones covenanted (amongst other things) that he would not assign or otherwise dispose of (except by will) the said indenture of lease, and the demised premises or any part thereof, without licence from the plaintiff Smalley, his executors, administrators or assigns.

3. By indenture of lease, dated the 19th of May, 1871, Jones demised to John Gardner, without licence of the plaintiff Smalley, a part of the said messuage for a term of twenty-one years from the 25th of March, 1870, at a rent.

4. By indenture, bearing date after the last-mentioned indenture, but the exact date whereof is unknown to the plaintiffs, Gardner assigned to the defendant, without licence of the plaintiff Smalley, all his interest in the indenture of the 19th of May, 1871, and in the premises thereby demised, and the defendant thereupon took possession of the said premises and is still in possession thereof. The plaintiffs crave leave to refer at the hearing of this action to the said three indentures.

5. In December, 1879, Jones filed a petition in the London Bankruptcy Court for the liquidation of his affairs by arrangement, and afterwards a resolution for the liquidation of his affairs was duly passed and registered, and on the 23rd of January, 1880, John Ferrier was appointed trustee under the liquidation.

6. On the 29th of April, 1880, Ferrier, as such trustee, applied to the said Court of Bankruptcy for leave to disclaim the interest of Jones in the said messuage, and by an order of the said Court, dated the 3rd of June, 1880, leave was given to Ferrier as such trustee to disclaim such interest.

7. The defendant duly received, shortly after the said application, notice thereof, and within a reasonable time before the said 3rd of June, 1880, notice that the application would be disposed of on the said 3rd of June.

8. On the 14th of July, 1880, Ferrier, under the said order, duly disclaimed the interest of Jones in the said messuage.

9. In the alternative the plaintiffs repeat all the preceding allegations, and say that shortly after the disclaimer they gave the defendant notice thereof and of all the circumstances mentioned in the 5th, 6th and 8th paragraphs hereof, and required him to give them within a reasonable time possession of the premises assigned to him by the indenture of assignment from Gardner to him, but he refused to give up possession at all, and the said reasonable time elapsed long before the commencement of this action.

The plaintiffs claim—

First, to recover possession of the premises assigned by the indenture of assignment from Gardner to the defendant; secondly, mesne profits from the 23rd of January, 1880; thirdly, such further or other relief as may be requisite.

The defendant demurred.

The covenants contained on the part of the sub-lessee in the sub-lease by Jones were such as to be less beneficial to the owners of the reversion than the covenants contained on the part of Jones in the lease to him.

Warmington (on March 7), for the defendant.—The statement of claim is not supported by the Bankruptcy Act, 1869, s. 23 (1). A person cannot disclaim what does not belong to him. The Act only empowers the trustee to disclaim the interest of the bankrupt, and the leave given in this case accords therewith.

[MATHEW, J.—How do you read the last clause of the section?]

It applies to such a case as the simple case of lessor and lessee, and does not imply that a sub-lessee from the bankrupt may be injured by the operation of the section. The words of the section, "Upon the execution of such disclaimer the property disclaimed shall, . . . if the same is a lease, be deemed to have been surrendered on the" date of the order of adjudication, are conclusive against the plaintiffs; for a voluntary surrender does not affect the rights of a sub-lessee. It would be extremely unjust that the Act should authorise the ejectment of a sub-lessee who may have paid a heavy premium, or may, in pursuance of the terms of his sub-lease, have built upon the land.

Charles (*Moorsom* with him), for the plaintiffs.—If the contention on behalf of the defendant is right, the lessor cannot have the land itself, or the rent or the covenants for which he bargained when he let the land, but gets at the utmost the benefit of the rent and covenants reserved upon the sub-lease, which are less favourable to him. The rent reserved on the sub-lease might be a merely nominal rent. The interest of an equitable mortgagee of a lease is extinguished by a disclaimer of the lease—*Ex parte Ditton; in re Woods* (2). This case is in substance identical with *Taylor* v. *Gillott* (3). If a person interested as equitable mortgagee, or as sub-lessee, in a lease granted by a person who has afterwards become bankrupt, wishes to protect his rights against a disclaimer by the trustee in the bankruptcy, he must intervene before execu-

(1) The Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 23, enacts: "When any property of the bankrupt acquired by the trustee . . . . consists of land of any tenure burdened with onerous covenants . . . . or of any other property that is unsaleable, or not readily saleable by reason of its binding the possessor thereof to the performance of any onerous act, . . . the trustee . . . . may by writing under his hand disclaim such property, and upon the execution of such disclaimer the property disclaimed shall, if the same is a contract, be deemed to be determined from the date of the order of adjudication, and if the same is a lease, be deemed to have been surrendered on the same date; and if the same be shares in any company, be deemed to be forfeited from that date, and if any other species of property, it shall revert to the person entitled on the determination of the estate or interest of the bankrupt, but if there shall be no person in existence so entitled, then in no case shall any estate or interest therein remain in the bankrupt. Any person interested in any disclaimed property may apply to the Court, and the Court may, upon such application, order possession of the disclaimed property to be delivered up to him, or make such other order as to the possession thereof as may be just. Any person injured by the operation of this section shall be deemed a creditor of the bankrupt to the extent of such injury, and may accordingly prove the same as a debt under the bankruptcy."

(2) 45 Law J. Rep. Bankr. 141; Law Rep. 3 Ch. D. 459.

(3) 44 Law J. Rep. Chanc. 740; Law Rep. 20 Eq. 682.

f the disclaimer—*Ex parte Buxton; Müller* (4).

rmington, in reply.—The original is in no danger of finding himself it either the land, or any rent, or ants, for if he does not get the ; of any other rent or covenants he r gets, by virtue of 8 & 9 Vict. c. . 9, the benefit of the rent and ants stipulated for from the sub- that Act, in effect, enabling the deree of the reversion on a sub-lease the sub-lessee upon his covenants. ases cited are no authorities for the ffs. In *Ex parte Ditton; in re* (2), the appellant complained of ler which gave leave to disclaim as ing him of his rights, and his ap- as dismissed on the simple ground e should have obtained a stay of ion of the order. The defendant s case could not have been better making an application such as, the authority of *Ex parte Buxton; Müller* (4), it has been suggested uld have made, inasmuch as the of the Court already saves his as sub-lessee. The case is unlike v. *Gillott* (3). There no lease tually been granted to the intended see (a fact adverted to by Vice- ellor Hall in his judgment), and uently the intended sub-lessee had n equitable interest, instead of , like the present defendant, a legal Further, he sought a lease on rms of the intended sub-lease, not accordance with the allegations in) he should have on the terms of ginal lease.

Cur. adv. vult.

HEW, J. (on March 8).—The ques- this case turns upon the construc- the 23rd section of the Bankruptcy 869, and is, What is the effect of aimer by a trustee in bankruptcy ease made to a bankrupt on the ses made by him before bank- of the premises contained in the l lease? Mr. Charles contended, e authority of *Taylor* v. *Gillott* at the disclaimer put an end to se and the sub-leases which the bankrupt had created. It seems to me that the reasoning of the Vice-Chancellor is applicable to the present case, and that the plaintiffs are entitled to rely upon the judgment as a decision in their favour. It was argued by the learned counsel for the defendant that the sub-lease here is a legal interest, while in *Taylor* v. *Gillott* (3) the subordinate interest was equitable. This, it was argued, made all the difference; but I think it makes no difference. The argument from hardship is available upon either contention, but I do not think it unreasonable to suppose that the Legislature intended to meet the difficulties occasioned by the bankruptcy of a lessee by providing means for terminating the lease while the Court of Bankruptcy is provided with the means of protecting the interests derived from the lessee. Whether or not the Court of Bankruptcy has power to administer relief in this case under section 23, I express no opinion.

Judgment for the plaintiffs.

The defendant appealed.

Warmington, for the appellant (on March 31).—The question raised by the demurrer is as to the effect on the estate of a sub-lessee of a disclaimer by a trustee in liquidation of the liquidating debtor's interest in a lease. The contention on behalf of the appellant is that there is no difference between a disclaimer under section 23 of the Bankruptcy Act, 1869 (1), and a surrender by a party not subject to the provisions of that Act. The law as it was before the Bankruptcy Act is clearly laid down in *Doe d. Beaden* v. *Pyke* (5), and establishes the position that a surrender of a lease does not affect a sub-lease previously granted. Then section 23 of the Bankruptcy Act, 1869 (1), enacts that a disclaimer shall be deemed to be equivalent to a surrender. That which is disclaimed is, it is submitted, the property or estate which the debtor had, and by the effect of 8 & 9 Vict. c. 106 the landlord takes the benefit and burden of the under-leases. *Smyth* v. *North* (6) decided that a disclaimer by

(4) Law Rep. 15 Ch. D. 289.

(5) 5 M. & S. 146.

(6) 41 Law J. Rep. Exch. 103; Law Rep. 7 Exch. 242.

the trustee of an assignee of a lease does not affect the liabilities *inter se* of the lessor and the original lessee. *Taylor* v. *Gillott* (3) is relied on by the plaintiff, but that case is to be distinguished on the facts. There was in that case no under-lease, and the plaintiff there had no legal estate. The distinction is adverted to in the judgment of Hall, V.C. The point has been expressly decided in the Court of Appeal in Ireland, and the judgment of that Court in *O'Farrell* v. *Stevenson* (7) is in favour of the contention of the defendant. *Ex parte Brook* (8), *Lowrey* v. *Barker* (9), *Ex parte Buxton* (4) and *Ex parte Corbett* (10) were also cited.

Charles and *Moorsom*, for the plaintiffs. —It is submitted that the surrender contemplated by the statute (1) is a voluntary surrender, whereas the surrender in such a case as this is not voluntary, on the part of the landlord at all events.

[LUSH, L.J.—Does not the word "surrender" imply that it is voluntary; does not the statute effect that the position of all parties is to be the same as if the lessor had accepted the surrender?]

The surrender resulting from a disclaimer extinguishes all leases and underleases. It differs from surrenders such as were under consideration in *Doe d. Beaden* v. *Pyke* (5). The question of hardship is not immaterial, for the Bankruptcy Act, 1869, shews by the same section (1) how the tenant or under-lessee may prevent his interest from being imperilled: he can apply to the Court. He has not done so here, and he must bear the consequences. The trustee cannot by disclaiming deprive any person of his rights if he chooses to apply in due time to the Court of Bankruptcy—*Ex parte Ditton* (2). That case also decided that a disclaimer extinguishes all interests, so that the lessor's title to the property is here complete.

[LUSH, L.J.—That was an application to the Court of Appeal in Bankruptcy, and it is not a decision on this point.]

(7) 4 Ir. Com. Law Rep. 715.

(8) 48 Law J. Rep. Bankr. 22; Law Rep. 10 Ch. D. 100.

(9) 49 Law J. Rep. Exch. 433; Law Rep. 5 Ex. D. 170.

(10) 49 Law J. Rep. Bankr. 74; Law Rep. 14 Ch. D. 122.

In *Ex parte Buxton* (4) the course was taken which should have been taken here, and then a proper indemnity would have been ordered to be given. *Taylor* v. *Gillott* (3) is an authority in point, and the decision covers this case.

[LUSH, L.J.—The distinction is that there was no privity between the lessor and under-lessee; but here there is an existing under-lease.]

The Vice-Chancellor considered that it was a startling proposition to say that in the case of a disclaimer a lessor is, till the end of an under-lease, only entitled to the benefit of such covenants as the intermediate lessee may have obtained from the under-lessee; and the remarks in that judgment on the question as to the prohibition of certain trades and other stipulations which a lessor may have made with his lessee, but which that lessee may not have made with his under-lessee, are very pertinent here.

[LUSH, L.J.—The lessor can guard against such dangers to the property by covenants.]

Not with any certainty, for the original lease is destroyed by the disclaimer. The provisions of 8 & 9 Vict. c. 109 must be held also only to apply to a voluntary surrender. *O'Farrell* v. *Stevenson* (7) does doubtless contain expressions which support the view of the appellant here. But that case may well be supported on another ground, for in that case there were three leases and the second was disclaimed; but after that disclaimer the third lessee paid rent to the first lessor, and that rent having been accepted the third lessee was entitled to say that the lease was in existence.

Warmington was not called on to reply.

BRAMWELL, L.J.—I think, with all respect to Mr. Justice Mathew, that this is a plain case. I will not speculate on the hardships which may result from our decision. They do not concern us. What does the statute say? "The property disclaimed shall, . . . if the same is a lease, be deemed to have been surrendered on the same date"—that is, the date of the adjudication, or from the date of the appointment of the trustee in liquidation;

nat is all. If the lease had been dered on the date of the appoint- of the trustee, then the plaintiff not maintain this action. The Act mething may be done which is to med to be, that is, which is—equi- to a surrender, and yet the argu- is that the case must be dealt with ugh those words did not exist. It ther urged that all surrenders are ary acts, and that this act is not a ary act on the part of the landlord. t be so, then I must observe that atute says that that which is not ary is to be deemed to be as though re voluntary. It may be added he landlord can protect himself t any evil consequences better than e tenant. I do not think that there thing in *Taylor* v. *Gillott* (3) which pposition to this opinion. I think he judgment of the Irish Court of l in *O'Farrell* v. *Stevenson* (7) is in I think that judgment is conclu- nd that the reasoning of their Lord- in that case is so forcible and werable that I cannot add any- to it.

GALLAY, L.J.—The carrying out the ions of section 23 of the Bankruptcy 869, may give rise to hardships on ides, but they cannot influence our on. The question is, What is the nd clear meaning of the words of atute? The precise words show he estate of the lessee is to be d to have been surrendered on the f the appointment of the trustee; en, by the effect of the Bankruptcy 869, and 8 & 9 Vict. c. 106, the to which the bankrupt was en- ceased on that surrender, while tate of the sub-lessees is preserved; t the plaintiffs are not entitled to ain this action, and this appeal be allowed.

H, L.J.—I also think that this ap- ust be allowed. The judgment of Chancellor Hall in *Taylor* v. *Gillott* es not govern this case. In the ow on appeal a lessee has become upt, who, before his bankruptcy, reated a legal estate out of his interest in a lease. If he had voluntarily surrendered that lease to his lessor there would be no prejudice to his sub-lessee, as by the effect of 8 & 9 Vict. c. 106. s. 9, the estate which confers as against the tenant the next right to the property, is deemed to be the reversion, so that a privity is created between the lessor of the party who surrenders and the sub-lessee. In *Taylor* v. *Gillott* (3) no such estate had been created: there was there only an agreement to create an estate. The intending grantor became bankrupt, and his trustee disclaimed. We have not now to decide, nor was it in that case necessary to decide, whether the person who was to have a sub-lease granted could intervene to prevent the disclaimer; at all events, he did not do so. I do not see what obligation there was there on the lessor to carry out the agreement with the intended sub-lessee; there was no privity of contract, and no obligation on the lessor to do anything which the bill claimed, so that such a bill was rightly dismissed. There is an essential distinction between that case and the present case. There was here—at the time of the bankruptcy—an existing legal interest; but in *Taylor* v. *Gillott* (3) there was only an equitable claim against some one, which the person who was seeking to enforce it had no equity to enforce against the lessor. In the present case there was a subsisting title in the sub-lessee, and I agree that the surrender did not put an end to that interest. I do not think that any suggestions of hardship, on one side or the other, can influence our decision, and I agree that the reasoning of the Lord Chancellor and Lords Justices in Ireland in *O'Farrell* v. *Stevenson* (7) is irresistible and unanswerable.

Judgment reversed, and entered for the defendant.

Solicitors—Walters, Deverell & Co., for plaintiff; W. H. Herbert, for defendant.

[IN THE COURT OF APPEAL.]

1881. March 3, 4, 5, 7. CHAPLEO AND WIFE *v.* THE BRUNSWICK BENEFIT BUILDING SOCIETY AND SMITH AND OTHERS.*

Principal and Agent—Building Society—Certified Rules—Borrowing in Excess of Authority—Liability of Society and Directors.

By the certified rules of an unincorporated building society the directors were empowered to borrow money up to a prescribed limit. The course of business was for the treasurer of the society to receive the loan and give the lender a receipt, together with an undertaking on behalf of the directors to give a promissory note of the directors for the amount; and these notes were subsequently exchanged for the receipt. The plaintiffs advanced 100*l. to the society, paying the amount to the treasurer, and receiving from him a receipt and undertaking. This sum was never paid over to the society, but was appropriated by the treasurer to his own use, and no promissory note for the amount was procured for the plaintiffs. At the time of this loan the society had borrowed in excess of the limit allowed by the rules. The plaintiffs having sued the society and the directors to recover the amount,*—Held, *that the individual directors were personally liable to the plaintiffs for the amount of the loan; but that the society was not so liable.*

Appeal from the judgment of Coleridge, C.J., on further consideration. The case is reported 49 Law J. Rep. C.P. 796.

Argument of rule *nisi* for a new trial granted by the Court of Appeal, on the application of the defendant directors after refusal by the Common Pleas Division.

The defendant society was established in 1871, and its rules were certified in March, 1871; and certain amendments to these rules were certified in 1873. The twelfth rule was as follows:—

"The directors may at any time, as may be necessary for the purposes of the society, borrow money at interest from any banker with whom the funds of the society shall be deposited, or from any other source, to procure which the directors may give such security as they may think proper; but the total amount of money to be so borrowed shall not at any time exceed two-thirds of the amount for the time being secured by the mortgages of the society.

The society received loans through Lea, the secretary, who issued advertisements inviting loans, acted as treasurer, received moneys advanced and gave receipts. The course of business was uniform: The lender brought the money to Lea; a receipt and an undertaking on behalf of the directors to give a promissory note was given by Lea or one of his clerks; promissory notes for the amount of the money lent were signed by the directors at their next meeting, and exchanged for the receipt and undertaking through Lea, and on the sums so borrowed interest was paid.

In 1872, and on four subsequent occasions prior to October, 1878, the plaintiff advanced money to the society, and on each occasion he received a promissory note signed by the directors of the society, binding them jointly and severally to pay three months after notice the sum advanced, with interest. In April, 1878, the money borrowed by the society exceeded the authorised amount. The directors desired the secretary to withdraw the advertisement, and as he did not do so they passed a resolution that it should be withdrawn, and it ceased to appear before October, 1878, in which month the plaintiffs paid 100*l.* to Lea, and received the following receipt:—

"Received from Mr. Joseph Chapleo, of 411 Oldham Road, Manchester, the sum of 100*l.* as a loan to the Brunswick Permanent Benefit Building Society; and we hereby undertake to procure the promissory note of the directors for the said loan of 100*l.*

"For Keighley Lea & Co.,
"Secretaries,
"Alfred W. Fazakerly"

—but no promissory note was ever procured.

Lea absconded shortly after without having paid that and many other sums of money received by him over to the society. The directors refused to pay interest on the 100*l.* or to give their pro-

* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Brett, L.J.

missory note. The plaintiffs accordingly sued both the society and the directors. Two questions were left to the jury: First, Did the defendant society hold out Lea to the plaintiffs as having authority to receive this loan on their behalf on the terms on which it was received? Second, Did the directors? Both questions were answered in the affirmative. The society was not incorporated at the date of the loan in question, but had been incorporated since.

Coleridge, C.J., gave judgment for the plaintiffs against both defendants.

The defendant directors moved in the Common Pleas Division for a rule for a new trial, which was refused.

The defendants appealed, and the defendant directors also obtained in the Court of Appeal a rule for a new trial on the ground of misdirection, surprise and that the verdict was against the weight of evidence.

Sir J. Holker and *Crompton*, for the defendant directors.—On the findings of the jury the directors are entitled to have judgment entered for them. The money in question was deposited with Lea as a principal and not as an agent. The directors did not hold him out as authorised to receive loans after the withdrawal of the advertisement; they could not do so, for the borrowing powers of the society were exhausted. In all cases where Lea received the money, and did not bring it to the notice of the directors, he was the agent of those who lent it and not of the society or of the directors.

The directors never authorised Lea to receive this loan, nor did they hold him out as having authority to receive loans. The principle of holding out was certainly widely extended in *Drew* v. *Nunn* (1); but even that case does not cover this. If the directors did hold out Lea as authorised to receive money it must have been for the society and not for themselves. The directors never received the money, and cannot be liable as though they had received it. The rule for a new trial has been obtained, as it is contended that the judgment was wrongly entered, notwithstanding the findings of the jury. It is said that there is a well-settled principle that a person who puts his agent in a position to do certain acts is responsible for those acts; but these directors never put Lea as their agent to defraud, so that the cases of *Barwick* v. *The English Joint-Stock Bank* (2), *Mackay* v. *The Commercial Bank of New Brunswick* (3) and *Addie* v. *The Western Bank of Scotland* (4) do not apply. There was here a fraud, but not one in the course of the business which the agent was appointed to transact. There is no evidence that the directors authorised Lea to receive the money, and to promise that they would give their promissory notes. There was no question left to the jury as to whether the conduct of the directors was a holding out, and therefore on that point at least there should be a new trial. The present plaintiffs cannot rely on any course of business with other persons, and there have been but four transactions with them. The directors may be liable on a warranty if what they did amounted to a warranty; but they cannot be liable for any misrepresentation, unless that misrepresentation was actually and not merely legally fraudulent—*Beattie* v. *Lord Ebury* (5), *Eaglesfield* v. *Lord Londonderry* (6).

Lea cannot have held the money deposited with him as agent, as is suggested, for the depositor till the next meeting of the directors, as they never exercised any discretion, and never rejected any loan. The directors are not liable under the principle of *Weeks* v. *Propert* (7).

The Solicitor-General (*Sir F. Herschell*) and *Heywood*, for the defendant society.—Before the plaintiffs can be entitled to judgment against the society a liability must be shewn to have existed in the society before its incorporation, and then it must be shewn that that liability was transferred to the incorporated society.

(1) 48 Law J. Rep. Q.B. 591; Law Rep. 4 Q.B. D. 661.

(2) 36 Law J. Rep. Exch. 147; Law Rep. 2 Exch. 259.

(3) 43 Law J. Rep. P.C. 31; Law Rep 5 P.C. 394.

(4) Law Rep. 1 H.L. Cas. Sc. App. 145.

(5) 41 Law J. Rep. Chanc. 804; Law Rep. 7 Chanc. App. 777.

(6) Law Rep. 4 Ch. D. 693.

(7) 42 Law J. Rep. C.P. 129; Law Rep. 8 C.P. 427.

By the 4th section of 6 & 7 Will. 4. c. 32 the provisions of the Friendly Society Acts of 10 Geo. 4. c. 56 and 4 & 5 Will. 4. c. 40 are extended to building societies. It is clear that a building society has no authority to borrow money unless its rules specially authorise it to do so—*Ex parte Williamson* (8); but it is also law that a rule empowering the trustees of a building society to borrow a limited amount of money is not illegal—*Laing* v. *Reed* (9)—while a rule authorising the borrowing of money to an unlimited amount is illegal—*Re The Victoria Permanent Benefit Building Society* (10). The power, therefore, given by rule 12 is a good power. By that rule the society authorised the directors and no one else to borrow, and that rule does not give the directors power to hold out any one else as having authority to borrow. The society can only be bound by acts done within and pursuant to its rules by those whom it has authorised to do those acts. In *Richardson* v. *Williamson* (11) the directors of a society which had no power to borrow money were held liable for money lent to the society; and that principle applies here where the limited power has been exceeded. To the same effect are the decisions in *Weeks* v. *Propert* (7) and *Fountaine* v. *The Carmarthen Railway Company* (12)—in those cases, as here, the borrowing was *ultra vires*, and so void. The society is at all events not liable unless the loan is accepted by the directors, and unless the borrowing powers have not been exceeded. The undertaking as to the giving of a promissory note must be the personal undertaking of Lea.

This society became incorporated pursuant to the provisions of 37 & 38 Vict. c. 42, and by section 15, sub-section 4, of that Act it is enacted that "any loans to a society under this Act, made before the commencement of this Act, in accordance with its certified rules, are hereby declared to be valid and binding on the society." That is, in fact, a legislative declaration of the view of the Legislature as to the position of such societies as this, and amounts to a declaration that such a loan as this cannot be binding on the society after incorporation, because it was *ultra vires* before incorporation. The plaintiffs may have been unaware of the limit fixed by the rules, but still they must be bound by that limit, and the result must be that, if the limit has not been exceeded they will have the security of the society; but if it has, they must have recourse to the directors as individuals. In *Balfour* v. *Ernest* (13) Willes, J., held that the plaintiffs were bound to know the deed of settlement of the company; and to the same effect was the decision in *The Royal British Bank* v. *Turquand* (14). *Re The Professional Benefit Building Society* (15), *Re The Kent Building Society* (16) and *Re The Vale of Neath Railway* (17) were also cited.

C. Russell (with him *Taylor* and *C. A. Russell*), for the plaintiffs.—The contention of the plaintiffs is that both the society and the directors are liable. These societies are regulated by 10 Geo. 4. c. 56 and 6 & 7 Will. 4. c. 32. The rules of the society are to be submitted to a barrister and certified by him, but his certificate is little more than a ministerial act—*Laing* v. *Reed* (9). This is a voluntary association—not an incorporated entity; it is a partnership governed by statutes. *The Ashbury Company* v. *Riche* (18) was only decided on the ground that, if all the members of the company had given the authority, they could not have done what was attempted. The partnership is liable for the fraud of their agent whom they allowed to contract for loans without any practical restriction.

The amount on mortgage varied from

(8) Law Rep. 5 Chanc. App. 309.
(9) 39 Law J. Rep. Chanc. 1; Law Rep. 5 Chanc. App. 4.
(10) 39 Law J. Rep. Chanc. 628; Law Rep. 9 Eq. 605.
(11) 40 Law J. Rep. Q.B. 145; Law Rep. 6 Q.B. 276.
(12) 37 Law J. Rep. Chanc. 429; Law Rep. 5 Eq. 316.
(13) 5 Com. B. Rep. N.S. 601; 28 Law J. Rep. C.P. 170.
(14) 6 E. & B. 327.
(15) Law Rep. 6 Chanc. App. 856.
(16) 1 Dr. & S. 417; 30 Law J. Rep. Chanc. 785.
(17) 3 De Gex & S. 149; 18 Law J. Rep. Chanc. 265.
(18) 44 Law J. Rep. Exch. 185; Law Rep. 7 E. & I. App. 653.

day to day; no one effecting a loan could guard himself, because no one, except the secretary, knew the state of affairs.

Assuming the loan was *ultra vires*, still the society put Lea in the position of being able fraudulently to represent that the borrowing limit was not exceeded; the society must, therefore, be liable. The liability of the society cannot be limited to the amount of the benefit it has received. No such limit of liability is imposed in any of the decided cases.

A corporation is bound by the wrongful act of its agent no less than an individual, if the act is within the scope of the agent's authority—*Mackay* v. *The Commercial Bank of New Brunswick* (3), *Houldsworth* v. *The City of Glasgow Bank* (19), *Swift* v. *Winterbotham* (20).

Here the whole business of borrowing money was left to Lea. There is no delegation by the directors. Lea, by the constitution of the society, was the person to transact all business.

The directors are liable—first, because they authorised Lea to obtain loans, undertaking to give their promissory notes as collateral security; secondly, they authorised him to warrant for them that the society had power to borrow money—that is, that the borrowing powers had not been exceeded.

First, by rule 12, the directors may give such security as they think proper. They uniformly signed the notes, and not as directors, but in their own names. The authority, therefore, is made out. Secondly, as to the authority to warrant, in *Weeks* v. *Propert* (7) it was held that the signature by a director was a warranty of authority that the directors had power to issue debentures which would bind the company. *Richardson* v. *Williamson* (11), *Weir* v. *Bell* (21), *Swire* v. *Francis* (22) and *Collen* v. *Wright* (23) were also cited.

Crampton, in reply.

Cur. adv. vult.

(19) Law Rep. 5 App. Cas. 317.
(20) 42 Law J. Rep. Q.B. 111; Law Rep. 8 Q.B. 244.
(21) 47 Law J. Rep. Exch. 704; Law Rep. 3 Ex. D. 238.
(22) 47 Law J. Rep. P.C. 18; Law Rep. 3 App. Cas. 106.
(23) 8 E. & B. 647; 27 Law J. Rep. Q.B. 217.

BRAMWELL, L.J. (on March 7).—I am of opinion that the judgment should, as far as it stands against the society, be reversed, and that the judgment should be given for the society on the ground put in argument by the Solicitor-General. This society before it was incorporated was not a society with any implied power in the partners thereof to borrow. The rules which were adopted allow the directors to borrow a certain amount, and but for the provisions of that rule, and save according to that rule, the directors could have no power to borrow at all. Rule 12 authorised the borrowing of a certain amount, and to that amount the directors were the agents of the society to bind it. In the present case they had exceeded their power in respect of borrowing money at the time when the money in question in this case was borrowed. They had, therefore, no power to bind the society, and the society cannot be bound.

Then it is said that there was a holding out that the society had power to borrow. Now the only holding out was that the society had authority to borrow within the limits allowed by the rules.

The question then arises, whether the individual defendants—the individual directors, that is—are liable. I own I have grave doubts as to this. There is no fraud alleged: the document signed by Lea was, if it was an agreement at all, either an agreement by himself personally, or on behalf of the company, and not on behalf of the directors. There was no fraud; there was the customary careless negligent indifference of people who make rules and then disregard them. It is said that it was agreed that the directors would give their promissory notes; it is said that Lea made such an agreement. I do not think that Lea did so personally or by himself as the agent of the society. He had no authority to do what he did and it does not follow that because what he did did not bind the society, therefore it must bind some one else. I think, therefore, that there was no agreement on the part of the individual defendants to give these notes. It is said on the authority of *Collen* v. *Wright* (23) and *Richardson* v. *Williamson* (11) that the defendants, the

directors, purported to act under the authority of the society, and that they therefore undertook to the plaintiff that they had such authority. To me it is difficult to see this. All that they did was to let Lea say that he had the authority of the society to receive the money. It is difficult to see that that would bring them within the principle of the cases referred to. It is manifest that if Lea were solvent he would be liable, as he assumed to have the authority of the society to receive money when he had it not. Lea himself might indeed have a remedy against the defendant directors, and this would seem to shew that the remedy of the plaintiffs is against Lea and not against the defendant directors. This difficulty is not removed, but the two Lords Justices think that the plaintiff is entitled to recover against the directors; the same view was taken by the Divisional Court, and especially by Mr. Justice Lindley. I do not venture therefore to differ, so that in the result the appeal of the society will be allowed and the appeal of the directors will be dismissed.

BAGGALLAY, L.J.—The action in which these appeals have been brought was originally commenced for the recovery of five several sums of money, which it was alleged by the plaintiffs had been lent by them to the Brunswick Benefit Building Society, the defendants to the action being the society and its six directors. The loan of four of the five sums was admitted by the society, and the amounts having been paid into Court were accepted by the plaintiffs. The action became thenceforth an action for the recovery of 100*l.*, alleged to have been lent by the plaintiffs to the society on the 29th of October, 1878, and which was the latest in date of the loans before mentioned. It is consequently immaterial to consider the circumstances of the earlier loans, except so far as they illustrate the mode in which the loan transactions of the society were carried out.

The society was established in the year 1871, its rules being duly certified in accordance with the provisions of the statute 6 & 7 Will. 4. c. 32. The first rule defined the objects of the society, which were the usual objects of a Benefit Building Society; the second provided for the government of the society by a board of directors consisting of six shareholders, who were to meet once in every fortnight, or oftener, if necessary, to transact business, and who were to determine all matters provided for or not provided for by the rules, and by the 12th rule the directors were empowered to borrow money for the purposes of the society, and to give such security for the same as they might think proper, but the total amount to be so borrowed was not at any time to exceed two-thirds of the amount for the time being secured by the mortgages of the society. Under this power the directors borrowed large sums of money, and the mode in which the several loan transactions were carried out was as follows: Any person desirous of lending money to the society, paid it to the firm of Keighley Lea & Co., at their offices in Manchester, taking in return their receipt for the amount so paid in a form to which I shall have occasion presently to more particularly refer, and such receipt was subsequently exchanged for a promissory note in favour of the lender signed by the directors for the time being of the society.

It should be stated that by the 10th rule of the society Messrs. Keighley Lea & Co. were appointed the secretaries to the society, their duties being defined by several other rules. The 32nd has been relied on by the plaintiffs, and I may conveniently mention it now: it is in these terms:—

"The secretaries shall superintend and direct the general business. They shall keep the accounts in such a manner as shall be satisfactory to the board; they shall call all meetings, whether of the board or the society; they shall attend all meetings, take minutes and furnish any information in their power, and fully attend to every duty pertaining to that office in consideration of which they shall receive from the funds the sum of one per cent. upon all receipts. They shall be at liberty to appoint a person to act for them in their absence."

This authority in terms confers upon

ecretaries a considerable amount of rity in respect of the management e society's affairs, but it must be in mind that the duties and powers e directors are at least as clearly d by the rules, and that the exer- f the power of borrowing is clearly l in the directors.

ppears from the evidence that the gs of the directors were held and ll the business of the company was cted at the offices of Messrs. ley Lea & Co., who acted in the apacity for several other benefit ng societies.

the 29th of October, 1878, the iff, Joseph Chapleo, took the sum of o the offices of Keighley Lea & Co., aid it to a Mr. Fazakerly, a clerk of m. A receipt was handed to him following terms:—

eceived from Mr. Joseph Chapleo, 1 Oldham Road, Manchester, the f 100*l.* as a loan to the Brunswick ment Building Society; and we undertake to procure the pro- y note of the directors for the said f 100*l.* Keighley Lea & Co., Secre- by Alfred Fazakerly."

circumstances under which the was taken to the offices of Keighley Co., and the receipt given for it, in all respects similar to those which the four previous loans had nade by the plaintiffs.

n the occasion of each of the pre- loans the receipt was given by erly, and the promissory note of rectors for the time being was sub- ntly given in exchange for the t. Several weeks, and upon one on as much as three months, elapsed the notes were given, but when they bore the dates of the re- e receipts.

e two months after the receipt for 00*l.* had been given, Keighley Lea, ince the year 1874 had alone con- d the firm of Keighley Lea & Co., nded without having procured from rectors a promissory note in favour plaintiffs in accordance with the aking contained in the receipt, nor y such promissory note in fact ever to the plaintiffs.

The action was thereupon commenced, as already mentioned, to recover the amount of all the five loans, the promissory notes given for the four earlier loans still remaining unpaid.

With the view of keeping the nature of the loan transactions free from complication I have hitherto abstained from directing attention to the fact that for some time previously to October, 1878, the total amount of the money borrowed on account of the society considerably exceeded that which the directors were empowered to borrow; but this fact is the basis of the defence of the society to the plaintiffs' claim.

Upon the trial Lord Coleridge submitted the two following questions to the jury:—

First, Did the defendant society hold out Keighley Lea to the plaintiffs as having authority to receive this loan on their behalf on the terms on which it was received? Second, Did the defendant directors?

To both of these questions the jury gave answers in the affirmative.

This was on the 20th of March, 1880, and on the 24th of April the learned Judge directed that judgment should be entered for the plaintiffs against both sets of defendants.

From this judgment both the society and the directors have appealed to this Court on the ground that upon the findings of the jury the judgment so directed to be entered against them was wrong.

Shortly after the trial this Court, upon the application of the defendant directors, and by way of appeal from the Divisional Court, granted a rule *nisi* for a new trial, and directed that cause should be shewn at the same time that the appeals were heard. We have consequently now to dispose of both appeals, and of the directors' application for a new trial.

It may be mentioned that a rule *nisi* for a new trial has been obtained by the society in the Divisional Court, but the argument upon the rule has been postponed until after these appeals have been disposed of. I will consider first the appeal of the society.

The judgment of Lord Coleridge from

which the society has appealed was apparently based upon the following considerations: that the society not being a corporation, might as a body, just as any other co-partnership might as a body know, and so act upon their knowledge, as to sanction the proceedings of Keighley Lea; that of this knowledge and of their so acting upon it abundant evidence had been given against the society; and that the society having put its agent in its place to do the very acts for it which he did must be answerable for the manner in which he conducted himself in doing those acts. It had been pressed upon Lord Coleridge, as it has been upon us, that the society had no authority to borrow beyond the limit ascertained by the 12th rule, and that it could not ratify the acts of its directors in so borrowing; but he was of opinion that that argument was not well founded. Differing, as I feel bound to do, from the view so taken by Lord Coleridge of the liability of the society in respect of the borrowings beyond the prescribed limits, I proceed to state the grounds upon which I have arrived at a conclusion different from that arrived at by him. Benefit building societies established under the Act 6 & 7 Will. 4. c. 32 have no power to borrow unless it has been conferred upon them by their certified rules. The authorities upon this point are numerous and free from doubt. If it be necessary to mention one, I will refer to the case of *The Professional Benefit Building Society* (15) in which Lord Justice James stated the well-recognised proposition in the following terms: "A society of this kind is not entitled to borrow money except under a particular rule; it is no part of its business to borrow money;" and if a limited power is conferred upon a society by its rules, the limits so prescribed ought not to be exceeded, and any borrowing in excess of the limits is a wrongful act.

In the case which we are now considering, the power of borrowing had been exhausted previously to the month of October, 1878, when the 100*l.* was received from the plaintiffs, and the society had not at this time any power or right to borrow that or any other sum; and whether the 100*l.* was borrowed by Keighley Lea upon his own responsibility or pursuant to instructions given to him by the directors, or by their implied authority, it was in my opinion equally a wrongful act.

The acts of the directors could in no way give effect to this which was in itself unlawful, nor in my opinion would the assent of every shareholder to the transaction make it binding upon the society, as a society, whatever might have been the liability of individual shareholders.

The observations of the Lord Chancellor upon this subject in *The Ashbury Railway Carriage Company* v. *Riche* (18) appear to me to support this view, though Lord Coleridge was apparently of a different opinion. If the society had received the benefit of 100*l.*—if, for instance, that amount had found its way to the credit of their banking account—the plaintiffs might, upon the authority of some of the decisions which have been cited in their behalf, have been enabled to establish a claim against the society to the extent of the benefit derived by them from the transaction; but no such benefit was derived by the society from the transaction with which we are dealing.

Our attention was particularly directed during the argument by the counsel for the plaintiffs to the observations of Lord Hatherley in the case of *Houldsworth* v. *The City of Glasgow Bank* (19), to the effect that a corporation, as much as an individual, is bound by the wrongful acts of its agent, and that the result of misrepresentations by an agent must take effect in the same manner against a corporation as it would against an individual. To the general principles involved in these observations of Lord Hatherley, especially as applied to the case then under consideration, I give, as I am bound, a ready assent; but it is clear, when the case is examined, that Lord Hatherley is referring to an agent acting within the scope of his authority, and I cannot assent to the proposition that either the directors, as such, or Keighley Lea, as secretary, were acting within the scope of their authority when they purported to borrow money on account of the company at a time when the society had not to their knowledge any power or authority whatever to accept

a loan. The cases of *Barwick* v. *The English Joint-Stock Company* (2) and *Mackay* v. *The Commercial Bank* (3), which were relied upon by the plaintiffs, were also cases in which the agent was acting within the scope of his authority.

Had it been the case, the other facts remaining the same, that the society had not exhausted its borrowing powers at the time when the 100*l.* was received from the plaintiffs, it might probably have been held that the directors and Keighley Lea were acting within the scope of their authority in receiving the money, and that the society were liable for the subsequent misconduct of its secretary. It has also been urged upon us that the plaintiffs had no means of knowing or ascertaining whether the society had exhausted its powers of borrowing, or whether indeed there was any limit to such power. To this argument I can only reply that persons who deal with corporations and societies that owe their constitution to, or have their powers defined or limited by, Acts of Parliament, or are regulated by deeds of settlement or rules deriving their effect more or less from Acts of Parliament, are bound to know or to ascertain for themselves the nature of the constitution, and the extent of the powers of the corporation or society with which they deal. The plaintiffs and everyone else who have dealings with a building society are bound to know that such a society has no power of borrowing except such as is conferred upon it by its rules, and if in dealing with such a society they neglect or fail to ascertain whether it has the power of borrowing, or whether any limited power it may have has been exceeded, they must take the consequences of their carelessness. It may be that the plaintiffs in the present case have been misled by the representations or conduct of others into the belief that the company had full authority to accept the loan from them; that is a question which I shall have to consider when dealing with the other appeal. Such representations or conduct may doubtless give rise to a claim against the parties making such misrepresentations or so conducting themselves, but in my opinion they can in no way give rise to or support a claim against the society.

Holding these views upon the facts of the case, I am of opinion that the appeal of the society should be allowed.

But it is said that the judgment of Lord Coleridge ought not to be reversed, having regard to the finding of the jury that the society held out Keighley Lea to the plaintiffs as having authority to receive this loan on their behalf on the terms upon which it was received. I am of opinion that the jury ought not to have so found, in point of law, whatever conclusion they might arrive at from the facts. The society could only hold out to the plaintiffs that Keighley Lea had such authority in one or other of two ways. It might have been so represented by the rules of the society; but the rules, taken in connection with the admitted fact that the powers of borrowing were exhausted, negative any such authority. The only other way in which such a representation could be made so as to bind the society would be by the directors acting within the scope of their authority, and this is apparently the view adopted by Lord Coleridge; but it was not, in my opinion, as I have already pointed out, within the scope of the authority of the directors to make such a representation as the one found by the jury to have been made. Whether the society held out Keighley Lea to the plaintiffs as having authority to accept the loan of 100*l.*, was, in my opinion, a question of law for the Judge to decide, notwithstanding the finding of the jury. Then, as regards the appeal of the directors, the judgment of Lord Coleridge appears to have proceeded upon the view that there was ample evidence that the directors held out Keighley Lea to the plaintiffs as authorised to undertake for them that they would give their promissory notes on the receipt of moneys paid as the 100*l.* was paid, and that they are consequently bound by his undertaking, and must either give their promissory note, or, in the events which have happened, pay the money.

I do not dissent from this view of the case, but I prefer rather to rest my own decision upon the grounds assigned by Mr. Justice Lindley when the rule *nisi*

for a new trial was refused in the Divisional Court.

The evidence, into which I need not enter in detail, satisfies me that after the directors well knew that the powers of borrowing had been exhausted, and that any further borrowing would be contrary to the constitution and rules of the society, and therefore wrongful, they authorised Keighley Lea to continue receiving money by way of loan on account of the company, and to do so in the same way as he had previously received money before the borrowing powers were exhausted. Thus the plaintiffs, who had lent money to the company before its borrowing powers were exhausted, finding a continuation of the same mode of receiving money on loan, were naturally led into the belief that Keighley Lea still had authority to receive their money, and they advanced this 100*l.* accordingly. I am of opinion therefore that the appeal of the directors should be dismissed. As regards the rule *nisi* for a new trial obtained in this Court by the directors, I am of opinion that it should be discharged.

We have the whole of the materials before us necessary for finally determining the questions in dispute. Moreover, I am of opinion that even if as has been contended there was any misdirection at the trial—as to which I desire to be considered as not expressing an opinion—no substantial wrong or miscarriage has been thereby occasioned to the defendants, the directors; and the 3rd rule of the 39th Order, and the 10th rule of the 40th Order are, in my opinion, clearly applicable.

BRETT, L.J.—On this appeal there must be judgment for the society, notwithstanding the findings of the jury. If the answer to the first question left to the jury at the trial means that the society authorised Lea to hold out anything to the plaintiffs, then there was no evidence for the jury as to that proposition, and it is admitted that no future evidence could be given on that point. If it were true that every member of the society agreed to accept the loan, and had authorised Lea to receive money, still the society as a society could not be sued. The meaning of the question was not that the society did or could authorise Lea otherwise than by or through the directors. But in any case there is no evidence to support the finding of the jury. It appears to me that when the money was paid to Lea it was accepted as a loan to the society. Now the directors of the society could not do this. If the society had, on the face of its constitution, an unlimited power of borrowing, but had given a secret order to its agents not to exceed a certain amount, and an agent did exceed that amount, the society would be bound; but where a society is limited in its power of borrowing, then everyone who deals with such a society is bound to know that there is a limit to the power of borrowing and to enquire what limit is fixed either by statute or by the constitutions of the society. This society did fix the limit of the power of the directors to borrow—that limit was exceeded; the plaintiff did not enquire and was not aware of this—that was his misfortune; but it is a misfortune which bars him from recovering against the society.

It is suggested that the society authorised Lea to hold himself out as a person empowered to accept loans. I think the society did do so by means of the directors. But the directors had no authority to do this; and there is, in my opinion, no ground on which the finding of the jury against the society can be maintained, so that our judgment should be in favour of the society, and the motion for a new trial then becomes immaterial. There remains the direction as to the directors. It is clear that there is no evidence of fraud; but assuming that there was no fraud I am of opinion that the directors are bound, and that for two independent reasons. The directors had authority to issue advertisements for loans; they did so, and these advertisements were invitations to persons to lend their money to Lea on certain terms. The moment that anyone lent his money to Lea there was, I think, a loan on certain terms—on the terms, amongst others, that the directors would, not on behalf of the society, but as themselves principals, give their promissory note, so that they would be sureties for the loan. The directors authorised Lea and his predecessors to issue this adver-

tisement for months if not for years. The evidence shews that the money was accepted as a loan to the society; and it is a fact that its acceptance was reported to the directors, not for them to consider whether they would accept the loan, but merely that they might know a loan had been accepted. A mark was put in a book against all the loans, and this mark shews the knowledge by the directors that the loan had in each case been notified to them, and the evidence shews that they were aware of the form of the receipt which had for years been given. The cautious evidence given by Smith may appear to bear the construction that he had not seen the receipts; but I think the jury had a right to scan that evidence with care, and that they were justified in saying by their verdict that it was idle to suppose that the directors had never seen the form of receipt. These receipts were invariably in the same form and were given to everyone who lent to the society. It must be taken that in every case the money deposited was treated as a loan, and that in every case the directors gave their promissory note. It is then urged that the directors told Lea not to receive or advertise for any more money. They did not, however, withdraw the previous advertisements, so that to those who had seen them there was no more a ceasing to receive money than if a tradesman who was in the habit of advertising were to cease to advertise, yet to keep his shop open, and then to assert that he had ceased to deal on the terms announced in those advertisements. The directors never ordered Lea not to receive any more money, and never told him to refuse money brought through former advertisements, so that the plaintiffs, who had seen the former advertisements, had a right to bring their money to Lea, and were justified in offering it to be received on the old terms.

What, in the next place, is the construction to be placed on the receipt, the form of which it is clear was known to the directors? It is clear that it imports that the money was lent to the society. The directors were not bound to affix their names to promissory notes unless they contracted so to do; but the course of dealing shews that the agreement was that every lender was to have the personal obligation of the directors. Can it be that the society was to undertake that the directors should give the promissory notes? Surely not; the promise was one by the directors, not by the society. The society accepted the loan, but the society was not bound to get the signature of the directors. For that period of time during which the money was in Lea's hands, and before the directors had signed the notes, the lender was intended to have the security not of the society but of the directors. Such was the intention of the parties, as is shewn by the receipt, which further shews that Lea was authorised to represent that the directors would give to the lender their promissory note. The directors therefore are personally liable. If I am in error as to the construction to be put on this receipt, then I think that there was a representation made by the authority of the directors that the money was accepted as a loan by the society, that is a representation by the directors that they were authorised to borrow for the society; and if so, the facts bring the case within the authority of *Collen* v. *Wright* (23).

If, again, there was a promise by the directors on behalf of the society that the society would procure their signature to the promissory notes, then there was a warranty by them that they were agents with an authority which they did not possess. If there was a holding out by them, then the case is within *Collen* v. *Wright* (23), and there is no difference between the cases. It appears to me that these directors put a construction of their own on this receipt by a course of conduct pursued with regularity for years, and that they treated the money as a loan from the moment it was given to Lea. They are therefore personally liable.

Judgment for the society, and against the directors.

Solicitors—E. W. Le Riche, agent for Cobbett & Co., Manchester, for plaintiffs; E. W. Le Riche, agent for Heywood & Son, Manchester, for the society; G. W. Worthington, agent for Sale & Co., Manchester, for the directors.

[IN THE COMMON PLEAS DIVISION.]

1881. March 5. BALL (*trustee of* LOE) *v.* WARWICK.

Champerty—Loan to be repaid by the result of Litigation.

An agreement for the repayment of a loan was as follows: "In consideration of your advancing my solicitors 30*l.*, *I agree to pay you one-third of the amount of any damages recovered in my action now pending against the London and North Western Railway Company. In case I should not obtain a verdict you are not to have any claim whatever on me in respect of such advance, and in case a verdict is obtained the one-third above mentioned is to be in full discharge of the said advance of* 30*l.*":—Held, *void on the ground of champerty, and that an undertaking to continue the suit until its termination was not essential in order to complete the offence.*

Further consideration.

Interpleader issue to determine whether the plaintiff, the trustee in bankruptcy of Loe, or the defendant, a judgment creditor of Loe, was entitled to a sum of 43*l.* 6*s.* 8*d.*, being one-third of a sum of 130*l.* recovered by one Reynolds in an action against the London and North Western Railway Company.

The interpleader issue came on for trial before Grove, J., when the following facts were either admitted or proved: In August, 1879, Reynolds obtained a verdict against the London and North Western Railway Company for 150*l.* The company obtained an order for a new trial. Reynolds had not the necessary funds to enable him to carry on the litigation, and he therefore applied to Loe for assistance. After some negotiation, Loe agreed to lend Reynolds 30*l.* upon the terms embodied in the following undertaking:—

"To Mr. Loe.

"In consideration of your advancing my solicitors 30*l.*, I agree to pay you one-third of the amount of any damages recovered in my action now pending against the London and North Western Railway Company. In case I should not obtain a verdict you are not to have any claim whatever on me in respect of such advance, and in case a verdict is obtained the one-third above mentioned is to be in full discharge of the said advance of 30*l.*

"G. Reynolds."

The action of Reynolds against the London and North Western Railway Company was tried a second time and resulted in a verdict for Reynolds for 130*l.* Subsequently Warwick, the defendant in the present action, who was a creditor of Reynolds, and had recovered judgment against him for 200*l.*, obtained a garnishee order *nisi* on the London and North Western Railway Company to attach the whole amount of the verdict recovered by Reynolds. The garnishee order *nisi* was made absolute with regard to two-thirds of the verdict, but the company was ordered to pay into Court the remaining one-third—that is, 43*l.* 6*s.* 8*d.*—to await the result of an issue directed to be tried between Loe and the defendant. Loe having been adjudicated bankrupt, Ball, the trustee in bankruptcy, appeared as plaintiff. The issue came on before Grove, J., and a jury, and, upon proof of the above facts, the question whether the above undertaking was valid was adjourned for further consideration.

Lumley Smith and *Maddison*, for the plaintiff, contended—That the strictness of the law regarding champerty had of late been relaxed. That the agreement by Reynolds did not amount to champerty, inasmuch as there was no undertaking to carry on the suit or indemnify for costs.

Sims, contra.

The following cases were cited:—*Master* v. *Mellor* (1), *Harrington* v. *Long* (2), *Hartley* v. *Russell* (3), *Sprye* v. *Porter* (4), *Anderson* v. *Radcliffe* (5), *Hutley* v. *Hutley* (6), *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (7), *Cockell* v. *Taylor* (8), *Story's Equity Jurispru-*

(1) 4 Term Rep. 320.
(2) 2 Myl. & K. 590.
(3) 2 Sim. & S. 244.
(4) 7 E. & B. 58; 26 Law J. Rep. Q.B. 64.
(5) E., B. & E. 806; 28 Law J. Rep. Q.B. 32; in error, E., B. & E. 819; 29 Law J. Rep. Q.B. 128.
(6) 42 Law J. Rep. Q.B. 52; Law Rep. 8 Q.B. 112.
(7) Law Rep. 2 App. Cas. 186.
(8) 15 Beav. 103; 21 Law J. Rep. Chanc. 545.

dence, *s.* 1048, *Tyson* v. *Jackson* (9), *Simpson* v. *Lamb* (10), *In re Irving* (11), *Ex parte Montagu* (12), *Stanley* v. *Jones* (13).

GROVE, J.—In my opinion this agreement amounts to champerty. It has been contended that in order to constitute champerty there must be not merely an agreement to pay money for the conduct of the litigation to be repaid out of the result, but also a collateral agreement to carry on the suit to its termination. Such a collateral agreement, it is true, is in terms wanting; though I am not sure that it is wholly wanting, for the natural inference to be drawn from this agreement is, that it is expected and intended that this shall be done. But I do not think it has been shewn that such a collateral agreement is essential in order to complete the offence. Several cases have been cited in which champerty has been defined, and the proposition embodied that to contribute money to carry on a suit on condition of receiving a portion of the sum recovered amounts to champerty, but in no case did I detect that such an agreement, without an undertaking to carry on the suit to its termination, was not champerty. There was no *dictum* in any of the cases, or inference which could be reasonably drawn from them to this effect. At most such an agreement was mentioned as an element in the offence.

It is not for me to express any opinion as to whether it is desirable to keep up the offence of champerty; it suffices that the law still exists, and so late as 1873—*Hutley* v. *Hutley* (6)—an agreement was held to constitute the offence. This agreement appears to me to contain all the elements of champerty: there is no consideration for the payment of the 30*l.* except the chance of recovering a verdict in the suit then pending; the consideration is solely and wholly contingent on the verdict which may be recovered. It appears hardly possible to frame an agreement more completely within the offence of champerty that is *campi partitio*—a bargain to share the result of litigation—an evil by which parties who were not interested encouraged litigation in the hopes of obtaining some part of the product of a successful suit.

An undertaking by the litigant to go on with the suit would be of no value, because he might put the whole of the money in his pocket and then refuse to proceed, setting up as a defence that the agreement amounted to champerty. In *Stanley* v. *Jones* (13), where an agreement to communicate such information as would enable a party to recover a sum of money by action, and to obtain evidence to substantiate the claim on condition of receiving a portion of the sum to be recovered was held to be illegal, there was no stipulation to carry on the suit. It does not appear that an action was pending or indeed commenced, so that case would appear to be a stronger one than the present. Nor do I find in *Hutley* v. *Hutley* (6) that there was any such collateral undertaking to carry on the suit. In the present case the suit was pending. For these reasons I am of opinion that the agreement is void on the ground of champerty.

Judgment for the defendant.

(9) 30 Beav. 384.
(10) 7 E. & B. 84; 26 Law J. Rep. Q.B. 121.
(11) 47 Law J. Rep. Bankr. 38; Law Rep. 7 Ch. D. 419.
(12) Law Rep. 1 Ch. D. 554.
(13) 7 Bing. 369.

Solicitors—Finnis & Wylie, for plaintiff; N. White, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1881. March 5. *Ex parte* WHITCHURCH; *in re* AN ORDER MADE BY JUSTICES OF NOTTINGHAM.

Nuisance—Abatement—Public Health Act, 1875, *ss.* 94 *and* 96—"*Works necessary for*" *abating Nuisance.*

[For the report of the above case, see 50 Law J. Rep. M.C. 41.]

[IN THE COMMON PLEAS DIVISION.]

1880. Nov. 30. } THE DUKE OF NORFOLK *v.* ARBUTHNOT.

Practice—Costs taxed on Higher Scale—Rules of Supreme Court (Costs), Order VI. rules 2 and 3.

Judgment for nominal damages was obtained by the plaintiff in an action for an alleged trespass on the part of the defendant who sought to justify under a claim of right. An injunction was also claimed and granted. The trial lasted a long time, and involved much expense, and a large body of evidence was adduced as to the title to the property on which the trespass was alleged to have been committed:—Held, *not a case in which a Court would exercise the discretion given to it by Rules of the Supreme Court (Costs), Order VI. rule* 3, *and order the costs to be taxed on the higher scale.* Held, *further, that the discretion given by that order is not limited to costs in actions in the Chancery Division or to actions involving matters of equity, but applies to all actions.*

This was a motion for a direction to tax the costs on the higher scale under the provisions of Rules of the Supreme Court (Costs), Order VI. rule 3 (1). A summons had been taken out at chambers for an order under Order VI. rule 2, and had been heard before Lord Coleridge, C.J., who had dismissed the summons with costs.

The action had been tried before Lord Coleridge, C.J., without a jury, in May, 1879, and is reported in 48 Law J. Rep. C.P. 737, and in the Court of Appeal, 49 Law J. Rep. C.P. 782.

Jeune, for the defendant, took a preliminary objection that there should have been an application to a Master at chambers under rule 2, from whom there would be an appeal to a Judge, from whose decision there would be no appeal. Thus the plaintiff has no right to appeal from the decision of the Judge at chambers.

The Court directed that the argument should continue.

G. Bruce (*W. G. F. Phillimore* with him).—The Court will direct taxation of costs on the higher scale, though an injunction is not the principal relief sought —*Pooley* v. *Driver* (2). Nor is the amount of damages recovered more than a material element to be considered by the Judge in determining whether the discretionary jurisdiction given should be exercised—*Harnett* v. *Wise* (3). The case of *Myers* v. *Defries* (4) establishes the independent jurisdiction of the Court. The plaintiff would have been entitled to these costs if he had brought his action in the Chancery Division, and why not in this?—*Chapman* v. *The Midland Railway Company* (5), *per* Lord Justice Brett. On the merits of the case the plaintiff is entitled to what he asks. It would be a mischievous rule to have two different regulations as to costs in the Chancery and Common Law Divisions respectively.

Jeune, for the defendant.—The only question at the trial was, "To whom does the land belong?" and that question was raised by an action of trespass. The Legislature did not intend in such cases to alter the ordinary scale of costs. Where before the Judicature Acts the costs were taxed on the lower scale, they would be taxed on that scale now in the Common Law Divisions. The real intention in giving this discretion to the Court under rule 3 was to cover any special cases not covered by rule 2, but here there is nothing special.

(1) Order VI. rule 2: "Solicitors shall be entitled to charge and be allowed the fees set forth in the column headed 'higher scale,' in the schedule hereto; in all actions for special injunctions to restrain the commission or continuance of waste, nuisances, breaches of covenant, injuries to property and infringement of rights, easements, patents and copyrights, and other similar cases where the procuring such injunction is the principal relief sought to be obtained, and in all cases other than those to which the fees in the column headed 'lower scale' are hereby made applicable."

Rule 3: "Notwithstanding these rules the Court or Judge may in any case direct the fees set forth in either of the said two columns to be allowed to all or either or any of the parties, and as to all or any part of the costs."

(2) 46 Law J. Rep. Chanc. 466; Law Rep. 5 Ch. D. 459.

(3) Law Rep. 5 Ex. D. 307.

(4) 48 Law J. Rep. Exch. 446; Law Rep. 4 Ex. D. 176.

(5) 49 Law J. Rep. Exch. 449; Law Rep. 5 Q.B. D. 435.

Duke of Norfolk v. *Arbuthnot, C.P.*

Phillimore, in reply, cited the case of *Hill* v. *The Metropolitan Asylum Board* (6) as a case where this discretion had been exercised.

DENMAN, J.—After the objections that have been taken it must be understood that this judgment is wholly confined to the state of things describable as an original application under rule 3. I think the plaintiff had a right to come here, notwithstanding what took place before Lord Coleridge, and ask us to direct a taxation of costs on the higher scale under rule 3. Lord Coleridge tells us that he considered the application to him to have been one exclusively under rule 2. I do not intend to hold, nor do I think we ought to hold, that in cases where an action is brought in the Common Law Divisions, which, before the Judicature Acts were passed or these rules made, would have been in its nature solely an action of trespass or ejectment, the Court might not for due considerations make an order for taxation of costs on the higher scale. In *Pooley* v. *Driver* (2) it was held in substance, though not *in verbis*, that the question whether the action is brought in the Chancery Division or Common Law Division is not a conclusive test. The *dicta* of Lords Justices Brett and Thesiger in *Chapman* v. *The Midland Railway Company* (5), though applying to rule 2, and not to rule 3, shew that this, though a test, is not a conclusive test upon the question whether the costs ought to be allowed on the higher scale. I can conceive that there may be cases in which, under the old law, the costs would be allowed to be so taxed, but the question for us here is, whether they ought to be so taxed in this particular instance. In deciding this we are, I think, bound to take into account the opinion of Lord Coleridge, whom we have consulted. He heard the case from beginning to end, and knows its whole history and merits. He says that if it had been the question submitted directly to him at chambers he would have refused to order such taxation. But though I by no means say that there may not be cases of actions, ordinary in their form, in which costs ought to be allowed on the higher scale, I do not think this has been shewn to be one of such cases. The case was a long and important one as between the parties, but many such have been and are daily tried, and it would require a stronger case than is here made to induce the Court to order taxation of costs on the higher scale in face of the opinion expressed by the Judge who tried the case. Though I do not think that in identical cases there should be any dissimilarity in the rules as to taxation in the two divisions, I cannot say that I think sufficiently strong reasons have been shewn why the higher scale of taxation should be adopted in this case. I think, therefore, the application should be refused.

LINDLEY, J.—I am of the same opinion. The construction of rule 3 is such that I think it gives the Court jurisdiction to consider and decide this question, unless the Judge who tried the case has considered it. Still, in a case of this kind, it is advisable that the Divisional Court should consult the Judge who tried the case, not substituting his discretion for theirs, but as a guide in coming to a conclusion. We have consulted Lord Coleridge, before whom the case was tried, who does not think it a case for the exercise of the discretion given us by rule 3 in favour of the plaintiff, and his opinion has much weight with me, and justifies me in adopting the same view, and in the exercise of my discretion refusing to make the order prayed for. The great question is, whether rule 3 applies to common law actions having no equitable element, and I am of opinion that the rule is not limited to cases having some equity. The preceding rules prescribe the cases in which solicitors shall be entitled to charge the fees set forth in the columns headed "lower scale" and "higher scale" in the schedule respectively. And rule 3 provides that "notwithstanding these rules, the Court or Judge may in any case direct the fees set forth in either of the said two columns to be allowed to all or either or any of the parties, and as to all or any part of the costs." This em-

(6) 49 Law J. Rep. Q.B. 228, 668; H.L. 745.

powers the Court or the Judge who tried the action in all proper cases to say that the costs shall be taxed on the lower or higher scale at their or his discretion, having regard to all the circumstances. I think the rule is so wide that the Judge or Court has power to order the costs of a pure common law action to be taxed on the higher scale. The practical consequences of not having one recognised principle of taxation for Chancery and Common Law cases would be very disadvantageous. Of course the Judge must exercise his discretion in applying the principle to each particular case. This case does not appear to involve any equitable principle, but to be simply a matter of title. The duke has succeeded in his contention and made good his title and is entitled to such costs as naturally and legally follow the event. But he asks for something more. The Judge who tried the case saw no reason to grant him more, neither do we. The motion must be dismissed with costs (7).

Solicitors—Few & Co., for plaintiff; Brooks, Jenkins & Co., for defendant.

[IN THE COURT OF APPEAL.]

(*Appeal from the Common Pleas Division.*)

1881. March 7, 9. } CORBY *v.* THE GREAT WESTERN RAILWAY COMPANY.*

Railway Company—Duty to erect and maintain Fences—Protection for Owners of adjoining Lands—Release by Owner of right of Protection—Effect on right of Occupier—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *s.* 68.

The plaintiff was in 1846, *and continued to the time of action brought, tenant from year to year of certain lands, part of which the defendants acquired in* 1847 *for the purposes of their line. The defendants then paid the landlord of the plaintiff compensation for his statutory right to have his land fenced off from the railway, and he released them from all obligation to fence. The defendants planted a hedge, with posts and rails on either side, and made a ditch between their line and the land occupied by the plaintiff. This fence was not kept in repair, in consequence of which a cow belonging to the plaintiff fell into the ditch and was killed. In an action for the value of the cow,*—Held (*affirming the judgment of the Common Pleas Division*), *that the defendants were liable to the plaintiff, as the agreement between his landlord and the defendants did not take away his statutory right to have a fence maintained pursuant to the provisions of section* 68 *of the Railways Clauses Consolidation Act*, 1845.

Appeal pursuant to leave from a judgment of the Common Pleas Division in favour of the plaintiff on a Case stated by a Judge of County Courts.

The case is reported *ante*, p. 313.

The material portions of the Special Case were as follows:—

This action is brought by the plaintiff to recover 30*l.* damages for the loss of a cow, the property of the plaintiff, which loss was caused by the defective and dangerous state of the fences of the defendants separating the railway of the defendants, in the parish of Over Compton, Dorset, from a close of land in the occupation of the plaintiff in that parish. The plaintiff is tenant from year to year to John Gooden, or his trustees, of a farm called Lower Farm. He became tenant thereof from year to year at some time prior to the making of the conveyance hereinafter mentioned, and he has occupied on the same terms, as a tenant from year to year, down to the present time.

One of the fields forming the farm of the plaintiff abuts on lands belonging to the defendants, through which lands the defendants' railway is constructed. Between the fields of the plaintiff and the lands of the defendants there exists a ditch. Between the ditch and the railway there was and is a sufficient fence to prevent animals from straying on to the railway itself.

On the afternoon of the 20th of July,

(7) See the case of *Horner* v. *Oyler*, 49 Law J. Rep. Q.B. 655.

* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Lush, L.J.

me of the plaintiff's cows, which on rning of the same day had been ive and in health in the field, was dead in the ditch. At the place the cow was found the ditch is et six inches wide at the top, and d a-half feet wide at the bottom, out six feet deep, and was partially own with brambles growing in the les of the ditch. The death of the sulted from its having fallen into tch and being unable to extricate

The ditch was made by the defen- at the time of the construction of ailway in or about 1846; and it had leared out by the defendants from o time, but not for the last three

When the ditch was made by the lants they erected a post and rail between it and the field of the ff; but after a thorn hedge, which fendants had planted on the side of itch nearest to the railway, had up, the post and rail fence was d to rot away, and it has ceased st for many years. The ditch was 20th of July, 1879, in such a ive condition as to be dangerous tle placed in the field of the plain- nd the death of the cow was oc- ed by the defective and dangerous ion of the ditch. There was no ce that any similar accident had efore occurred, or that any com- had been made to the defendants condition of the ditch, or that they ver been called upon to fence it the field of the plaintiff. The defen- tendered in evidence a conveyance the 14th of December, 1846, from Gooden and his trustees, of the equired for the defendants' railway place in question, with a receipt lan indorsed thereon shewing the cquired by the company; and they endered in evidence an indenture ease dated the 14th of December, and made between Lord Portman, Gooden and the defendants. The of these deeds was to convey the to the defendants for a sum which rantors declared to be in full satis- n and recompense for the value of nd conveyed, in full compensation ny damage sustained or to be sus- tained by them, their heirs or assigns, by reason of the severance of such lands, and also for "all right, title or claim to have any posts, rails, hedges, ditches, mounds or other fences or works made or maintained by the company for separating the lands taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass or the cattle of the owners or occupiers thereof from straying thereout."

The question for the Court was whether, on proof of the above facts, the plaintiff was entitled to judgment for 30*l.*, the value of the cow.

The Common Pleas Division gave judgment for the plaintiff.

The defendants appealed.

R. S. Wright, for the defendants.—The question is, whether the plaintiff, who was in occupation of the land adjoining the railway before the railway was made, and who has not had notice to quit, is entitled to recover from the defendants the value of his cow. The plaintiff's landlord was duly compensated by the defendants pursuant to the provisions of section 68 of the Railways Clauses Act (1). It is submitted that the plaintiff cannot recover: he is only a yearly tenant; his interest

(1) 8 & 9 Vict. c. 20. s. 68 enacts: "And with respect to works for the accommodation of lands adjoining the railway, be it enacted as follows: The company shall make, and at all times thereafter maintain, the following works for the accommodation of the owners and occupiers of lands adjoining the railway (that is to say)— . . . . sufficient posts, rails, hedges, ditches, mounds, or other fences for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass, or the cattle of the owners or occupiers thereof from straying thereout by reason of the railway, together with all necessary gates made to open towards such adjoining lands, and not towards the railway, and all necessary stiles; and such posts, rails, and other fences shall be made forthwith after the taking of any such lands if the owners thereof shall so require, and the said other works as soon as conveniently may be. Provided always that the company shall not be required to make such accommodation works in such a manner as would prevent or obstruct the working or using of the railway, nor to make any accommodation works with respect to which the owners and occupiers of the lands shall have agreed to receive, and shall have been paid compensation instead of the making them."

as an occupier is at the outside only a two years' interest—*Cattley* v. *Arnold* (2). The defendants are not empowered to redeem the interest of the occupier; but, assuming they were enabled to do so, what would be the interest of the present plaintiff which they would have to redeem. It would not be a forty years' interest; it would be a less interest than that of a termor, and would have been one or two years' interest—*Rogers* v. *The Kingston-upon-Hull Docks Company* (3). The interest of a tenant from year to year is recognised and limited in sections 119 and 122 of the Lands Clauses Act (4). The obligation imposed on the defendants by the statute is limited to putting up and maintaining fences during the named period. No question of duty to the public arises here; the railway is, as regards them, sufficiently fenced.

The words of the proviso at the end of section 68 (1) are negative: they cannot confer a right on the plaintiff, nor do they put the defendants under any obligation.

Petheram, for the plaintiff.—The plaintiff was tenant of the farm, which he still occupies, when the deed of release was made. That deed is between the landlord and the defendants; the plaintiff was no party to it; the plaintiff's interest was not considered. The interest of the reversioner is all that is or could be taken into account, whereas section 68 (1) especially gives a right of protection to both owners and occupiers. The statute imposes an obligation on the railway company which is perpetual. The rails and fence belong to the defendants: they are, apart from the statute, bound to keep them in repair.

Wright, in reply.

Cur. adv. vult.

BRAMWELL, L.J. (on April 9).—I think that this judgment must be affirmed. The plaintiff was the occupier of the land adjoining the railway, and he had a right to have fences made and maintained. He was tenant to the owner, and I think his rights continued even though the owner were compensated. I hardly know what more can be said. It is conceded that if the plaintiff had had a lease for fifty years he would have had a right to compensation. As it is, he is still tenant and with the same rights against his landlord. It would, indeed, be a hardship on the plaintiff if the case were otherwise. What could he do?—he was no party to the agreement for compensation. He must, I suppose, be taken to have given up a right without compensation. Then it is urged that it is the fault of the plaintiff himself—that he could have given notice to quit. But he has a right to say that he does not desire to give notice, and that he ought not to be driven to do this; and in this it seems to me that he has both law and reason on his side. It is plain that the plaintiff would be right if he had a lease for a term of years; but the argument for the appellants (the railway company) was that a decision in favour of the plaintiff would be a hardship on the company, and contrary to the general intention of the statute; for it is said that if the statute had given the railway company power compulsorily to buy up the interest of the tenant they would have only to pay at the outside compensation assessed on a two years' tenancy. If it be a hardship on the railway company I am unable to see that that makes it improbable.

BAGGALLAY, L.J.—I agree with Mr. Justice Lindley that this case is not free from difficulty. There was under section 68 of the Railways Clauses Act, 1845 (1), a duty on the railway company (the appellants) to make a fence, and *prima facie* to maintain it. The same section contains a proviso "that the company shall not be required .... to make any accommodation works"—of which these fences form a part—"with respect to which the owners and occupiers of the lands shall have agreed to receive, and shall have been paid compensation instead of making them." Here there was an agreement made with the owner by which the owner deprived himself of the right to have the fences made and maintained; and the question is, whether the plaintiff, being a tenant from year to year, can insist that the fences shall be

(2) 1 Jo. & H. 651; 28 Law J. Rep. Chanc. 352.
(3) 34 Law J. Rep. Chanc. 165.
(4) 8 & 9 Vict. c. 18.

ained. When the land was pur-
l by the railway company the tenant
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erned, compensated, and as regards
and his tenancy was determined;
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; but this was a continuing tenancy
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H, L.J.—The facts of this case are
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question turns entirely on section
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of the land, but none has been given
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are out of the proviso and they must
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ain the necessary fences. That, as
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oviso is out of the question. If the
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e the occupier or were now to do
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ff has? That is a question which
under section 121 of the Lands Clauses Consolidation Act (4), be decided by two Justices in their discretion, when an award of compensation has to be made to the occupier. The appellants are out of the proviso and cannot claim the protection thereof, and they are liable because they have not maintained the fences, which they were bound to do. The ordinary rule of law applies, and the railway company must be held responsible for the loss caused to the plaintiff by the neglect by them of their statutory duty.

Appeal dismissed.

Solicitors—Warry, Robins, Burges & Co., agents for Ffooks, Sherborne, for plaintiff; Nelson, for defendants.

[IN THE QUEEN'S BENCH DIVISION AND THE COURT OF APPEAL.]

1880. Dec. 16, 18. } SCHNEIDER *v.* BATT AND COMPANY.*

Practice—Notice to Third Parties—Directions as to Mode of Trial—Judicature Act, 1875—*Order XVI. rules* 17, 18, 21.

In an action against the defendants for non-delivery of certain iron rods of the quality contracted for, the defendants proceeded to bring in H., a foreigner, as a third party, under Order XVI. rule 18, *on the ground that they had contracted with him in respect of the iron rods so supplied and upon the same terms. It was not denied that the clause as to quality was the same as between the plaintiff and the defendants on the one hand and the defendants and H. on the other. The plaintiff, however, relied upon certain admissions made by the defendants as regards the subject-matter of the contract, which shewed that the action was, as between the plaintiff and the defendants, an undefended one. It further appeared that the case had already been set down for trial, and would be reached in a day or two. Upon application made by the defendants, under Order XVI. rule* 21, *to give directions as to the mode of trial,—*

* *Coram* Lord Selborne, L.C.; Baggallay, L.J.; and Brett, L.J.

Schneider v. *Batt & Co.* (*App.*), *Q.B.*

Held, *that the Court had power to consider whether the case was one in which a third party ought to be allowed to come in, and ought to refuse the application where the effect of such third party being introduced would be to embarrass and delay the plaintiff.*

This was an appeal by the defendants against an order of Denman, J., made at chambers, refusing an application under Order XVI. rule 21, upon facts which are fully set out in the judgment of Field, J.

Arthur Cohen and *F. O. Crump* appeared for the defendants, the appellants.

J. O. Mathew, for the plaintiff.

Grantham and *Bray*, for the third parties.

Cur. adv. vult.

Judgment was delivered (on Dec. 16) by the Court as follows (1) :—

FIELD, J.—This is an application to rescind or vary an order made by my brother Denman, which was applied for by way of appeal from the Master under Order XVI. rule 21, it being an application by the defendants for directions as to the mode of having a question in an action determined, and on which order my brother Denman refused to give any directions. The question before us is, whether under those circumstances his order is right, or whether this Court is bound to give directions under the 21st rule of Order XVI. Now, the facts of the case are short and clear, and it is important and necessary to state them, because there is, no doubt, a great deal of difficulty in exercising this somewhat new jurisdiction with reference to third parties. The short facts of the case are these: In the month of January, 1880, the defendants Batt & Co., who are merchants in London, ordered of the third party, Messrs. Pamoelo & Co., who are merchants, 500 tons of No. 1 Belgian nailrods, or, rather, No. 1 "Lion Belge." Those were the terms of the contract between Batt & Co. and the third party. Whether the words "Lion Belge" were written in inverted commas or not does not appear, and it is immaterial, in my judgment, whether they were or not. I do not think that would at all alter the meaning of the contract; but that was the description by which the defendants ordered 500 tons of nailrods of Pamoelo & Co. The defendants, in fact, had placed 350 tons in China, and no question here arises about those 350 tons, because they have gone somewhere—probably no one knows where; they have gone, and no one knows what condition they may be in when they get to China, or what may be the view of the person who may be unfortunate enough to open the packages and get these rods. But it is certain that seventy-five tons which the defendants placed with the plaintiff are of exceedingly inferior quality. The contract of the defendants with the plaintiff was in identically the same words as the defendants' contract with Pamoelo & Co.—"Belgian rods, No. 1 Lion Belge." The mode of delivery adopted was the ordinary mercantile mode; that is to say, the defendants, not having these goods for themselves, merely wanted to have them delivered to their buyer, the plaintiff. Therefore, the direction given to the third party in Belgium was, "Please ship these goods at Antwerp, and make the bill of lading deliverable to the order of your forwarding agent;" the effect of which would be that, having got that bill of lading from the master of the ship at Antwerp, deliverable to the order of the forwarding agent, when indorsed by that forwarding agent it became a document, by the delivery of which to the plaintiff he would be able to get the goods in London from on board the ship by which they came. Accordingly, seventy-five tons did arrive, and the plaintiff went and looked at his goods and did not like them at all. He found two faults with them: first, he said they were not "Lion Belge," that they had no mark of that kind about them, either a lion or any mark which the company, if there is such a company as the "Lion Belge," adopts; and he said they were also very imperfect in quality. Upon that (and this is a very important part of the matter), on the 13th of March the defendants write a letter to the third party, going through a very elaborate detail pointing out all the vices

(1) The judgments were not written.

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o be served on the third party, and
not on the plaintiff at all; and it is to be issued on the application of the defendant *ex parte* without any control. Of course the Master or Judge to whom such application is made do their best to see if the case is one that comes within this rule; but, as was pointed out during the argument, the affidavit of a member of the defendants' firm makes a case within the rule by simply stating, to put it shortly, the existence of a common question, and therefore anyone reading that affidavit would have no means of knowing at all but that it was a case absolutely within the rule.

That notice being issued, the next rule but one (rule 20) is that, "If a person, not a party to the action, who is served as mentioned in rule 18, desires to dispute the plaintiff's claim in the action as against the defendant on whose behalf the notice has been given, he must enter an appearance in the action within eight days from the service of the notice. In default of his so doing, he shall be deemed to admit the validity of the judgment obtained against such defendant. It is therefore a most stringent process as regards the third party, because it has all the effect of a judgment against him if he does not come in and appear. The third party here did come in, and the proceedings went on and issue was joined somewhere about the 7th of August, and then application was made to a Judge at chambers, who said it was not vacation business, the result being that the application did not come on to be heard until November. In the meantime the plaintiff was going on with his action and entered it for trial, and it actually now stands for trial, and but for the judgment which we are now giving this morning, or for the delay caused by this application, it might probably at this moment have been in the course of trial.

Then the third party having been brought in in this way, the defendants proceed to take the next step, and they apply to a Master for directions as to the mode of having the question in the action determined; and upon that application no doubt, as was pointed out to us, there was in this case a question that might have been properly made

by itself the subject of the application of rules 18 and 20, if the plaintiff's interest had not been looked to. But still, on going into that matter, the learned Judge, either because he thought the plaintiff's interest would be very materially affected by this, or for some other reason, declined to give any directions. And the Court is now asked to vary that order and to give the directions which it is said the learned Judge ought to have given. The question therefore arises, On what principle is this Court to exercise that jurisdiction, and is this the proper time for doing it? For myself, I should, in the absence of authority, have been inclined to think the application was made too late; that is to say, that the application was right, but that the Court cannot, at the present stage, say that there is any matter whatever in respect of which to give directions, and ought therefore to decline to give any directions at all. For I cannot help thinking, looking at the purview of these rules and orders, that the objection ought to have been taken by way of appeal against the Judges' order made originally under rule 18. But that would be hard indeed on the plaintiff, because, as I pointed out just now, he is not made a party to that proceeding, which is dealt with in the rule as if it were a matter between the defendants and the third party, and as if the plaintiff had no interest in the matter. Now I really do not know whether he is a party who might at that stage appeal. I think he might, because I see it has been done in one case, and successfully. But, however that may be, this is a doubt that I entertained some time ago, in the case of *Wright* v. *Cotton* (2); but I there adopted the same course that my brother Denman adopted here, and I am inclined to think that that case is an authority for holding that when the application comes before the Court under rule 21, it is still for the Court in its discretion to look into all the circumstances of the case and see whether or not it is a proper case for a third party to intervene—to be called in and cited, and, if I may use a common phrase, to be introduced to the prejudice of the plaintiff. Therefore I may take it in *Wright* v. *Cotton* (2), I adopted the same course that my brother Denman did here. In that case the Court of Appeal thought I was in error. They considered that I ought to have given some directions, and the Court of Appeal went very fully into the directions which had to be given, which would have been unnecessary if my view about the period of time at which the application was to be made was correct. They went fully into all the questions, and in that case they saw their way to making an order and giving some directions, which therefore of necessity seems to imply that they did not consider that it was too late, otherwise all that discussion would have been useless. I am therefore inclined to think, although I had some doubt about the matter, that it is competent to us at this time to consider the whole question, and to say whether or not it is a case that is really and truly within the meaning of rules 18 and 21.

Now let us see what is the meaning to be attached to the rules. On the words of the 21st rule, it seems to me clear that where the matter is brought before the Court, the Court may, if it thinks it desirable to do so, adopt a certain course; it may direct such pleadings to be delivered as it thinks right, and it may generally direct such proceedings to be taken as to the Court or Judge may seem proper. Now that rule has become the subject of judicial decision in two cases which I will advert to now, because it is on the doctrine laid down in these two cases that I propose to act.

The first is the case of *The Swansea Shipping Company* v. *Duncan, Fox & Co.* (3). In that case the Court of Appeal laid down two rules—that is, that the questions to be tried between the plaintiff and the defendant and a third party need not be identical and need not be co-extensive; but if there is one, or if there are more questions than one in the plaintiff's action, which are also applicable to, and the solution of which is a step necessary in the claims of the defendant against the third party, then that is a case within the

(2) Not reported.

(3) 45 Law J. Rep. Q.B. 638; Law Rep. 1 Q.B. D. 644.

meaning of these rules and orders. If that had been the only consideration in this case, I am of opinion that there is here such a question as, but for what I am about to say, would, at all events at the time leave was asked for, induce me to think that I ought to give directions for trial. But I find there is a case in the next volume of the "Law Journal" which added another matter which is of great importance, and this is the marginal note of it: "In an action against insurance brokers for negligence in effecting certain policies, the defendants obtained an order for leave to serve notice under Order XVI. rule 18, upon a third party whom they had employed to effect one of the policies. The plaintiff having satisfied the Court that he would probably be able at the trial to rely upon admissions, as against the defendants, which would not be evidence against L. & Co., and also that the case was already set down for trial at assizes, which would commence in seven or eight days' time,—*Held*, that the probable effect of the order would be to embarrass and delay the plaintiffs, and that it should therefore be rescinded" (4).

There Lord Justice Baggallay says, "I think the plaintiff would be in considerable risk of being prejudiced if the order were to stand"; and Lords Justices James and Mellish were of the same opinion. In the view entertained by the Lords Justices I entirely concur, and I purpose to apply the principle laid down to the present case, to which it applies with a great deal more force than it did in *Bower* v. *Hartley* (4). For in the present case there are two questions that may possibly be raised. The plaintiff says, You contracted to deliver me rods, quality "Lion Belge," which means merchantable in quality, and means also of the description specified, namely, "Lion Belge," and you have not done so. The defendants then think proper, although they knew perfectly well that the plaintiff's case was perfectly true, to deny the plaintiff's case and to say that it is not true; and then they proceed at once to bring in a foreigner living in Belgium, and they say, "This third party must come in because we have made a contract with him on the same terms." Now ought that to be done? No. Why not? I think it is a case in itself within the rule; but then it is clear that in this case as against the defendants it is an undefended action, because both with regard to the iron and the quality, the defendants, having had a careful examination made of the rods, have distinctly said that they are not rods of the brand "Lion Belge," and that they are not properly branded. Under those circumstances is it just and right, and within the fair interpretation of the rule, the case being just about to be tried, that we should impose on the plaintiff, who must get a verdict against the defendants, the bringing in a third party who could not possibly be ready to defend the action, and who would therefore apply for a commission and so throw the plaintiff over the present sittings? I do not think that would be a proper course to adopt. I fully admit the benefit of these rules and their usefulness in certain cases, but they are capable of being turned against a plaintiff and may do very great injustice indeed. The plaintiff says, "What have I to do with a third party? I contracted with solvent persons, the defendants: they are here ready to fight me and I am ready to fight them; but you will not let me do that, you will put upon me a person whose solvency I know nothing about and who lives in Belgium, and who may put me to great expense and trouble in trying this action, and I shall probably have to resort to a Belgian tribunal to get my rights." I cannot help thinking that that would be unjust, and that these rules were never intended to inflict on a plaintiff in a case like this such injustice. It is the defendants who want this relief, and I cannot help thinking that defendants who have deliberately and in writing admitted the whole of the plaintiff's case are not persons who are entitled to come to the Court and say, "Please bring in a third party here to fight this case with the plaintiff, in order that we may have some remedy against him." I think in that state of things, if they have that remedy

(4) The case referred to is *Bower* v. *Hartley*, 46 Law J. Rep. Q.B. 126; Law Rep. 1 Q.B. D. 652.

which they think they have against the third party, they must resort to it in their own action when they bring it against such third party. For these reasons I think that the order of my brother Denman should stand, and the cause must take its course in the ordinary way. That is the view which my learned brother and I take. When the case came on the other day there was a good deal of confusion as to the real facts of the case. At that time there were no pleadings, therefore my brother Manisty and I acted on the principle laid down in the Court of Appeal in *Wright* v. *Cotton* (2), and we directed that the defendants should deliver their pleadings to the third party, and that the third party should deliver his pleadings also, so that when the case came on again, as it has come on now, the Court might be in possession of what the claim between those two parties really was, in order to see clearly whether or not there was the common question. Those pleadings were delivered, and with regard to those I think the proper course would be to make no order on the present application. No proceedings will have to be taken upon them until further order and the cost of those pleadings will be reserved, but the present order will have to be dismissed with costs.

MANISTY, J.—In this case there are two questions which the Court has to decide. The first is no doubt an important question, but the second is the more important. The first question is, whether in the present state of the proceedings the Court is at liberty to go into the question whether this is a case in which a third party should be allowed to be called in. On that point, both on principle and on authority, the Court is clearly entitled to go into the question of merits. My learned brother has referred to the case of *Wright* v. *Cotton* (2). That case is not reported, but the facts appear to be in the mind of my brother Field, and according to those facts the Court of Appeal thought it not too late to go into the substantial question whether it was a proper case in which to allow a third party to come in. But I have had an opportunity of looking up the point while my brother Field has been delivering his judgment. I thought the point had been decided, and so I have found in the case of *Benecke* v. *Frost* (5). The Court appears in that case to have taken the same course of proceedings as has been taken in this case. It was an action for not accepting a quantity of chests of fine shellac, and the defendant sought to bring in two other parties as third parties, and a notice was issued under Order XVI. rule 18 as in this case, and an appearance was entered as in this case, and the Court in that case directed the pleadings to be delivered that they might see how they stood as in this case, and then the question came before the Court upon an application for directions to be given. The Court went into the whole question. Now the 18th rule is a rule that entitles a defendant to go *ex parte* and satisfy a Judge on his own statement that it is a proper case in which to give a notice calling in a third party, and if that third party does not appear then he is to be taken to admit the validity of the judgment that may be obtained against the defendant. But it seems to me that I am confirmed—nay, I may say, concluded—by authority, where the case comes, as this does, under rule 21, for directions, the Court having thought it right to see on paper what it is that the defendant alleges against the third party, and notice having been issued and an appearance having been entered.

Then comes the 21st rule. Now what does that rule provide? If a person not a party to the cause served under these rules—that is, any of them, say rule 18—"appears pursuant to the notice"—that is this case—"the party giving the notice may apply to the Court or a Judge for directions as to the mode of having the questions in the action determined, and the Court or Judge upon the hearing of such application may, if it shall appear desirable so to do—that is to say, if in their discretion they think it right, having regard to the circumstances—give the person so served liberty to defend the action upon such terms as shall seem just, and may direct such pleadings to be delivered or such amendments in any

(5) 45 Law J. Rep. Q.B. 693; Law Rep. 1 Q.B. D. 419.

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Then we have a right to take into account the delay which would ensue, and the embarrassment which would be caused to the plaintiff. For that we have the highest authority—at least, not the highest authority, but the authority of the Court of Appeal—that the delay is an element to be taken into consideration. When I turn to the case of *Bower* v. *Hartley* (4) I find those are the very grounds on which the Court of Appeal acted. The defendants here have admitted themselves out of Court, and the plaintiff relies on that as against the defendants but not as against the third party sought to be brought in. So that, upon principle and authority, and upon the clear words of rule 21, I think this application ought to be refused and with costs.

On the 18th of December the case was again argued by the same counsel in the Court of Appeal upon appeal brought by the defendants from the above judgment of the Queen's Bench Division, and the following judgments were delivered:—

Lord Selborne, L.C.—I agree with Mr. Crump's suggestion that the Rules and Orders of the Judicature Act meant to provide against two trials where justice could be done between the parties by one. But in real truth the two contracts in the present case are not so connected together as to make it appear—in the words of rule 17 of Order XVI.—"that a question in the action should be determined not only as between the plaintiff and the defendant, but as between the plaintiff, defendant" and another person. I do not say that under the rules a third person might not be brought in when contracts existed similar to the present; but it is quite clear that the rules only allow that to be done when it clearly appears that justice will be best done by having but one trial, in which the common question shall be determined. In the present case the plaintiff would rely upon an admission by the defendants which could not be evidence against the third party, and both the third party and the plaintiff might be seriously prejudiced thereby.

It is therefore clearly not right to try the matter in one trial. Moreover, I should not be disposed to overrule the concurrent discretion exercised by the two Judges in the Court below without a strong case being made out.

BAGGALLAY, L.J.—I am of the same opinion. I will only add that I base my decision upon the particular facts of this case.

BRETT, L.J.—I think that the third party should have objected to being made a third party, and should not have appeared. I am of opinion that under the circumstances no order should be made. We are not called upon to decide any question upon the Rules and Orders of the Judicature Act. The only question is as to the exercise of the discretion by the Court below, and I am not disposed to interfere with their exercise of that discretion.

Appeal dismissed.

Solicitors—Hollams, Son & Coward, for plaintiff; Crump & Son, for defendant; Hill, Son & Rickards, for third parties.

[IN THE QUEEN'S BENCH DIVISION AND THE COURT OF APPEAL.]

1880. March 9, 16. } BEWICKE *v.* GRAHAM AND OTHERS.*

Practice—Discovery—Inspection of Documents—Privilege—Sufficiency of Affidavit—Order XXXI. rules 11 *and* 12.

An affidavit of documents made pursuant to Order XXXI. rule 12 *is conclusive against the party seeking discovery, not only generally, but also in respect of the assertion by the party making the affidavit that certain documents, admitted to be in his possession and to be relevant, relate solely to his own case, and not to the case of the other party, and do not tend to support it, and that to the best of his knowledge, information and belief they do not contain anything impeaching his own case. Where therefore an affidavit claimed privilege from production and inspection for documents on the above ground without any further description of their character,*—Held (*by* DENMAN, J., *and* POLLOCK, B., *dissentiente* WILLIAMS, J.), *that, on the authority of* Taylor *v.* Batten (48 Law J. Rep. Q.B. 73) *and* Jones *v.* The Monte Video Gas Company (49 Law J. Rep. Q.B. 627), *inspection of such documents could not be ordered.* Held (*by the Court of Appeal, affirming the decision of the Queen's Bench Division*), *that both on principle and on the construction of rule* 11 *of Order XXXI., inspection ought not to be ordered.*

This was an appeal from an order of Bowen, J., reversing an order of Master Dodgson, by which the learned Judge refused to allow to the plaintiff inspection of certain documents, enumerated in the affidavit of documents, made by the defendants under Order XXXI. rule 12, and for which they claimed privilege in the following terms: (Paragraph 4) "We, Thomas Edmund Graham, Robert Philip Graham and Charles Glanville, for ourselves, say that we have in our possession or power certain documents numbered 101 to 110 inclusive, which are tied up in a bundle, marked with the letter A, and initialed by the deponent Charles Glanville. The said documents relate solely to the case of the said defendants and not to the case of the plaintiff, nor do they tend to support it, and they do not, to the best of our knowledge, information and belief, contain anything impeaching the case of the said defendants, wherefore we say we object to produce the same, and say they are privileged from production."

C. C. Macrae, for the plaintiff.—The defendants have not sufficiently shewn that these documents are privileged from production. They have admitted their relevancy, and it is therefore for the Court to see whether they are protected. But there is nothing in this affidavit to shew the nature of the documents.

The general rule is, that upon the question of relevancy the Court accepts the

* *Coram* Denman, J.; Pollock, B.; and Williams, J.

nent on oath of the party resisting ɔtion, but not his assertion as to ıer the documents relate to the case ə applicant or of himself solely—*anıell's Chancery Practice*, 1687. It the Court to judge of their bear- ıpon the issues—*Mansell* v. *Feeney* 2) (1). In *Benbow* v. *Low* (2) the ɔr of the Rolls refers to the "well- lished rule that discovery of the e of the case that is to be made st you and of the written documents) possession of the parties in support ıt case should be allowed to both " Here it is impossible for the ıiff to know what is the nature of documents which the defendants ; to be relevant but do not describe. e only cases where the Court has documents not specifically described protected from inspection are those ə they have been documents of title, there is good reason for not par- ıising them because a description deed really discloses its contents. ɔnly apparent exceptions are in the of corporations where titles to dues been in question—*Combe* v. *The Cor- ɔn of London* (3), *Bolton* v. *The ration of Liverpool* (4). And the ıd on which protection was given in cases was not that set up here— ly, the oath of the party—but the ıf title.

ɔLLOCK, B., referred to *The Attorney- ul* v. *The Corporation of London* (5), o *Wigram on Discovery*, p. 321.]

e Court must be able to judge of the dants' case, and the alleged exclusive ıncy of the documents to it. In ns v. *Bushby* (6) Vice-Chancellor eraley decided that a defendant is d to produce anything which may e least degree tend to make out laintiff's case; and he ordered pro- on notwithstanding that the plaintiff d that the documents would estab- he defendant's title. The defendants ely on *Jones* v. *The Monte Video Gas Company* (7) and *Taylor* v. *Batten* (8). The former case, however, only shews that further discovery cannot be had upon the suggestion, though on affidavit of the party seeking discovery, that there are other documents besides those sworn to be the only ones by his opponent. It in no way decides that when the party resisting inspection has admitted that he has relevant documents in his possession the Court will not require him to shew why they should not be produced. Such a course would not lead to a conflict of contentious affidavits as would have occurred in *Jones* v. *The Monte Video Gas Company* (7) had the judgment been otherwise than it is. *Taylor* v. *Batten* (8), though deciding that for purposes of identification it is enough to tie the numbered documents up in a bundle and mark and initial it, is not an authority that the ground of privilege need not be stated; for in that case the documents were described as letters and correspondence which had passed between the defendant and his legal adviser, in reference to the action, which were clearly privileged.

H. D. Greene, for the defendants.—This affidavit is drawn in exact accordance with that which was upheld in *Taylor* v. *Batten* (8). If there be a privilege it must be real, and therefore no description of the privileged documents can be required except for the purpose of identification.

[DENMAN, J.—If the rule be so general, why would it not apply to the case of *Bustros* v. *White* (9) ?]

It was there left doubtful; and I admit if that be so inspection would be ordered. The plaintiff is not entitled to inspect the documents, because they may be evidence in the cause; for, assuming that they are, to compel inspection would violate the rule laid down by Cotton, L.J., in *Taylor* v. *Batten* (8). He says, "The only object of the affidavit is to enable the Court to order the documents to be produced if it think fit, and to make an order to that

(1) 2 Jo. & H. 320.
(2) 50 Law J. Rep. Chanc. 35.
(3) 1 You. & C. 631.
(4) 1 Myl. & K. 88.
(5) 2 Mac. & G. 247.
(6) 35 Law J. Rep. Chanc. 400.
(7) 49 Law J. Rep. Q.B. 627; Law Rep. 5 Q.B. D. 556.
(8) 48 Law J. Rep. Q.B. 72; Law Rep. 4 Q.B. D. 85.
(9) 45 Law J. Rep. Q.B. 642; Law Rep. 1 Q.B. D. 433.

effect; and if words are used which, if true, protect the documents, no further particularity is necessary than in the case of documents for which protection is not claimed."

There is no hardship on the plaintiff, because he can interrogate as to any particular document he wants. *Jones* v. *The Monte Video Gas Company* (7) covers all the cases cited on the other side. There is nothing upon this affidavit to shew that the defendants have documents which in any way assist the plaintiff's case other than those which they are willing to produce.

As to the form in which it is stated that the ground of privilege is to the best of the knowledge, information and belief of the defendants, that was held sufficient in *Minet* v. *Morgan* (10).

Macrae, in reply.—It is for the defendants to shew affirmatively that the documents are privileged. It does not follow that, because a party is bound by his opponent's affidavit as to relevancy in general, he should be equally bound as to relevancy in particular; because a document generally sworn to be irrelevant could not be used afterwards, whereas those said now to be irrelevant to the plaintiff's case may afterwards be used against him. In *Benbow* v. *Low* (2) James, L.J., gives another reason which is in favour of further discovery, namely, that if the defendant shews an overwhelming case, the plaintiff ought to have the opportunity of seeing it and knocking under.

The Court being divided in opinion, the following judgments were delivered:—

WILLIAMS, J.—In my opinion the order of Bowen, J., ought to be reversed.

The application was one made on behalf of the plaintiff for an order directing the defendants to produce for the inspection of the plaintiff certain documents admitted by the defendants to be in their possession and to be relevant to the questions in issue in the cause, but the production of which they resisted upon the ground that they were privileged from inspection.

(10) 42 Law J. Rep. Chanc. 627; Law Rep. 8 Chanc. App. 361.

The defendants had already filed an affidavit discovering the documents in question, in obedience to an order of a Judge made under Order XXXI. rule 12, directing the defendants to make discovery on oath of all documents which were or had been in their possession, or power relating to the matters in question in the action, and in that affidavit they thus described them: "We have in our possession certain documents numbered 101 to 110 inclusive, which are tied up in a bundle, marked A, and initialed by the deponent Charles Glanville. The said documents, relate solely to the case of the defendants and not to the case of the plaintiff, nor do they tend to support it, and they do not, to the best of our knowledge, information and belief, contain anything impeaching the case of the said defendants, wherefore we say we object to produce the same, and say they are privileged from production."

The present application is not for an order for a further affidavit of discovery of documents, but for an order to produce for inspection relevant documents known to be in the defendants' possession; and this distinction is material in considering the present question.

The true question turns upon what are the principles of law to be applied in carrying out the provisions of rule 11 of Order XXXI. (11), when privilege is claimed for the non-production of relevant documents for inspection. All that appears in the case is, that the action is brought by indorsees against acceptors of a bill of exchange, and that the defence is rested in part upon absence of consideration and fraud; and the defendants swear that the documents in question relate exclusively to their case, and do not support that of the plaintiff. It appears to me that the materials relied upon by the defendants are not sufficient

(11) Order XXXI. rule 11 is as follows: "It shall be lawful for the Court or a Judge, at any time during the pendency therein of any action or proceeding, to order the production by any party thereto, upon oath, of such of the documents in his possession or power relating to any matter in question in such action or proceeding, as the Court or Judge shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just."

te v. *Graham* (*App.*), *Q.B.*

ect the documents from produc- The case of *Jones* v. *The Monte as Company* (7) in the Court of which was relied upon by the nts, seems to me to be no autho- on the question. That was an ion for an order under rule 12, g the defendants to make a fur- davit of discovery of documents, ving already made an affidavit, in ce to a similar order, that no nt in their possession, except et forth in the schedule thereto, to the matters in dispute. The f Appeal decided that the defen- aving sworn such an affidavit, it isive, and that they could not be to make another. This decision, s in accordance with the practice, as I can recollect it, is really , not upon any artificial or arbi- le of the Courts, but upon the ture of things. If a defendant that none of the documents in his on, except those enumerated in edule, are relevant or material to stions in dispute, or to test the ore closely, if the defendants had hat a particular known document relate to the matters in issue, uld any Court order him to swear does relate to the matters in dis- at the same time protesting and g that it does not? The Court o doubt, afford to either party s made an imperfect and erro- affidavit of discovery a *locus peni-* and direct him to file a further ter affidavit, but it is obviously the power of any Court to order rty to swear to particular facts e is determined to swear the con- and this is the true principle and ndation of the rule in *Jones* v. *nte Video Gas Company* (7). This le is not applicable to the case of r to produce documents for in- n. In such case, starting with mption that the documents, the ion of which is sought by the one isted by the other, are relevant and l to the questions at issue in the here may well be a conflict between ies as to the character and effect of uments and as to the manner in which they bear upon the questions in issue; and in this conflict it seems to me that the Court is bound to apply the ordinary rules of evidence in determining whether a case of privilege has been established; and it is possible to conceive cases, and I have known cases, in which a Judge, having refused to order a further affidavit of discovery, has nevertheless ordered the production of the controverted document, being satisfied that it was relevant to the case.

It seems to me that the defendants, who admit the possession of the documents and their relevancy, have failed to shew that they come within any class of documents privileged from inspection. The defendants might have shewn what the nature of the controversy was, and that the documents in question were of a class coming within one of the established exceptions entitling them to be privileged; but he does not do so, and contents himself with a wide, general and vague statement that they relate exclusively to his case and not to that of the plaintiffs.

In the case of *Ebsworth* v. *The Alliance Marine Insurance Company* (not reported on this point) the defendants successfully resisted an application to inspect documents in their possession admittedly relevant to the case. That was an action upon a policy of marine insurance upon a cargo of cotton. The defence was that the ship had been fraudulently destroyed by fire, and that the cotton had never been in fact shipped, but that bales of rubbish had been shipped in its place. The defendants pointed out on oath the nature of the dispute and the character of the documents sufficiently to enable the Court to test substantially the grounds of the claim of privilege upon sworn testimony which, if untrue, would have subjected the deponents to an indictment for perjury.

In the same way, in *Bustros* v. *White* (9), where the privilege was disallowed, the party claiming the privilege sufficiently stated the character of the documents, so as to enable the Court to judge of the validity of the claim. I think the defendants have not in this case placed

before the Court the materials that they could and ought to have done, nor have they shewn any reason for not doing so; and I am of opinion, therefore, that their claim fails, and that the order for inspection ought to have been made.

POLLOCK, B.—The conclusion to which I have come is that the order of Mr. Justice Bowen was right. The Master had made an order in the action ordering certain documents enumerated in paragraph 4 of the affidavit of documents made by defendant under Order XXXI. to be produced for inspection. This order was made when the Master had before him the affidavit sworn by the defendants in the terms which have been read.

I am not at all clear what would be the best rule of practice if the Court were laying it down for the first time, but it seems to me that by the principle already recognised in the Courts of equity the documents in question are privileged. *Jones* v. *The Monte Video Gas Company* (7) shews that in these matters we are to be governed by the modern rules of practice, and I cannot forget that such rules are now drawn in accordance with the practice of the Courts of equity. As I understand the practice, there are many cases in which it appears that a plaintiff who sought discovery was bound by the oath of the defendant, and no case has been cited to us to shew that in one case a party is bound and in another he is not. For instance, it is not said that when a deponent swears that the documents are irrelevant his oath is conclusive, but that when he swears that they are correspondence between himself and his solicitor it is not.

The only case where documents which are of a character to be protected are ordered to be produced is where the party has waived his privilege by disclosing the contents in his pleading or in the affidavit itself. But wherever the matter is to be determined by the oath of the party I can find no case where the distinction sought to be drawn by Mr. Macrae has been recognised.

The rules in equity clearly establish the practice as I find it laid down in *Wigram on Discovery* (p. 299): "Where the documents are not referred to, but are admitted to be in the defendant's possession, there the question whether the defendant shall produce them or not is determined by considering whether the documents do or do not relate to the title of the plaintiff. If they relate solely to the title of the defendant, in that case the order for production is not made."

There has been some difficulty in applying the rule in the common law Courts, for in most of the equity cases the documents in question have been muniments of title or something of that nature. In such cases the mere name would shew the import of the document much more than would be the case if the subject-matter were mercantile documents, such as accounts or bills of exchange. But in so far as any distinction exists it is in favour of the defendant, in my opinion. For while in equity the party may be called upon to describe the document as a will or conveyance or what not, but is not called upon to produce the evidence upon which he will establish the document, it seems to be in the common law Courts contrary to all practice at *nisi prius* to disclose evidence before the trial, where a party becomes entitled to see his opponent's evidence for the first time when the case comes into Court.

Now let us see what the decision in *Jones* v. *The Monte Video Gas Company* (7) amounts to, where, in the first instance, two Judges in succession, thinking it to be very hard that a man by a point-blank denial should evade giving inspection of documents which they thought it was apparent were relevant, ordered their production. Was it right? I must confess that it seems to my mind still to have been a convenient course to adopt in such a case as that. The Court of Appeal, however, said that it was contrary to the rule as to the production of documents as established by the new practice. That decision was arrived at by all the members of the Court of Appeal: by Lord Justice Brett, on the ground that it cannot be shewn by a contentious affidavit that the affidavit of documents is insufficient, and that the party seeking production can obtain what he requires by interrogatories; by Lord Justice

on the ground that the practice anded on the former practice of the of Chancery, which did not allow lavit of discovery to be contradicted. Justice Thesiger seems to have e same difficulty as I do, but to onsidered himself to be bound by ctice.

only distinction that I can see be- that case and this is, that there it id that the documents were not t, and here that they relate solely ndant's case. It is certainly that the distinction sought to be hed by Mr. Macrae cannot be n any case; and I think that the reason is because the principle is ise.

l add one word as to *Bustros* v. *White* e decision there did not turn on any nt in the affidavit that the docu- of which inspection was sought ferred to the defendant's own case, the point that the particular nts were not privileged as not within the professional privilege to the law; and so far from order- spection I understood the Master Rolls to say that in equity no n was in practice asked, except r the oath of the defendant was ly pledged to the claim of privilege. se reasons I think that the appeal e dismissed.

MAN, J.—If this case were one in no authority could be found on side and we had to decide on the n of the Judicature Act and Rules, t hesitate to say that my opinion be in favour of the view expressed . Justice Williams; but I cannot this case without looking at the decisions already given on the of discovery. It is not without ion that I think that we cannot, ently with the cases in the Court eal, reverse the decision of Mr. Bowen.

l not go at length into those cases, ll add a few words upon some of

to *Jones* v. *The Monte Video Gas* y (7), notwithstanding the opinion ed by Mr. Justice Williams, I it does bear on the present ques- tion, for although the judgment did not go into the question subsequent to the one actually decided, and which we are now considering, yet it is ample to shew that the principle was laid down generally that the party seeking discovery and inspection is bound by the oath of the opposing party. Several expressions in the judgments go the whole length of saying that the matter is concluded by the oath, and that such oath prevents the party from getting further discovery. Although it is apparently giving a great advantage to a mere statement on oath, still considerations may be suggested on the other side, so that I cannot offhand form a judgment as to which would certainly be the most desirable rule. We must always remember that the party seeking inspection is enforcing a somewhat inquisitorial right which he must support, and his opponent is entitled to protect himself by his oath, and his protection depends therefore on his doing something which a scrupulous man would not do falsely in his own favour.

I think that *Bustros* v. *White* (9) has nothing to do with the question before us, for it was not at all considered in that case. There was there a particular claim to protection on the ground of solicitors' privilege, and it turned out that this could not be supported.

The case of *Taylor* v. *Batten* (8) is strongly in favour of Mr. Greene's contention. It gives this very form of affidavit in resisting inspection.

In *Seton on Decrees* (4th ed. vol. i. p. 162), where there is a summary of all the decided cases on the subject of the production and inspection of documents, it seems to be considered clear law that the party's own statement of the nature of the deeds is conclusive, although it merely go to knowledge, information and belief; and the party seeking inspection is therefore bound by the statement that the documents in question relate exclusively to the case of the person making the affidavit, even if it amounts only to his belief that they do so.

The other case before Vice-Chancellor Kindersley—*Jenkins* v. *Bushby* (6)—does not really support the plaintiff's conten-

tion. It decides that under the term "title" is to be considered as included not only title-deeds properly so called, but also documents which go to support the case only of the party resisting inspection. The admission there was that the documents of which inspection was sought related to the plaintiff's case, but it was said that they did not establish his title; and inspection was refused on that ground, which, as the Vice-Chancellor pointed out, rested on a confusion arising from the use of the word "title." On the whole, therefore, though with great hesitation, I am of opinion that the decided cases preclude us from saying that the judgment of Mr. Justice Bowen was wrong, and the appeal will be dismissed.

March 16. The plaintiff appealed (12).

Macrae, for the appellant.

Bagshawe and *Greene*, for the defendants, were not called on.

LORD COLERIDGE, C.J.—I am of opinion that this appeal must fail. It appears to me, speaking for myself, that the judgment may be put either on the rule itself—and in that case it may be said, and I do say that I do not think it right to order the production of the documents in this case—or I may say that I think this case is governed by *Taylor* v. *Batten* (8) and *Jones* v. *The Monte Video Gas Company* (7). The judgment in *Taylor* v. *Batten* (8) was delivered by a Lord Justice especially versed in matters of equity practice. The principle of those cases is that, on an application for discovery and inspection, which are very similar, the applicant is bound by the oath of the other party, if that oath enables the applicant to identify the documents in question. Now I am of opinion that there is a sufficient identification in the present case, for the paragraph to which objection has been taken follows almost the very words which were held in *Taylor* v. *Batten* (8) to be sufficient.

The two cases to which I have referred decided that a party is bound by the oath of the adverse party, and that he must take the description of documents given by him as true. I believe that in those cases there was no order for inspection; but it does not appear to me that any difference arises therefrom, for the party who applies for discovery or inspection is still equally bound by the oath of the other party, whether the application be for discovery or for inspection. If the case of *Mansell* v. *Feeney* (1) is inconsistent with the later cases to which we have been referred, then it must be remembered that *Taylor* v. *Batten* (8) and *Jones* v. *The Monte Video Gas Company* (7) are both more recent, and are also decisions of a Court of higher authority than that of Vice-Chancellor Wood, but it may be that I have not fully appreciated the grounds of that decision. In my opinion, the judgment of the Divisional Court ought to be affirmed, either on principle or on the ground of discretion.

BAGGALLAY, L.J.—I agree that this judgment should be affirmed; but I am not sure that I am able to agree with all the reasons which the Lord Chief Justice has given. The affidavit which has been made in answer to an order for inspection states that the defendants have in their "possession or power certain documents numbered 101 to 110 inclusive, which are tied up in a bundle marked with the letter A and initialed." I think that there is here a sufficient identification of documents; but then the second part of that paragraph sets up a claim of privilege. It is clear that every material document must be produced unless it is privileged, and privilege is confined to documents of title and to communications from a party's solicitor or an agent employed by or at the instance of the solicitor. I am not aware of any case which decides that documents such as these are privileged. It was held in *Anderson* v. *The Bank of British Columbia* (13) that a letter from a manager of one branch of a bank to the manager of another branch was not privileged, and in railway accident cases communications between medical men have been held not to be privileged unless made with reference to the action. This

(12) *Coram* Lord Coleridge, C.J.; Baggallay, L.J.; and Bramwell, L.J.

(13) 45 Law J. Rep. Chanc. 449; Law Rep. 3 Ch. D. 644.

nay, however, be decided on the rords of the rule of Court. This it was made and no further affi- was applied for, so that the state- contained in it must be taken to , and I do not think it is a case in I should "think it right" to make rther order.

MWELL, L.J.—I agree with the Lord Justice that this appeal must be sed. I am not sure whether I nderstand the argument of the unt. The defendants here have ll that is directed to be done by lgment in *Taylor* v. *Batten* (8). The aph of the affidavit first identifies cuments, and then asserts that they solely to the case of the defendants. the defendants might indeed have ed each particular document, and vould have identified them more ilarly but not more certainly; and s it is more reasonable that the ication should be such as it is in ase, or otherwise the defendants be obliged to give the very inform- which they desire to withhold.

Judgment affirmed.

rs — G. E. Kaye, for plaintiff; Prior, & Co., agents for Graham & Sons, Abing- for defendants.

[IN THE QUEEN'S BENCH DIVISION.]

1881. March 15, 16. } HORNE *v.* HUGHES.

Bill of Sale, Transfer of—Bills of Sale Act, 1878 (41 *&* 42 *Vict. c.* 31), *s.* 10.

In 1877 *Edward Clark by deed assigned by way of mortgage certain household goods to a loan company for securing a loan of* 500*l.; this deed was duly registered as a bill of sale. In* 1878 *the company and Edward Clark, in consideration of* 500*l. paid by one Joseph Clark to the company, by deed transferred the said mortgage to Joseph Clark. On the* 20*th of February*, 1880, *the said mortgage debt having been reduced to* 348*l., Joseph Clark and Edward Clark, in consideration of the plaintiff paying* 348*l. to Joseph Clark and* 113*l. to Edward Clark, which, together with expenses, raised the amount then paid by the plaintiff to substantially the same sum as that secured by the original bill of sale, assigned by deed to the plaintiff all the said goods by way of mortgage and security for the total sums of money so advanced by him*:—Held, *that the deed of the* 20*th of February*, 1880, *was a transfer of a bill of sale within the meaning of section* 10 *of the Bills of Sale Act*, 1878, *and did not require registration.*

SPECIAL CASE stated pursuant to the order of the Honorable Baron Pollock, dated the 22nd of December, 1880, under the Common Law Procedure Act, 1860, s. 15.

On or about the 1st day of December, 1880, the sheriff of Middlesex seized certain scheduled goods and chattels in the possession of Edward Rawson Clark at 147 Church Street, Chelsea, under a writ of *fieri facias* issued at the suit of the defendant against Edward Rawson Clark, and the same were claimed by the plaintiff under the following circumstances:—

On the 26th of July, 1877, by a deed made between the said Edward Rawson Clark, Edwin Stanley Clark and the Real and Personal Advance Company (Lim.), whereby, after reciting a deed of mortgage of household goods and effects—the goods in question—of Edward Rawson Clark to Edwin Stanley Clark for securing the sum of 1,589*l.* 8*s.* 6*d.*,

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THE QUEEN'S BENCH DIVISION.]

l. } THE QUEEN *v.* THE JUSTICES OF 8. } MONTGOMERYSHIRE.

—Rating—Statute 6 *&* 7 *Will.* 4. *s.* 6—*Special Sessions—Right of by Assessment Committee against of Special Sessions—Union Assess- Committee Act*, 1864 (27 *&* 28 *Vict. s.* 2.

r the report of the above case, see v J. Rep. M.C. 52.]

and interest thereon at five per cent. per annum, which recited deed had been duly registered, and after reciting that Edwin Stanley Clark consented to postpone his security to the security intended to be thereby made, the said Edward Rawson Clark and the said Edwin Stanley Clark at the request of the said Edward Rawson Clark assigned the said goods by way of mortgage to the Real and Personal Advance Company (Lim.), for securing a loan of 500*l.*, with interest at the rate of twenty per cent. per annum, with a proviso for redemption in the event of the said Edward Rawson Clark paying to the company, on the 26th day of October then next ensuing, all sums then owing to them by virtue of the deed.

This instrument was duly registered as a bill of sale according to law.

On the 26th of February, 1878, the Real and Personal Advance Company (Lim.), by the direction of Edward Rawson Clark, by a deed which recited the foregoing facts and deeds, transferred the mortgage before made to the company, but without prejudice to Edwin Stanley Clark's second charge, to one Joseph Clark, who then, in consideration of an advance by him to the said Edward Rawson Clark of the sum of 500*l.*, became transferee and mortgagee of the said goods and chattels by way of security for the repayment of the said sum of 500*l.*, together with interest at the rate of ten per cent. per annum.

On the 20th of February, 1880, the said mortgage debt had become reduced, so that there remained due only the sum of 348*l.* 7*s.* 4*d.*, and the said Joseph Clark, desiring to be wholly paid off, had applied to the plaintiff to advance the necessary funds and take a transfer of the securities. The plaintiff had consented to do so, and at the same time, at the request of the said Edward Rawson Clark, had consented to advance him a further sum of 113*l.* which, with 40*l.* 8*s.* 5*d.* expenses, would bring up the amount then advanced by the plaintiff to 501*l.* 15*s.* 9*d.*, substantially the same amount as that originally secured by the bill of sale to the said company. Accordingly, on the 20th of February, 1880, a deed was entered into between the mortgagee, Joseph Clark, Edwin Stanley Clark, Edward Rawson Clark, and the plaintiff, whereby, after reciting all the foregoing facts and deeds, and that the plaintiff had made the promised advances, amounting to 501*l.* 15*s.* 9*d.*, Joseph Clark, by the direction of the said Edwin Stanley Clark and Edward Rawson Clark, and Edwin Stanley Clark and Edward Rawson Clark for themselves, granted and assigned to the plaintiff all the said goods and chattels by way of mortgage and security to the plaintiff for the total sums of money so advanced by him, together with interest at ten per cent. per annum. The said deed contained a proviso for redemption in the event of the said Edward Rawson Clark on demand, or on the 31st day of July next ensuing, paying to the plaintiff the total sum of money advanced by him and interest. The said sum of 501*l.* 15*s.* 9*d.* was now due and owing to the plaintiff.

The execution by the said Edward Rawson Clark of the deed dated the 20th day of February, 1880, was duly attested by one Samuel Smith Seal, a solicitor of the Supreme Court, who, previously to the execution, read over and explained the same to the said Edward Rawson Clark. The said Samuel Smith Seal also witnessed the signature of the said Joseph Clark. A true copy of the said deed and the attestation of the execution of the same, together with an affidavit by the said Samuel Smith Seal, was duly filed on the 25th of February, 1880, with the Registrar appointed under the Bills of Sale Act, 1878.

There was no attestation by a solicitor of the Supreme Court to the execution of the said deed by the said Edwin Stanley Clark, nor was there any description in the said deed of the residence and occupation of the attesting witness to the signature of the said Edwin Stanley Clark.

No affidavit containing a description of the residence and occupation of the said Edwin Stanley Clark or of the said Joseph Clark, or of the residence and occupation of the attesting witnesses to the signatures of the said Edwin Stanley Clark and Joseph Clark respectively, was filed with the Registrar appointed under the Bills of Sale Act, 1878, except the

v. *Hughes, Q.B.*

of Samuel Smith Seal before
ed.
leed of the 20th of February,
ferred to a certain schedule or
y to the deed of the 26th of
77, but neither such schedule or
y, nor a true copy thereof, were
d to or filed with the Registrar
even clear days of the making or
or execution of the deed of the
February, 1880.
nestion for the Court was, whether
ntiff was entitled to the said goods
nst the defendant, the execution

r *Charles* (*H. D. Greene* with
r the plaintiff.—The deed of the
February, 1880, amounted to a
nsfer of a bill of sale by Joseph
the plaintiff, which, by section 10
Bills of Sale Act, did not require
tion. The words of the final
f the section are, "A transfer or
ent of a registered bill of sale
t be registered."
LIAMS, J.—It was only the extreme
cy of section 4 which rendered it
y to insert that clause.]
ndly, assuming the deed of the 20th
uary, 1880, to be a bill of sale the
ies required by the Act have been
d with. The execution by Edward
Clark was duly attested by a
of the Supreme Court; the same
witnessed the signature of Joseph
he other party to the deed, Edwin
Clark, need not have signed the
Section 10 does not enact that any
on shall be attested by a solicitor
Supreme Court, but that the exe-
shall be attested and the deed
ed to the grantor. There is only
antor here, namely, Edward R.
the deed was properly explained to
l was duly executed by him.
said that no schedule or inventory
esented to the Registrar within
ays of the making of the deed of
1 of February, but this inventory
ly filed with the Registrar with
d of the 26th of July, 1877. In
ng every schedule annexed to the
sale to be filed, the statute has in
plation the case where no schedule
has ever been filed. There is a reference to a schedule in the predecessor's title on the file, and the Act, having been once complied with, need not be complied with again.

Edward Pollock, for the defendant.—This is an assignment of goods. Previous to 1880 the amount of the consideration had been reduced, but in 1880 it was brought up to its original amount and the goods were consequently assigned for a fresh amount. The schedule referred to should have been filed. A mere reference to a schedule previously filed is not sufficient, and any person searching the register would have to refer back to remote times. A mere reference to a past registration is not sufficient.

Charles, in reply.

Cur. adv. vult.

The judgment of the Court (1) was (on March 16) delivered by

WILLIAMS, J.—This is an interpleader proceeding, in which the plaintiff claims certain goods seized by the sheriff of Middlesex under a writ of *fieri facias*, issued at the suit of the defendant in December, 1880, against one Edward Rawson Clark. The question in the issue is, whether a bill of sale of the said goods from Edward Rawson Clark to the plaintiff, dated the 20th of February, 1880, under which the plaintiff claims, is void by non-compliance with the provisions of the Bills of Sale Act, 1878. [After stating the facts, his Lordship proceeded as follows:] The defendant raised several objections to the validity of the plaintiff's title. He contended that the deed of the 20th of February, 1880, being a bill of sale within the meaning of the 4th section of the Bills of Sale Act, 1878, was not duly registered according to the provisions of that statute, and was accordingly void as against him. To these objections the plaintiff replied — first, that this did not require registration, because it was a transfer or assignment of a registered bill of sale

(1) Williams, J., and Mathew, J.

need not be registered. Secondly, he contended that it was in fact duly and sufficiently registered as a bill of sale. If the plaintiff's first contention be correct the further questions do not arise.

In our opinion, the plaintiff's first contention is correct, and for the following reasons. The original duly registered bill of sale was given as a security for the repayment of an advance of 500*l.*, together with interest at the rate of twenty per cent. per annum, and was intended to remain and be a security so long as the 500*l.* and interest, or any part thereof, were due and unpaid; and if the state of the accounts between the mortgagor and mortgagee in relation to the advance so secured had fluctuated from time to time, there can be no doubt that the mortgage would have subsisted as a security for the sum due at any given time on that account until the whole had been finally paid off. This mortgage was duly transferred by the original mortgagees to Joseph Clark, who advanced the necessary money to pay them off. Joseph Clark thereupon, as the transferee and mortgagee of the goods, held them upon precisely the same terms and with the same rights as the original mortgagees; and although the amount of his advance was at one time reduced to 348*l.*, there can be no doubt that if he had allowed it again to be increased, either by arrears of interest or by another advance, to the maximum sum of 500*l.*, the security would have been valid and effectual for that sum. In this position of affairs Joseph Clark, being desirous of being paid off, applied to the plaintiff to take his place, and take a transfer of the security. The plaintiff consented to do so, and at the same time to make up the advance once more to the maximum amount secured by the bill of sale. This appears to us to be in substance, as well as in strict form, a transfer of the bill of sale within the meaning of section 10 of the Act. Had it been attempted under the colour of a transfer or assignment of the existing mortgage to have extended the security, and to have made it available for a larger advance than that for which the original mortgage had been given, such a transaction would not, in our opinion, have been a transfer of a duly registered bill of sale within the meaning of the 10th section of the Act, but substantially a new bill of sale which would have required registration under the Act.

Judgment for plaintiff.

Solicitors—S. Seal, for plaintiff; Bower & Cotton, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1881. March 9. } THE ATTORNEY-GENERAL *v.* MITCHELL.

Revenue — Succession Duty — Appointment by Donee of General Power—Predecessor—Succession Duty Act, 1853 (16 & 17 *Vict. c.* 51), *ss.* 2, 4, 18—*Legacy Duty Act* (36 *Geo.* 3. *c.* 52), *s.* 18.

A testator bequeathed certain funds in trust for his daughter for life, with remainder to such persons as she should by deed appoint, and in default of appointment to her next-of-kin. The testator died before the passing of the Succession Duty Act, 1853, *and legacy duty at the rate of one per cent. was paid on the above trust funds. The daughter, after the passing of the Succession Duty Act*, 1853, *exercised the power in favour of her nieces, grandchildren of the testator*:—Held, *first, that the nieces were liable to a duty of one per cent. as on a succession derived from the testator, who was the "predecessor" within section* 2 *of the Succession Duty Act*, 1853; *secondly, that the payment of the legacy duty had not discharged the nieces from the obligation to pay succession duty.*

An information by the Attorney-General claiming on behalf of the Crown succession duty at the rate of three per cent. in respect of the succession of Anna Jenison and others to certain trust funds appointed by Anna, Baroness de Grothusen, under a general power of appointment given to her under the following circumstances:—

James Mitchell, by will dated the 27th

uary, 1826, bequeathed certain
a trust for his sons and daughters
l portions, the portion of each
be paid over at twenty-one, the
of each daughter to be held by
stees in trust to pay the income
to her for life with remainder to
ildren, and in default of children
a persons as she should by deed
, and in default of appointment to
ersons as would have been entitled
daughter had died unmarried and
e.

s Mitchell died in 1835. His will
oved and legacy duty at the rate
per cent. was paid under 36 Geo. 3.
. 18 (1) on the whole of his resi-
estate, including the trust funds
d to, and upon which succession
as now claimed.

s Mitchell had nine children, six
m were sons and three daughters,
l of whom survived him and at-
the age of twenty-one years. One
daughters, Anna, married the
de Grothusen. There were no
n of the marriage. On the 9th of
859, Anna, Baroness de Grothusen,
ed-poll exercised the power of
tment vested in her, in which, after
cease of herself and her husband,
pointed her portion of the said
unds to the children of her sister
Jenison. The Baroness de Gro-
survived her husband, and died
2nd of January, 1867. There
ive daughters of Ellen Jenison
at the death of the Baroness de
sen.

Crown claimed succession duty at
per cent. upon the succession to
enison's children as derived from
unt, the Baroness de Grothusen,
as predecessor within section 2 of the Succession Duty Act, 1853 (2).

The Solicitor-General (*Sir F. Herschell*) and *W. W. Karslake*, for the Crown.—First, succession duty at three per cent. is payable. The question turns on section 2 of the Succession Duty Act, 1853. Giving the words of the section their ordinary meaning the nieces would be the "successors," and the Baroness de Grothusen, as the settlor from whom the interest of the succession is derived, would be the "predecessor" within the section. The deed of 1859 was the disposition of property whereby the nieces became beneficially entitled to the property on the death of the Baroness de Grothusen. The rule of law that persons taking under a donee of a power are considered as taking from the donor is not applicable to this section; the rule would be ap-

3 Geo. 3. c. 52. s. 18: " . . . . Where
perty shall be given for any limited in-
nd a general and absolute power of ap-
nt shall also be given to any person or
to whom the property would not belong
ılt of such appointment, such property,
execution of such power, shall be charged
same duty and in the same manner as if
perty had been immediately given to the
or persons having and executing such
after allowing any duty before paid in
hereof. . . ."

(2) 16 & 17 Vict. c. 51. s. 2: "Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act [May 19, 1853], either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a 'succession,' and the term 'succession' shall denote the person so entitled; and the term 'predecessor' shall denote settlor, disponer, testator, obligor, ancestor or other person from whom the interest of the successor is or shall be derived."

Section 4: "Where any person shall have a general power of appointment under any disposition of property taking effect upon the death of any person dying after the time appointed for the commencement of this Act, over property, he shall, in the event of his making any appointment thereunder, be deemed to be entitled at the time of his exercising such power to the property or interest thereby appointed as a succession derived from the donor of the power; and where any person shall have a limited power of appointment under a disposition taking effect upon any such death, over property, any person taking any property by the exercise of such power shall be deemed to take the same as a succession derived from the person creating the power as predecessor."

plicable to section 4, but the present point is not affected by that section because the testator died before the commencement of the Act. Had James Mitchell died after the Act was passed the case would have been within section 4, and the Baroness would have been the "predecessor" as in *The Attorney-General* v. *Upton* (3); and in that case Bramwell, B., points out the result would have been the same under section 2. In *In re Barker* (4) it was conceded that the donor of the power was the predecessor, and therefore the point was not argued. Bramwell, B., however, dissented from the majority of the Court, and was of opinion that the substance of the transaction ought to be regarded. His judgment would apply to the present case, and had the Baroness de Grothusen exercised the power of appointment in her own favour, and then had bequeathed the funds to her nieces the latter would have been liable to a three per cent. duty. What has happened is the same in substance, though the Baroness never went through the ceremony of appointing to herself. It is submitted that since *The Attorney-General* v. *Upton* (3) the case of *In re Barker* (4) is no longer law, and that the Court will look at the substance of the transaction. *The Attorney-General* v. *Dowling* (5) and *In re Lovelace's Settlement* (6) were also referred to.

Secondly, if J. Mitchell was the predecessor, and succession duty is payable at one per cent., the nieces are not relieved from this succession duty by reason of payment of the legacy duty on the estate of the testator. The succession of the nieces is a new succession and is not "the same acquisition of the same property" within section 18 of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51) (7).

(3) 4 Hurl. & C. 336; 35 Law J. Rep. Exch. 138.

(4) 7 Hurl. & N. 109; 30 Law J. Rep. Exch. 404.

(5) 49 Law J. Rep. Exch. 621; Law Rep. 5 Ex. D. 139.

(6) 4 De Gex & J. 340; 28 Law J. Rep. Chanc. 489.

(7) 16 & 17 Vict. c. 51. s. 18: "Where the whole succession or successions derived from the same predecessor, and passing upon any death to any person or persons, shall not amount in money or principal value to the sum of one hundred pounds, no duty shall be payable under this Act in respect thereof or of any portion thereof; and no duty shall be payable under this Act upon any succession, which, as estimated according to the provisions of this Act, shall be of less value than twenty pounds in the whole, or upon any moneys applied to the payment of the duty on any succession according to any trust for that purpose, or by any person in respect of a succession, who, if the same were a legacy bequeathed to him by the predecessor, would be exempted from the payment of duty in respect thereof under the Legacy Duty Acts; and no person shall be charged with duty under this Act in respect of any interest surrendered by him or extinguished before the time appointed for the commencement of this Act; and no person charged with the duties on legacies and shares of personal estate under the Legacy Duty Acts, in respect of any property subject to such duties, shall be charged also with the duty granted by this Act in respect of the same acquisition of the same property."

(8) 49 Law J. Rep. Exch. 86; Law Rep. 4 App. Cas. 427.

Hemming and *Hannen*, for the defendants.—First, the nieces derive their interest from their grandfather, J. Mitchell, and the Crown is therefore only entitled to one per cent. Section 4 of the Succession Duty Act, 1853, it is admitted, does not apply. In all cases under section 2 the predecessor is the person who creates the power, and not the person who exercises it. *In re Barker* (4) is a decision in favour of the defendants, and the popular reading of the statute adopted by Baron Bramwell has never been followed. In *In re Lovelace* (6) the very circumstances arose which invited the Court to reflect light on section 2 from section 4, but Knight-Bruce, L.J., refused to do so. In *The Attorney-General* v. *Upton* (3) the 4th section applied, and it is only Baron Bramwell who holds that section 2 would apply. The decision in *Charlton* v. *The Attorney-General* (8) is in favour of the defendants.

Secondly, no succession duty is payable at all. The Baroness has paid one per cent. on the capitalised value under 36 Geo. 3. c. 52. s. 18, and she could do what she liked with the property: the nieces are exempted by section 18 of the Succession Duty Act.

Herschell, in reply.—In *Charlton* v. *The Attorney-General* (8) the power was to be

exercised, and therefore is dif- to the present case where the is single. Where one has the power absolute owner, but where the is to be exercised by two, one of could displace the other, there can absolute owner. Reference back to tlor ought not to be made if any- ıoe has had an absolute power of tment. In *Charlton* v. *The Attorney-l* (8) and *Lord Braybrooke* v. *The y-General* (9) there was no such

VE, J.—There are two questions in ıse for our determination: First, ɔr the Crown is entitled to claim ıty; and, secondly, whether, if the is so entitled, duty can be claimed per cent. or three per cent. The ɔtion of 16 & 17 Vict. c. 51 does ply because James Mitchell died the passing of the Act, and the ɔn we have first to determine de- wholly on section 2. In the first what is the disposition of property ch these five nieces become bene- entitled? I should have con- l the deed of 1859, because it s to me that construing those not only in their ordinary, but eir legal sense, the event on which ecame beneficially entitled was the of the Baroness de Grothusen; but not a case in which I can exercise w, because there is a decision in ɔuse of Lords which prevents my ıing this section in the way in I should naturally desire. The f *Charlton* v. *The Attorney-General* binding; the Solicitor-General has isfied me it is distinguishable from esent, and I read that case as de- on section 2 that the disposition property is derived from the ori- ettlor. There is also the case of *Barker* (4), in which three Judges l at a similar construction. It is ıat Baron Bramwell dissented, and I am disposed to adopt his view, hat in the case of *Charlton* v. *The y-General* (8) the House of Lords ecided the other way. On reading the judgments I cannot fairly distinguish the case on the ground that the donees of the power were joint, and therefore the appointment was not derived from a person having an absolute disposal of the property. I feel that I am bound by that decision, and on the principle of that decision I hold that the Crown is entitled to succession duty.

On the second question I am of opinion that the Crown is entitled to one per cent. I do not think this depends on section 18 of the Legacy Duty Act, because at that time there was no succession duty. A subsequent Act (16 & 17 Vict. c. 51) enacts that anyone who succeeds to property is to pay duty, and the only head under which the present defendants can claim exemption from payment of this duty is to be found at the end of section 18: "No person charged with the duties on legacies and shares of personal estate under the Legacy Duty Acts, in respect of any property subject to such duties, shall be charged also with the duty granted by this Act in respect of the same acquisition of the same property." The only meaning of this is clearly that a person who has paid duty shall not pay a second time—that is, he shall not pay succession and legacy duty. Had the defendants paid legacy duty the Crown would not have been entitled to succession duty, because the same persons would then have had to pay twice, but the legacy duty was paid in respect of different persons.

In my judgment, therefore, the Crown is entitled to one per cent. duty.

LINDLEY, J.—I am of the same opinion. The facts amount simply to this, that a will before the Succession Act gave a general power of appointing certain trust funds to the Baroness de Grothusen, who, after the Act, exercised the power in favour of her five nieces, who were grandchildren of the testator. The question for our decision is, What succession duty ought these nieces to pay? Section 4 does not apply, because J. Mitchell died before the Act, and the section which imposes the duty is section 2. How is that section to be construed? It is capable of two constructions. The first, which I may call the popular con-

H.L. Cas. 150; 31 Law J. Rep. Exch.

struction, would, if adopted, justify the contention of the Crown, but though the section has often been considered, it never has received that construction. It has always received what I may call a conveyancer's construction, following the general principle by which the appointment under a power is incorporated with the instrument creating the power; and this is so not only where the power is exercised jointly, as in *Charlton* v. *The Attorney-General* (8), but also where the power is exercised singly. It is impossible not to read Lord Justice Turner's judgment in *In re Lovelace* (6) without seeing that he was prepared to place the conveyancer's construction on section 2. The same interpretation is to be found in *In re Barker* (4) and other cases, but no case has been cited in which, where section 4 does not apply, the other canon of construction has been adopted. Taking then that interpretation as a guide, it appears to me to follow that the appointees in the present case must be considered as deriving their interest from the settlor and not from the appointor.

It is manifest the Crown is entitled to something, but it has been argued that as duty has already been paid by the donee, no succession duty can be charged, because it would be imposing two duties on "the same acquisition of the same property," but that is a fallacy. The donee has paid one per cent. on the property; she has power to do what she likes with the property, and she has now given it to some one else; it is fair that that some one should pay duty. There have been two dispositions of the property, and therefore two duties are payable.

Judgment for the Crown for one per cent.

Solicitors—Solicitor of Inland Revenue, for the Crown; Young, Jackson & Beard, for defendants.

[IN THE COMMON PLEAS DIVISION.]

1881. Feb. 22. } SPARROW *v.* HILL AND ANOTHER.

Practice—Taxation of Costs where Plaintiff succeeds only on part of his Claim—Apportionment of Costs which cannot be separated—Allowance of those which can—Order VI. Rules of the Supreme Court (Costs), 1875.

Where a plaintiff succeeded on one out of three heads of his claim, and an order was made that "the plaintiff be allowed such costs as one of the Masters may find that he has rightly incurred in recovering a certain amount, and the defendants be allowed such costs as they have rightly incurred in defending themselves on the points on which they have succeeded," the principle that should be followed in taxing the costs is to allow to each party the costs of such items of the claim as he has succeeded on, so far as they can be separated, and to apportion the general costs of the cause which cannot be separated, and not to give those general costs to the plaintiff because he has partly succeeded on his claim.

This was an appeal by motion from an order on a summons to review the taxation of the costs of a cause which was twice tried. On the first trial the Judge directed a verdict for the plaintiff, but a new trial was granted on the ground of misdirection. The claim was for, first, 296*l.* 11*s.* 8*d.* for balance of account for work done to the outside of a house; second, 592*l.* 7*s.* for work done to the inside of the house; third, 216*l.* 15*s.* 3*d.* for gilding picture frames; fourth, 64*l.* 8*s.* 11*d.* for picture rods. It was held that the plaintiff was concluded by the certificate of the architect in respect of the outside and inside work, and the defendants had paid the amount so certified. The two remaining items were referred to an arbitrator, who awarded to the plaintiff in respect of them 37*l.* 0*s.* 3*d.* beyond the amount paid into Court, and judgment was entered accordingly. In this state of things the following order as to costs was made: "Pursuant to the order of Court herein dated the 27th day of November, 1879, whereby it is ordered that judgment be entered for

laintiff for the sum of 37*l.* 0*s.* 3*d.*, the amount found due to the plain-rer and above the amount paid by efendants by the award of Richard rd Turner, Esq., the plaintiff to be d such costs as one of the Masters ind that he has rightly incurred in ring the above amount, and the lants to be allowed such costs as ave rightly incurred in defending elves on the points as to which they succeeded, it is adjudged that the iff recover against the defendants m of 37*l.* 0*s.* 3*d.*, and such costs as the Masters may find he has rightly ed in recovering the above amount taxed; and that the defendants r against the plaintiff such costs y have rightly incurred in defend-emselves on those points on which ave succeeded to be also taxed."

Master allowed the general costs of use to the plaintiff, disallowing items which applied exclusively to rts of the claim on which he did ceed. The defendants objected to ode of taxation on the following ls:—

hat the plaintiff was not entitled costs for the first trial, the defen- having obtained a rule for a new

hat the plaintiff is not entitled to sts under the rule for a new trial, provision was made for them by le.

hat the defendants are entitled to costs, allowed by the order dated th of November, 1879, and which fendants contend should be taxed llowed on the principles of the *Knight* v *Purssell* (1).

hat it is the intention of the de- s to move the Court on the ques- what costs the defendants have incurred in defending themselves points on which they have suc- in this action.

hat the defendants object generally axation of the plaintiff's bill until ve question has been decided.

Master defended his principle of n on the grounds that "there was but one issue on which the plaintiff recovered the one item of 37*l.* 0*s.* 3*d.* beyond 675*l.* paid after action brought out of three items which he claimed. He is entitled to all the general costs of the cause, excluding only such items of costs (if any) or parts of items of costs as are applicable exclusively to the two items on which he failed, or would not have been incurred if these two items had not been in question. The defendants, on the other hand, are entitled to such costs only as were incurred by reason exclusively of the two items of claim which they successfully resisted, or, in other words, such costs only as would not have been incurred if those items had not been in question. The plaintiff is clearly entitled to the costs of both trials, to be ascertained on the above principle."

Graham, for the defendants.—The defendants succeeded on two out of three distinct claims, and should have two-thirds and the plaintiff one-third of these costs of the second trial, which cannot be separated—*Knight* v. *Purssell* (1). The costs of the first trial should be the defendants', as the plaintiff is not under this special order entitled to the costs of the trial obtained by misdirection, and the costs of the rule for setting it right.

Buzzard (with him *Dugdale*), for the plaintiff.—The defendants' bill has practically been taxed. The provisions of Order VI. rule 30 (Costs) are very plain that the objections to a taxation should be in writing, but have not been complied with. There was really only one issue, namely, the question whether the agreement applied—that is, whether there was anything to submit to any arbitrator. On this the plaintiff succeeded, and is therefore entitled to the general costs of the cause. It is left entirely to the discretion of the Master to decide what are the costs relating to the items on which the defendants succeeded—*Field* v. *The Great Northern Railway Company* (2).

Graham, in reply.—There was not one cause of action only; there was one question, but three distinct causes of action.

(1) 49 Law J. Rep. Chanc. 120.

(2) 47 Law J. Rep. Exch. 662; Law Rep. 3 Ex. D. 261.

Sparrow v. *Hill*, *C.P.*

GROVE, J.—I am of opinion that the Master taxed these costs on a wrong principle in this case, though speaking generally one may say that he was right according to the ordinary rule. But here we have an express order, which the Master in taxing has not, I think, followed. The order is, "That the plaintiff recover against the defendants the sum of 37*l.* 0*s.* 3*d.*, and such costs as one of the Masters may find that he has rightly incurred in recovering the above amount, to be taxed; and that the defendants recover against the plaintiff such costs as they have rightly incurred in defending themselves on the points on which they have succeeded." It was contended by the counsel for the plaintiff that the defendants have not succeeded at all, as there was but one cause of action. This clearly cannot be so or this order would not have been made. It is an unusual order and must mean something. It does not refer to separate issues, but yet speaks of the points on which the defendants succeeded. Now the action was for three separate and distinct heads as the defendants contend—for one amount of three items as the plaintiff says—namely, first, for work done on a house at Nottingham; secondly, for work in that house; and thirdly, for some picture rods and gilding some picture frames. The case was tried before Lord Justice Bramwell, and the plaintiff was successful, but a new trial was granted by the Court of Appeal, and on the second trial the jury decided in the defendants' favour as to the work done outside and inside the house, but, as to the claim for picture rods and gilding picture frames, they could not come to the conclusion that it was within the agreement, and it was referred to an arbitrator to assess the value of the rods and the gilding. The arbitrator found that the plaintiff was entitled to the sum of 37*l.* 0*s.* 3*d.* beyond the sum paid into Court. In the ordinary way I think the Master would have been right in taxing the costs as he has, but here there is an order made as to the taxation of the costs, and I do not think he has acted within the meaning of that order. He has taxed off the defendants' bill all items applying to the general costs of the cause, and has disallowed the great bulk of the items, leaving a small number of them. I am of opinion that the order means that the plaintiff is to have such items of costs as do not apply to the whole case, and that those that do are to be apportioned. For the effect of this order seems to be expressly to deprive the plaintiff of the general costs of the cause to which, according to the usual taxation, he would be entitled, as it would be inequitable that he should have the whole general costs. But the Master has only taken out those items which apply exclusively, and not touched those which apply generally. Unless this order was made expressly to avoid this it is useless, since to tax the costs as the Master has is only to follow the ordinary principle apart from any order. I differ entirely from the Master, who has not given force to this order, but proceeded as though it did not exist. This is not a question of objections to items as such, but to the principle of taxation, and therefore Order VI. rule 30 of the Rules of the Supreme Court (Costs), 1875, does not apply. *Knight* v. *Pursell* (1), though somewhat differing, is in point. There the plaintiff, who claimed an injunction in respect of three distinct matters, only obtained it in respect of one. The costs of the defendants of so much of the action as had been dismissed, and of the plaintiff of so much as he had succeeded on were allowed, and the Master taxed the plaintiff's and defendants' costs of the whole action, and allowed one-third to the plaintiff and two-thirds to the defendants. I do not say that two-thirds is a necessary partition; I leave that to the Master. If he thinks there were three points he may divide the costs into three portions, and allot them to each party as he succeeded. Nor do I understand Vice-Chancellor Bacon to lay it down as a principle that the partitions should correspond exactly to the number of items. The Court is really now deciding that the principle of taxation adopted by the Master is erroneous, and that the costs in this cause should be taxed on the principle I have pointed out.

LINDLEY, J.—I am of the same opinion. The first question to be considered is, whether the preliminary objection that

ndants have not specified in their
ns the items of taxation to which
ject is fatal. The rules with which
id the defendants have failed to
are so worded that the Court may
l see to what extent they do or do
ly. They are evidently intended
r to cases where items are in dis-
i such. But here the question
i, Has the Master proceeded on the
rinciple? Therefore I think the
nary objection fails. Coming then
nerits of the case the matter turns
on the true construction of the
) tax. As regards the plaintiff's
re is not much to find fault with
Master had taxed the defendants'
the same principle. The order
rds of the same meaning as regards
lls, shewing, as I read it, that both
be taxed on the same principle.
s the Master seems to have ignored,
i taxed the defendants' bill, leaving
those costs that apply generally
whole case. Some of the objections
nstance, that which objects that
intiff is not entitled to any costs of
t trial—go too far. I think these
ust be referred for retaxation on
me principle as that adopted in
v. *Purssell* (1), though the allow-
ed not be in the same proportion
hat case.

der to review the taxation. Costs of the summons at chambers and of this rule to be paid by the plaintiff.

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s—Walker, Son & Field, agents for Smith
we, Wednesbury, for plaintiff; Taylor,
& Taylor, agents for Maples & M'Craith,
ngham, for defendants.

[IN THE QUEEN'S BENCH DIVISION.]

1881. March 21, 23. } *In re* MALTBY.

Habeas Corpus—Lunatic charged with a Crime in India—Removal to England— 14 *&* 15 *Vict. c.* 81. *ss.* 1 *and* 2*—Indian Criminal Code,* 1872.

By 14 *&* 15 *Vict. c.* 81. *s.* 1, "*If any person shall be indicted for or charged with any crime or offence in any Court in India, and shall be acquitted of or not be tried for such crime or offence on the ground of his being found to be of unsound mind, and shall by reason of the premises be lawfully in custody in India, it shall be lawful for the persons having the government of the Presidency in which such person shall be so in custody to order such person to be removed from India to any part of the United Kingdom, there to abide the order of Her Majesty concerning his or her safe custody.*"

The magistrate of a district in India proceeding to investigate a charge of murder preferred against M., a British subject, and finding him apparently suffering from mental derangement, caused an enquiry into his state of mind to be made by two medical men, under section 423 *of the Indian Criminal Code,* 1872. *They reporting M. to be of unsound mind, and incapable of conducting his defence, the magistrate stayed proceedings under section* 423*, and reported the case to the Madras Government. The Madras Government ordered M. to be removed to Madras, and on making further enquiry into his state of mind, ordered his removal to England under* 14 *&* 15 *Vict. c.* 81. *s.* 1. *On arrival in England M. was confined in a private lunatic asylum by order of the Secretary of State:—*

Held, *that M. was, within the meaning of* 14 *&* 15 *Vict. c.* 81. *s.* 1, *a person charged with a crime before a Court in India, and not tried because found to be of unsound mind; that he was therefore lawfully in custody in India, and that his subsequent removal to England and confinement by order of the Secretary of State were therefore legal.*

Rule *nisi* for a writ of *habeas corpus* calling on the Secretary of State for the Home Department and Dr. Stilwell, the

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superintendent of Moorcroft Private Lunatic Asylum, in the county of Middlesex, to shew cause why a writ of *habeas corpus* should not issue, directed to them, commanding them to have the body of Thomas James Maltby before the High Court of Justice, Queen's Bench Division, immediately after the receipt of the said writ, then and there to undergo and receive all and singular such matters and things as the said Court shall then and there consider of concerning him in that behalf.

Mr. Maltby, the applicant, was a member of the Madras Civil Service, and assistant magistrate to the district of Vizagapatam. During a journey from Vizianagram to Chicacole on the night of the 24th of December, 1879, without any provocation he shot dead one villager and wounded another, under the delusion that he had been attacked by some insurgents, known as the Rampa insurgents. On hearing of the occurrence Mr. Troine, the magistrate of the district, proceeded to the place where Mr. Maltby was detained in custody to investigate "a charge of murder preferred against him" (1). On arrival the magistrate found Mr. Maltby in an excited condition, and evidently suffering from mental derangement. The magistrate, therefore, under section 423 of the Indian Criminal Code, 1872 (2), caused him to be examined by two medical men in order to ascertain the state of his mind. The medical men having reported Mr. Maltby to be of unsound mind and unfit to defend himself upon a criminal charge, the magistrate stayed proceedings under the above section, and directed his detention pending orders from the Madras Government, to whom a report of the case was immediately sent. The Madras Government ordered the removal of Mr. Maltby to Madras, there to be confined in the lunatic asylum (3). Mr. Maltby was accordingly removed to Madras and placed in the lunatic asylum. A committee of official visitors there examined him under the order of the government, and pronounced him to be then insane and incapable of making his defence. A petition on his behalf was next presented to the High Court at Madras by a Mr. Longley, praying that an enquiry into his detention might be made, after hearing which the Court refused to interfere with the discretion of the government (4).

(1) The words used by the magistrate in his official report to the Government of Madras.

(2) Indian Code of Criminal Procedure, 1872, s. 423: "When any person charged with an offence before a magistrate competent to try the case appears to such magistrate to be of unsound mind and incapable of making a defence, such magistrate shall institute an enquiry to ascertain the fact of such unsoundness of mind, and shall cause the accused person to be examined by the civil surgeon of the district or some other medical officer, and thereupon shall examine such civil surgeon or other medical officer as witness, and shall reduce the examination into writing. If such magistrate is of opinion that the accused person is of unsound mind, he shall stay further proceedings in the case."

Section 424: "When from the evidence given before a magistrate there appears to be sufficient ground for believing that the accused person committed an act which, if he had been of sound mind, would have been an offence triable exclusively by the Court of Session, and that he was at the time when the act was committed, by reason of unsoundness of mind, incapable of knowing the nature of the act charged, and that he was doing what was wrong or contrary to law, such accused person shall, if he happens to be sane at the time of enquiry, be sent for trial by the magistrate before the Court of Session.

"If an accused person appears to be insane at the time of enquiry the magistrate shall act in the manner provided in the last preceding section."

(3) The order directing Mr. Maltby's confinement in Madras was as follows: "Jan. 6, 1880.—Under section 426 of the Code of Criminal Procedure, his Grace the Governor in Council directs that Mr. T. J. Maltby, charged with having caused the death of Latchmi Nayudu, village munsif of Sattivada, before the acting district magistrate of Vizagapatam, but found to be of unsound mind and incapable of making his defence, be kept in safe custody in the lunatic asylum, Madras."

(4) The judgment of the Court was as follows: Upon reading the petition and hearing counsel, and after examining Arthur Henry Lepingwell, superintendent of the lunatic asylum at Madras, and Alexander Porter, surgeon, as to the state of mind of the said Thomas James Maltby the Court delivered the following judgment:—

"There is no express provision for the presentation of an application of this nature by the next friend of a lunatic, but such a procedure is consistent with the general practice of the Court; and seeing that the Court might on its own motion enquire into the detention of a person in public or private custody within the limits of its ordinary criminal jurisdiction, we have felt ourselves justified in entertaining the petition."

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Maltby was detained in this asylum he 20th of April, and two medical aving in the meantime examined nd reported him to be in a weak of bodily health as well as of unmind, and that to the best of their ient it was absolutely necessary for covery that he should be removed to nd as soon as possible, the Governof Madras on the 20th of April, in se of the powers conferred by 14 Vict. c. 81. s. 1 (5), ordered his re-

dgment of the High Court of Judicature at s.

on hearing, &c.

is apparent from documents produced on rt of the Crown that an enquiry was com- l by the magistrate of the district having ction in a matter in which Mr. Maltby was d to have committed murder by slaying a ithout provocation. The district magistrate, aking the evidence of two medical men, was d Mr. Maltby was of unsound mind, and ble of making his defence. He, therefore, section 423 of the Code of Criminal Pro- , stayed proceedings, and reported the to the Government under section 426 of the f Criminal Procedure, and the Government, iving this report, directed that Mr. Maltby l be detained in the lunatic asylum at a, which is situate within the ordinary cri- jurisdiction of this Court. The accused nveyed to the asylum, and arrived there on 0th of January, and has been there confined the present date. On the 21st of February, the order of the Government, a committee cial visitors examined Mr. Maltby, and pro- ed him then insane, and incapable of making fence.

n our judgment Mr. Maltby is still suffering mental disease, and his mind is affected lly in regard to the matters which occurred 24th of December. By reason of the delu- nder which he labours, to use the words of nglish law, 'he cannot plead with that advice aution that he ought.' This being so, it fol- that he is now being dealt with according to

t is competent to the Government to detain in this country until he recovers his reason iently to make his defence; or, under 14 & ct. c. 81, to order him to be removed to any of the United Kingdom, there to abide the of her Imperial Majesty. Having found Mr. Maltby is being dealt with according to we can pass no order interfering with the etion of the Government.

"(Signed) Charles A. Turner,
L. C. Innes.

March 12, 1880."

14 & 15 Vict. c. 81. s. 1: "If any person have been or shall hereafter be indicted for harged with any crime or offence in any moval to England (6). On arriving in England, Mr. Maltby was, by warrant of the Secretary of State, placed in Broad-

Court in India, and shall have been or shall hereafter be acquitted of or not be tried for such crime or offence on the ground of his being found to be of unsound mind, and shall by reason of the premises be lawfully in custody in India, it shall be lawful for the person or persons administering the government of the presidency in which such person shall be so in custody, to order such person to be removed from India to any part of the United Kingdom, there to abide the order of her Majesty concerning his or her safe custody, and to give such directions for enabling such order to be carried into effect as may be deemed fit and proper."

Section 2: "The orders and directions of the said government of any of the said presidencies for the removal of any person under the provisions of this Act shall be a sufficient warrant and authority to all commanders of vessels and others, to whom the care and custody of any such person shall be committed, for the removal of such person from India to the United Kingdom in conformity with such directions, and for his detention in custody there until an order shall be made by her Majesty as hereinafter is mentioned; and upon the arrival of any such person in the United Kingdom, it shall be lawful for her Majesty to give such order for the safe custody of such person during her Majesty's pleasure in such place and in such manner as to her Majesty shall seem fit, in like manner as if such person had been indicted for an offence and found insane, and were thereby subject to the provisions of the Act passed in the 39 & 40 Geo. 3, intituled 'An Act for the safe custody of insane persons charged with offences.'"

(6) Proceedings of Government, April 20, 1880.

"Whereas Thomas James Maltby, a member of the Madras Civil Service, who was charged before the district magistrate of Vizagapatam with having on or about the 25th day of December, 1879, at Sattivada, in the district of Vizagapatam, caused the death of Latchmi Nayudu, by doing an act with the intention of causing the death of the said Latchmi Nayudu, and the said Thomas James Maltby was found by the said magistrate and by the High Court of Judicature of Madras to be unfit to plead to the said charge by reason of unsoundness of mind.

"And whereas the said Thomas James Maltby is now in lawful custody in Madras by reason of the premises.

"The Governor in Council hereby directs, under the provisions of 14 & 15 Vict. c. 81, that the said Thomas James Maltby shall be removed to London forthwith, and for that purpose shall be put on board the steamer *Stelvio*, in the custody of Henry Stanborough, Esq., surgeon, who is authorised to keep the said Thomas James Maltby in his custody in London until an order shall be made by her Majesty for the safe custody of the said Thomas James Maltby in pursuance of the said Act."

moor Criminal Lunatic Asylum and subsequently removed to Moorcroft Private Lunatic Asylum (7).

A rule *nisi* on his behalf for a writ of *habeas corpus* having been obtained as above,

Sir H. James (*Attorney-General*), *A. L. Smith* and *Poland* shewed cause.—The applicant is legally in custody. The Home Secretary must act upon the warrant of the Governor of Madras, and therefore everything has been legally done in this country; but in order to see whether the applicant is legally in custody the proceedings in India must have been legally conducted. Those proceedings were legal, the applicant was there "charged with a crime in a Court and not tried because found to be of unsound mind," within the meaning of 14 & 15 Vict. c. 81. s. 1 (5). In the Indian Criminal Code, 1872, the term "Criminal Court" is defined to be "every Judge or magistrate enquiring into or trying any criminal case or engaged in any judicial proceeding." Mr. Irving was a magistrate of the district enquiring into a charge of murder which had been preferred against the applicant: he was then found to be of unsound mind, and the trial was not proceeded with. The enquiry was held and proceedings stayed in strict compliance with the provisions of section 423 of the Indian Criminal Code. The result of holding that the applicant was not a person "charged" within the meaning of 14 & 15 Vict. c. 81. s. 1 would be that he would have to be sent back to India to be tried, and if acquitted on the ground of insanity he would be detained during Her Majesty's pleasure.

The Court will not grant the writ of *habeas corpus* if danger to the public would thereby be apprehended.

The Court here called on

J. D. Mayne and *Castle*, in support.—The word "charge" refers to a written document formally drawn up and corresponding to our indictment—(see Indian Criminal Code, 1872, s. 439)—and the applicant has not been charged within the meaning of the Act. Moreover, the words "indicted for or charged with any crime or offence in any Court" (14 & 15 Vict. c. 81. s. 1) mean indicted before a jury or charged before a magistrate, who in either case is competent to try the case, otherwise the person could not come within the subsequent words, "not tried." The words "found to be insane" contemplate the same procedure as in 39 & 40 Geo. 3. c. 94. s. 2, and this is confirmed by the last part of section 2 of the 14 & 15 Vict. c. 81. The Act assumes the case of a person coming before a tribunal which could finally dispose of the case.

(7) "Victoria R.—Whereas Thomas James Maltby was charged before the district magistrate of Vizagapatam, in the presidency of Madras, British India, with having, on or about the 25th day of December, 1879, at Sattivada, in the district of Vizagapatam, caused the death of Latchmi Nayudu by doing an act with the intention of causing the death of the said Latchmi Nayudu, and the said Thomas James Maltby was found by the said magistrate and by the High Court of Judicature of Madras to be unfit to plead to the said charge by reason of unsoundness of mind.

"And whereas the Governor of Madras in Council by order, dated the 20th of April, 1880, directed, in pursuance of the provisions of an Act of Parliament made and passed in the 14th and 15th of our reign, that the said Thomas James Maltby should be removed to and kept in safe custody in England until further order should be made therein in pursuance of the said Act.

"And whereas the Right Honourable Sir William Vernon Harcourt, one of our principal Secretaries of State, did by warrant under his hand, bearing date the 5th day of May, 1880, order and direct that the said Thomas James Maltby should be conveyed to and kept in Broadmoor Criminal Lunatic Asylum in the county of Berks.

"And whereas humble suit hath been made unto us to be graciously pleased to order the said Thomas James Maltby to be removed from the said Broadmoor Lunatic Asylum to the lunatic asylum at Moorcroft House, Hillingdon, in the county of Middlesex.

"We, taking the premises into our Royal consideration, do by virtue of the before-mentioned Act hereby signify our pleasure that you do receive the said Thomas James Maltby from the said Broadmoor Asylum and keep him in custody in the said lunatic asylum at Moorcroft House, there to remain until our further pleasure shall be known.

"And for so doing this shall be your warrant.

"Given at our Court at St. James's the 19th day of July, 1880, in the 44th year of our reign.

"By Her Majesty's command.

"(Signed) W. V. Harcourt.

"To our trusty and well-beloved the Superintendent of the lunatic asylum at Moorcroft House, Hillingdon, in the county of Middlesex, and all others whom it may concern."

witnesses as to the sanity of the nt were examined before him, nor e brought before the magistrate; e magistrate went to the place he was detained and there held uiry behind his back, so that the nt had no opportunity of contro- the evidence.

Henry James, in reply.

Cur. adv. vult.

MAN, J. (on March 23).—We have ide whether a rule *nisi* for a writ *eas corpus* should be made absolute harged. The case is one of con- le importance and gives rise to a deal of difficulty; but on the whole e come to the conclusion that the ould be discharged.

applicant had held the office of nt district magistrate of Vizagapa- n India, and when on a journey from to Calcutta for his health, he was unately under the impression that n persons were emissaries of some n or rebel potentate and had designs life. On the night of the 24th of ber, 1879, he appears to have fired volver, killing one man and wound- nother, and it is impossible to doubt e was at the time under the charge rdering persons whom he thought bout to murder him. Mr. Irvine, agistrate of the district, with every to behave kindly and considerately, to the place where he was kept restraint for the purpose of in- ating the charge and to hear wit- , but Mr. Maltby behaved with so violence that it would have been sible to proceed with the enquiry nt exciting him to such an extent bably to cause permanent injury to nd. Consequently, Mr. Irvine being bungalow ready to proceed with nquiry, and the witnesses being also nt, it was found impossible to pro- and on seeing Mr. Maltby and the tion he was in, Mr. Irvine came to onclusion that he was of unsound and that it would be improper to the enquiry. Mr. Irvine therefore d and ordered an enquiry to be held edical men, under sections 423 and 424 (2) of the Indian Criminal Code, regarding Mr. Maltby's state. They reported to the effect that Mr. Maltby was not fit for trial. The magistrate stayed proceedings and reported the case to the High Court at Madras, and they ordered his removal to Madras.

Mr. Maltby was thereupon sent to Madras. At Madras an application was, with the best intentions, made by Mr. Longley on his behalf, to enquire into his detention. The High Court of Madras, after hearing the application, decided that Mr. Maltby was in lawful custody; and it being pointed out that it was competent to the government, under 14 & 15 Vict. c. 81, to order him to be removed to England, they did so; and the main question in the case is, whether the Government of Madras had power to remove him to England, and, consequently, whether he was lawfully sent to England, and is lawfully in custody in an asylum in England.

It is better now to take the facts in their reverse order. The last document in date before us, and therefore the first in the reverse order, is that signed by the Secretary of State (7), which recites the facts in India, stating that Mr. Maltby was charged before the district magistrate with doing an act with the intention of causing death; that he was found unfit to plead, and that the government have, in pursuance of 14 & 15 Vict. c. 81, removed him to England; that the Secretary of State by his first warrant ordered him to Broadmoor Asylum, and from thence to Moorcroft Home Asylum, to the care of Dr. Stilwell. This is the authority of the Secretary of State to Dr. Stilwell, signifying the Royal pleasure that he should be received from Broadmoor, and it gives on its face sufficient reason for the detention of Mr. Maltby; but it is not sufficient for the Court, because on a rule for *habeas corpus* the Court is bound to see whether the foundation of the proceedings has been lawful, and we must consequently enquire further.

The next document in this order of date is that of the Governor of Madras (6), which is to the same effect, namely, that he was charged with causing the

death of a person by doing an act with the intention of causing the death of such person, and that he was found by the magistrate as well as by the High Court of Madras to be unfit to plead to the charge; that he was lawfully in custody at Madras; and that, under 14 & 15 Vict. c. 81, he should be removed to a steamer to be taken to England and kept in custody until an order should be made by Her Majesty for his safe custody.

This case depends almost entirely on the construction to be placed on sections 1 and 2 of 14 & 15 Vict. c. 81. It becomes important to notice section 2, because that section does, to some extent, throw light on the first section; and it also, in some measure, supports the argument of the learned counsel who appeared on behalf of Mr. Maltby. They relied on the reference in section 2 to 39 & 40 Geo. 3. c. 94, and contended that the provisions of 14 & 15 Vict. c. 81 only applied to persons found to be insane by procedure of the earlier statute. But the earlier statute did not confer such power as is derived from the later statute. By the earlier statute provision is made for the case only of persons indicted, or who on arraignment have been found to be insane, while the later statute contains larger words; and it is clear the latter part of section 2 refers to persons found to be insane within 14 & 15 Vict. c. 81, and is not intended to confine the statute to the class of persons found to be insane by 39 & 40 Geo. 3. Although the 39 & 40 Geo. 3 does apply to persons of unsound mind, yet it does not throw light upon the class of persons to whom this Act is intended to apply.

The question then to be decided is whether Mr. Maltby was a person within the description given in 14 & 15 Vict. c. 81. s. 1, and that depends upon the construction to be placed on that clause. The impression I at first formed on reading the words "shall be indicted or charged" was that they ought to be construed *reddendo singula singulis*, thus, that the words "indicted for or charged with any crime" would only apply to the Court having jurisdiction to try the case, and not to the Court which had only the power of deciding whether the accused should be committed for trial. But where we are construing a statute dealing with persons of unsound mind, which cannot therefore be regarded as a statute restraining liberty, but as a remedial measure, and a statute moreover which is dealing with India, a country in which one must feel that a European is in greater danger from injury to the brain than he would be in this country, and where the object of the statute is to do a humane thing, namely, to remove the afflicted person from the hot air of India to the cooler air of his native country, I do not think we ought to apply the same principle of construction, or to deal with the statute in the same way, as we should if it were a statute of another character and confined only to the United Kingdom. Bearing that in mind, I consider the statute ought to be construed so as to include the present case. In my opinion, the word "charged" is to be construed in this sense, namely, either indicted or charged with any crime not *reddendo singula singulis*.

Then does it include the case of a man tried with a crime before a jury, or before a magistrate who is only to enquire whether he should be committed for trial? As regards the words "any Court," it appears impossible, looking at the Criminal Code of India, to say that the magistrate was not sitting as a Court. He went with the witnesses intending to try the case, and he was as much a Court as any Court could have been. In my opinion the magistrate was "a Court" within the meaning of the Act. I also am of opinion Mr. Maltby came within the words "shall have been acquitted or not tried for such crime." There can be no doubt that the crime, or the question whether he should be sent for trial, was not enquired into because he was of unsound mind; he was, I think, "not tried" within the meaning of this statute.

Then comes the principal difficulty, which is an undoubted difficulty and was strongly though not unduly urged by the counsel who appeared in support of the application. It was contended that the words "being found to be of unsound mind" contemplate something different

being found by a magistrate to be evidence brought before him. This is, I confess, one of difficulty. I truck with the argument, and per- he more, because the word "found" d in 39 & 40 Geo. 3. c. 94. ss. 1 , in the sense of "found by a jury." not be used in that limited sense in resent statute, because the words cted for" and "charged with," different, must apply to those cases persons are indicted before a jury harged before a magistrate; but t apply further? I have come to nclusion that the words are capable more extended construction, and he "being found to be of unsound " is fairly met by the fact of the trate going to enquire into the and consider whether he ought to it the accused for trial; on the nd on the evidence of respectable ses he finds that the man is of un- mind, so that he cannot be sent al. In such a case it appears to me not straining the words to suppose egislature at the time of the pass- this Act did, by varying the words hose used in Geo. 3, intend to give powers in the case of persons d in India, and to give the govern- the humane and useful power of g such person to England, so that ght have the best opportunity of ring. He would be then confined Her Majesty's pleasure, and every- ho has witnessed the exercise of ower will admit it is always wisely ed.

attention has been called to the Criminal Code of 1872, but in one this throws but little light on the , because we have to consider what ntemplated at the time of the Act than what is stated in the Code. ain effect of sections 423–428 of de is to give power to keep per- in custody who have committed s, but who are found lunatic, and ng them up from time to time ver they are fit to take their trial, his is not inconsistent with the hich gives the further power of al to England. In the first place dings are stayed; but when once stayed the Act applies, and the power given by it may be exercised. In the pres nt case application was made to the High Court at Madras. Mr. Maltby was at that time legally in custody in India, and the Governor of the presidency, in exercise of the power conferred by 14 & 15 Vict. c. 81. s. 1, ordered his removal to England. The case was one in all respects within the terms of the statute, and is concluded by it.

I must add that I should have been sorry had our view of the law been otherwise. To no one more than to Mr. Maltby himself would the alternative view have been disastrous. As it is, every hope may be entertained of his ultimate recovery; but, obviously, had we complied with this application, and Mr. Maltby been brought up on this writ, he would in all probability have had to be sent back to India there to be tried and subjected to so much distress and agitation, both here and in India, that there must have been less hope of his ultimate recovery.

POLLOCK, B.—In my judgment this writ ought not to be issued, and the grounds of my decision happily do not involve any question respecting the condition of this unfortunate gentlemen, or discretion as to whether it would be wise to keep him in custody or release him.

The foundation on which the validity of these proceedings rest is 14 & 15 Vict. c. 81, because, although there is undoubtedly abundant ground for upholding the acts of the ministerial officer through whose hands this matter has passed, yet it is clear that when considering a question of *habeas corpus* we must go back to the foundation of the proceedings through which the subject has been confined. The 1st section of this statute (14 & 15 Vict. c. 81) requires as a foundation for the exercise of the power conferred by it that the accused shall be found to be of unsound mind. Having reference to all the circumstances, it is clear that the word "found" does not mean found lunatic, as in the ordinary case of a trial, but points to a finding by a magistrate at a much earlier stage of criminal proceedings than that which is the practice in this country, whether on sessions or circuit.

The objection most strongly urged

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against the validity of these proceedings was, that the words "indicted for or charged with any offence or crime in any Court in India" ought to be construed "indicted for a crime before a jury, or charged with an offence before a magistrate," and that the Court or magistrate should be the Court which had power to try him. This contention was founded on the word "charge," but, to my mind, that word affords no foundation, because the learned counsel for the applicant were unable to cite any authority which gave a technical meaning to the word "charge" in India. Two years ago, in the case of *The Queen* v. *Hughes* (8), this word underwent considerable discussion, and I have only to look at the judgment of Mr. Justice Hawkins in that case to see that so long as the magistrates had jurisdiction to hear the charge it mattered not that the accused was informally brought before them, though there was in fact no charge legally preferred; and also to the judgment of Chief Justice Erle, in *The Queen* v. *Shaw* (9), where he says, "In my opinion, if a party is before a magistrate and he is then charged with the commission of an offence within the jurisdiction of that magistrate, the latter has jurisdiction to proceed with that charge, without any information or summons having been previously issued, unless the statute creating the offence imposes the necessity of taking some such step."

Then I must bear in mind that this statute was not passed merely with reference to the earlier statute of 39 & 40 Geo. 3. c. 94, or to the ordinary statutes directed to such cases in this country which my brother Denman has referred to, and therefore I shall not discuss, except to notice that this statute merely gives power to bring persons of unsound mind within the category of persons referred to in Geo. 3. Had there been nothing further I should have had some doubt, but further light is thrown on the statute by the Code. It is seen that a condition precedent to the exercise of the power conferred by the statute is, that the accused shall be found to be of unsound mind, and either acquitted or not tried on that ground. It was said that the meaning of the words "not tried" must be determined by analogy with the present mode of trying or not trying such a case in this country. Referring back to the Code, I find that the magistrate before whom this matter came was holding a criminal Court, because, by the interpretation clauses of that Code, "criminal Court means and includes every Judge or magistrate, or body of Judges or magistrates, enquiring into or trying any criminal case or engaged in any judicial proceeding." The magistrate was, therefore, a Court for all purposes. In considering whether the accused was "not tried," I find by section 423 (2) of the Code a process whereby a person is charged before a magistrate who is competent to try the case. But this gentleman is brought before a magistrate who had no jurisdiction to try the case. Then by section 424 (2) I find that where, from the evidence given before a magistrate, there appears sufficient ground for believing that the accused person committed an act which, if he had been of sound mind, would have to be sent for trial, and that he was at the time when the act was committed, by reason of unsoundness of mind, incapable of knowing the nature of the act charged, then—I now read the latter part of the section—if the accused person appears to be insane at the time of the enquiry, the magistrate shall act in the manner provided in the last preceding section. Under that section (423) he is to stay proceedings. Taking this matter of procedure, is it not clear that when the magistrate stays proceedings under these sections of the Code, he is putting the accused in the position of a person who is not tried because of unsoundness of mind? Then what is the duty of the magistrate? His duty is to institute an enquiry.

One observation by the counsel for Mr. Maltby was that this was not a proper enquiry, because it was taken behind the back of the accused; but I do not gather, either from the intention or language or spirit of these sections, that the enquiry should take place in open Court, and I

(8) 48 Law J. Rep. M.C. 151; Law Rep. 4 Q.B. D. 614.

(9) 34 Law J. Rep. M.C. 169.

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s that the magistrate had not had
used charged before him, inasmuch
as not brought before him at his
justice. What happened was, that
agistrate was told of Mr. Maltby's
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stead of sending for him he went to
this bungalow, as constantly hap-
n this country when the accused
ceived some injury and the magis-
oes to the hospital or to a house.
agistrate there made enquiry, and
opinion the statute was complied
nd everything was done necessary
e him jurisdiction to act as he did.
opinion, also, the enquiry was pro-
instituted, and gave the magistrate
to send the accused to Madras.
der at Madras was within the power
by 14 & 15 Vict. c. 81. s. 1, and the
d has been legally removed to this
y and confined. In my opinion,
ore, the grounds which have been
, and I wish to add fairly urged, for
ng this writ have failed.

Rule discharged.

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ers—The Solicitor to the Treasury, for the
wn; Cobbold & Woolley, for applicant.

THE QUEEN'S BENCH DIVISION.]

81. 19. GOULD AND OTHERS (*appellants*) *v.* THE BACUP LOCAL BOARD (*respondents*).

blic Health Act, 1875 (38 & 39 *Vict.*), *s.* 150—*Sewering of Street—Re- of Expenses incurred by Local Board tice not in accordance with Statute— ts Improvement Expenses—Summary dure before Justices.*

or the report of the above case, see aw J. Rep. M.C. 44.]

[IN THE QUEEN'S BENCH DIVISION.]

1881. March 2, 12. BATTHYANY *v.* BOUCH.

Ship—Registration—Written Agreement to Transfer—Merchant Shipping Act, 1854 (17 *&* 18 *Vict. c.* 104), *s.* 55—*Merchant Shipping Act Amendment Act*, 1862 (25 *&* 26 *Vict. c.* 63), *s.* 3.

An agreement in writing to transfer a ship does not require to be registered under the Merchant Shipping Act, 1854 (17 *&* 18 *Vict. c.* 104), *s.* 55, *nor need the special description of the ship sold required by that section to be inserted in a bill of sale transferring the ship be contained in such agreement.*

The plaintiff agreed in writing with the defendant to sell, and the defendant agreed to purchase, a yacht belonging to the plaintiff for the sum of 2,600*l.*, *whereof the plaintiff was the registered owner, on condition that the defendant should be at liberty to rescind the said agreement should the yacht prove unsound. The defendant refused to carry out his part of the agreement, and the plaintiff brought an action against the defendant for specific performance, or, in the alternative,* 2,600*l.*, *and for damages for breach of contract. The defendant pleaded that the agreement, if any was made, was not a bill of sale, nor was it registered, nor did it contain a sufficient description of the yacht, as required by the Merchant Shipping Act*, 1854. *The plaintiff demurred*:—Held, *that section* 55 *of the Merchant Shipping Act*, 1854, *applies to the actual instrument by which the ship is to be transferred and not to an agreement to transfer.*

This was an action to enforce specific performance of an agreement to purchase a yacht.

The statement of claim alleged that on or about the 29th of February, 1880, it was agreed in writing by and between the plaintiff and the defendant that the plaintiff should sell to the defendant and the defendant should buy of the plaintiff a certain yacht known as the *Kremhilda*, whereof the plaintiff was the registered owner, at and for the price of 2,600*l.*, on condition that the defendant should be

at liberty to rescind the agreement should the yacht prove unsound.

That the defendant waived his right to a survey, and took possession of the said yacht, and that the defendant afterwards refused to perform the said agreement.

The plaintiff claimed—First, specific performance; second, in the alternative, 2,600*l.*; third, damages for breach of the said agreement.

The defendant, in his statement of defence, pleaded that "the agreement was not a bill of sale, nor was it registered, nor did it contain a sufficient description of the yacht, as required by the Merchant Shipping Act, 1854."

The plaintiff demurred, on the ground that the agreement for the sale of a ship does not require to be registered, and on the ground that the Merchant Shipping Act, 1854, does not require any special description of a ship to be inserted in an agreement for the sale of a ship.

Gainsford Bruce, for the plaintiff, in support of the demurrer.—The defence pleaded amounts to the proposition that no agreement for the sale of a registered ship to a British subject is valid at law unless by bill of sale. By the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 55, a registered British ship must be transferred by bill of sale, which has to be drawn in accordance with Form E given in the schedule. The material words of that form are, "I, in consideration of £ transfer." That section applies only to the actual transfer.

The words of the former repealed Acts (34 Geo. 3. c. 68. s. 15; 6 Geo. 4. c. 110. s. 31; 3 & 4 Will. 4. c. 55. s. 31; 8 & 9 Vict. c. 89. s. 34) were more stringent, and there are cases decided upon them shewing that an executory contract for the sale of a ship required registration—*Hughes* v. *Morris* (1), *McCalmont* v. *Rankin* (2); but the Merchant Shipping Act, 1854, has omitted the words which gave rise to those decisions, and restricts the formalities to be complied with only to the case of actual transfer. In *The Liverpool Borough Bank* v. *Turner* (3) it was held that an agreement to assign a mortgage when required could not be enforced, because it was not drawn up in accordance with the formalities required by the Act, section 66, which enacts that a mortgage of a registered ship must be in accordance with Form I. But a mortgage is different from a sale, and the section speaks of the instrument creating the security. In consequence of this decision 25 & 26 Vict. c. 63. s. 3 was passed, by which "equities may be enforced against owners and mortgagees of ships in respect of their interest therein in the same manner as equities may be enforced against them in respect of any other property." But there is no authority to shew that since the Merchant Shipping Act, 1854, "an agreement for the sale of a British ship has to be in accordance with the formalities attending a transfer."

Cohen (*Ashton Cross* with him), for the defendant.—The Statute of Frauds does not apply to the sale of a ship, and consequently the contention of the plaintiff must extend to this, that there may be a contract of sale of a ship by word of mouth. There is no distinction between a mortgage and a sale, and the *ratio decidendi* in *The Liverpool Borough Bank* v. *Turner* (3) covers the case of a sale. In *Hughes* v. *Morris* (1) the Court refused to order specific performance of a contract for the sale of a ship. That case was followed by *Duncan* v. *Tindal* (4) and *McCalmont* v. *Rankin* (2), where Cresswell, J., says, "A parol agreement for the sale of a ship is void." After these cases the Merchant Shipping Act, 1854, was passed, but the "provisions of that statute extend to an executory contract for the transfer of a ship at a future day"—see *Addison on Contracts* (7th ed.), 517. As an authority for that passage the case of *The Liverpool Borough Bank* v. *Turner* (3) is cited.

The effect of 25 & 26 Vict. c. 63. s. 3 is that if a registered owner contracts to sell his ship to a person qualified and

(1) 2 De Gex, M. & G. 349; 21 Law J. Rep. Chanc. 761.

(2) 2 De Gex, M. & G. 403; 22 Law J. Rep. Chanc. 554.

(3) 29 Law J. Rep. Chanc. 827; affirmed 30 Law J. Rep. Chanc. 379.

(4) 13 Com. B. Rep. 258; 22 Law J. Rep. C.P. 137.

thyany v. *Bouch*, Q.B.

to declare his qualification to have
ıip registered in his name, the con-
can be enforced, but this is the
se case and cannot be enforced.
ton v. *Hymen* (5) and *Keith* v.
ws (6) do not touch this case, the
cial interest alluded to there not
ng a beneficial interest other than
f the registered owner. The equit-
loctrine that "what is agreed to be
s to be taken to be done" renders
reement to sell a ship virtually an
ıte sale of such ship.

nford Bruce, in reply.—If section 55
Merchant Shipping Act, 1854, stood
it would be impossible to contend
n agreement for the sale of a ship
; valid in law. The only decision
ıg against the plaintiffs, namely,
Liverpool Borough Bank v. *Turner*
s decided on another section.

ROVE, J.—There is a *dictum*, although
obiter, that mortgages and transfers
ı the same footing.]

ı, but that case was decided on the
n relating to mortgages, and the
f 1862 was expressly passed to do
with the effect of that decision.
onstructions on the former Acts
the real meaning of the section, and
Liverpool Borough Bank v. *Turner*
no longer binding. The mere *dic-*
s to mortgages does not affect this
ion. There is a substantial distinc-
etween section 55 and section 66.
ıtract to transfer is not equivalent
transfer, though an agreement to
ı security is of itself a security.

NDLEY, J.—But an agreement for
ı, in equity, a sale.]

nly entitled the vendee to call on the
r to do what is necessary to effect
ansfer. Section 37, sub-section 2;
n 38, sub-section 5; section 43,
ection 100, shew that "beneficial
ship" is the ownership of others
the registered owner. The express
ation in 1862 affirms the fact that
Judges had been in error in sup-
g the beneficial owner was so re-
ed.

2 Hurl. & C. 918; 33 Law J. Rep. Exch.

45 Law J. Rep. C.P. 876; 46 ibid. 801;
ep. 1 C.P. D. 722; ibid. 2 C.P.D.163.

GROVE, J. (on March 12).—This demurrer arises thus: The plaintiff in his statement of claim alleged that it was agreed in writing between the plaintiff and defendant that the plaintiff should sell to the defendant and that the defendant should purchase of the plaintiff a certain yacht whereof the plaintiff was the registered owner, for the price of 2,600*l.*, and that the defendant refused to perform his part of the agreement. The defendant in the first paragraph, which is all that is important, of the statement of defence, alleged that "such agreement was not a bill of sale, nor was it registered, nor did it contain a sufficient description of the said yacht, as required by the Merchant Shipping Act, 1854." To this plea the plaintiff demurred "on the ground that an agreement for the sale of a ship does not require to be registered." I have not to decide whether the plaintiff, if the demurrer be allowed, is entitled to specific performance, the price of the yacht, or damages. He may be entitled to one or more of those remedies. But I have to decide whether the defendant's plea affords a valid defence. I am of opinion that it does not, and for the following reasons:—

The main section—namely, the 55th—relied on by counsel for the defendant enacts that "a registered ship, or any share therein, when disposed of to persons qualified to be owners of British ships, shall be transferred by bill of sale, and such bill of sale shall contain such description," &c. If that section stood alone the true construction is perfectly clear, namely, that it applies only to the instrument itself by which the ship is to be transferred, and not to an agreement to transfer. If untrammelled by any decisions on the sections, it would be difficult when first reading the section over to doubt as to what is the legal construction. The provisions that no property shall be transferred, except by a parchment signed and sealed, never has been held to prohibit parties agreeing to transfer without any deed. But the decisions, so far from throwing any impediment in the way of this construction, show, so far as they have any bearing on this section, that it is the true one.

There are no decisions actually on the section itself, but the case of *The Liverpool Borough Bank* v. *Turner* (3)—a decision on section 66 of the Merchant Shipping Act, 1854—was decided by two distinguished Judges—Lord Hatherley (then Vice-Chancellor Wood) and Lord Campbell—on the grounds that the words in the 66th section relating to mortgages, were not inconsistent with the provisions of 8 & 9 Vict. c. 89, which had been decided, as I think, on good grounds, to mean that any passing of property should be void, unless accompanied by the formalities enjoined by that Act, and that the reasoning under the earlier statute could be imported into the discussion as to the meaning of the section in question. Now if I were deciding a question on the 66th section, I should be bound by that decision, whatever my own opinion might happen to be. But then two reasons are alleged why this decision is not binding on me. One is, that the decision was on the 66th section, relating to mortgages, and not on the 55th section, relating to transfers of ships. This 66th section enacts that a "ship, or any share therein, may be made a security for a loan or other valuable consideration, and the instrument creating such security hereinafter termed a mortgage" shall be in a specified form. And the decision thereon was, that a registered British ship could not be made security for a loan except by mortgage which required registration. Though it is said that there is a considerable difference between this section and the 55th, yet I cannot help feeling much influenced by the expressions used by Vice-Chancellor Wood, who put the two cases of mortgage and transfer on the same footing, which to a less extent Lord Campbell also did. But I am not bound by these, which are only *obiter dicta*, and if I can find any substantial distinction I am bound to use my own judgment. And I am of opinion that there is such a distinction to be drawn which leads me to feel not bound by the *obiter dicta* of the Judges in that case. The words in the 55th section, "shall be transferred," are, without doubt, restricted in their meaning to a sale; whereas the word "security" must *ex vi termini* mean equitable or legal agreements. In the 66th section it seems to be provided that no security of any kind can be created in respect of a ship but by way of mortgage, but the words in section 55 are exclusively referable to sales. Then, again, the learned Judge who put sales and securities on the same footing, did so without hearing any arguments on the point, and their attention was not drawn to the difference between section 55 and section 66. I am therefore not bound by that decision, and, indeed, am not sure that if they had had the point argued out, they would have come to any such conclusion. The case also has been doubted by Baron Pollock in a recent case—*Stapleton* v. *Hymen* (5)—but a subsequent statute was passed, I cannot judicially say with the express object of remedying this effect of *The Liverpool Borough Bank* v. *Turner* (3), yet having every appearance of having been so passed, for it certainly makes a very great difference in the law on the subject in question, and the result is to get rid of that judgment; for by that judgment beneficial interests are not recognised except as applying to aliens and foreigners—a construction shewn by the subsequent Act not to have been intended. By that later Act it is provided that beneficial interests, when used in the second part of the principal Act, include interests arising under contracts and other equitable interests, and that that Act intended that equities may be enforced against owners and mortgagees of ships in respect of their interests therein in the same manner as they may be enforced against them in respect of any other personal property. It is plain, therefore, that this Act was purposely intended to go further and recognise beneficial interests to an extent not recognised in *The Liverpool Borough Bank* v. *Turner* (3). Mr. Cohen admits this, but contends that this only enables persons to enforce their equitable rights against owners and mortgagees of ships, and does not give the owners and mortgagees the right to enforce equitable rights against other persons—that is, he contends that the rights are not correlative. It would, in my opinion, be very strange if the statute should be con-

as providing that, of two contract-rties, the buyer should have rights t the seller, but that the seller l not have correlative rights against ıyer. It would be very anomalous, know of no such case. Mr. Cohen as an example of such a unilateral ct, a contract under the Statute of s. But that is not a unilateral ct. Certain formalities only are ed by that statute, which does not the contract. It therefore does ply to this question. The question is, Are the words so peremptory hough no reason can be shewn for they must be enforced? I think re not. They do not, taken in their al sense, force me to construe the "owners" as being restricted to ered owners. Mr. Cohen says that e former Act the only beneficial st contemplated is that of a pur-. This clearly is not so. Section b-section 2, speaks of "title," and strongly of opinion that beneficial sts are within section 38, sub-sec-. Then, again, section 100 reads "Whenever any person is bene-y interested otherwise than by gage in any ship, or share therein, ered in the name of some other n as owner, the person so interested as well as the registered owner, ject to all pecuniary penalties im-by this, or by any other Act, on s of ships or shares therein, so never-s that proceedings may be taken for nforcement of such pecuniary penal-gainst both or either of the aforesaid ers, with or without joining the of them." This evidently treats a n beneficially interested as in the category as owners, not as a person ng a contract with him and seeking force it against him, but as being, speak, on the same side as the owner. econd part of the section certainly ons the rights of owners against gagees, and not those of mortgagees st owners; but taken as a whole I the section would give beneficial sts to the mortgagee against the , and that the clear intention of ction was to give those beneficial sts which from the judgment in *The Liverpool Borough Bank* v. *Turner* (3) it was supposed had not been given. It would certainly be a very startling thing, and a prohibition of many mercantile transactions, if I held that those who are beneficially interested cannot enforce those interests; for till there was an actual transfer there would be no dealings with the ship. It would require very clear and strong language to induce me to give my judgment for such a construction. Therefore I think the demurrer must be allowed.

Judgment for plaintiff with costs.

Solicitors—Deacon, Son & Gibson, for plaintiff; J. J. & C. J. Allen, agents for Simpson & North, Liverpool, for defendants.

[IN THE QUEEN'S BENCH DIVISION.]

1881. Feb. 23. THE GUARDIANS OF THE FULHAM UNION (*appellants*) *v.* THE GUARDIANS OF THE ISLE OF THANET UNION (*respondents*).

Poor — Settlement — Irremovability — 9 & 10 *Vict. c.* 66. *s.* 1—39 & 40 *Vict. c.* 61. *s.* 34—*Penitentiary supported by Subscriptions*—"*Bona fide charitable gift.*"

[For the report of the above case, see 50 Law J. Rep. M.C. 42.]

[IN THE COMMON PLEAS DIVISION.]

1880. Nov. 29. GRAINGER (*appellant*) v. AYNSLEY AND ANOTHER (*respondents*). BROMLEY (*appellant*) v. TAMS (*respondent*).

Employers and Workmen Act, 1875 (38 & 39 *Vict. c.* 90), *ss.* 3 *and* 10—*Definition Clause—Sub-workmen.*

[For the report of the above case, see 50 Law J. Rep. M.C. 48.]

[IN THE COURT OF APPEAL.]

1881. April 8, 9.

BROWN *v.* HICKINBOTHAM.*

Conversion—Allowance out of Property to Bankrupt—Resolution of Creditors—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 4 *and* 38.

B., an undischarged bankrupt, to whom his creditors had given, by a resolution duly passed, a certain quantity of his furniture, assigned that furniture by bill of sale to the plaintiff, and afterwards sent it to the defendant, an auctioneer, who sold it and paid the money received to the bankrupt. In an action for conversion,—Held, *that the plaintiff was entitled to the furniture, for that the bankrupt could, under the resolution of his creditors, dispose of it to the plaintiff, and that there was no jus tertii which the defendant could set up.*

Appeal from the judgment of Lopes, J., at the trial without a jury.

Action for conversion.

Henry Brown became a bankrupt in 1876. On the 5th of December, 1878, a meeting of his creditors was summoned for the 15th of December, by a notice which announced that the meeting would consider "what allowance should be made to the bankrupt in respect of furniture."

On the 15th of December a resolution was duly passed, and afterwards duly registered, "That the trustee be, and he is hereby empowered to deliver to the bankrupt, Henry Brown, furniture of the value of 80*l.*, including the statutory allowance of 20*l.*"

On the 15th of April, 1880, Henry Brown assigned the furniture so granted to him to J. Brown, the plaintiff, by a valid bill of sale. In August, 1880, Henry Brown sent the furniture to the defendant, an auctioneer, to sell for him, and he having done so, and having paid the money received from the sale to Henry Brown, who had not then received his discharge, this action was brought.

Lopes, J., the facts being admitted, gave judgment for the defendant.

The plaintiff appealed.

* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Lush L.J.

Cock and *C. Scott*, for the appellant.—It is submitted that the plaintiff is entitled to recover. This property was assigned to him by a bill of sale, to the validity of which no objection is taken, on the 15th of April, 1880. The property in question was given to the bankrupt, the grantor of the bill of sale, by a resolution of his creditors in December, 1878. That resolution was made in pursuance of the authority of the Bankruptcy Act, 1869, s. 38 (1). There need be no consideration for such an allowance; no reason need be assigned for the gift; the creditors can give money or money's worth. Since the action was brought the bankruptcy has been closed and the bankrupt has received his discharge.

There has been no attempt to set aside the resolution, so that the trustee could not claim these goods, and the defendant is in fact attempting to set up a title in another person, when that person could not set up such title himself. Even if there had been fraud, and even if the gift could be set aside between the parties interested, still the defendant cannot claim to retain the value of these goods.

Underhill and *Rose*, for the defendant.—The resolution is defective; it is bad on the face of it; it does not shew that the allowance was made for either of the two purposes for which alone it could be made. It is absolutely void, for the word "allowance" is not used in it: an allowance must be of money and not of money's worth. The defendant here does not set up the *jus tertii*; the plaintiff sets up a title which he fails to prove.

[LUSH, L.J.—The plaintiff is not obliged to prove a statutory title.]

Even if the resolution were good, still this property would be after-acquired pro-

(1) 32 & 33 Vict. c. 71. s. 38: "The trustee, with the consent of the creditors, testified by a resolution passed in general meeting, may, from time to time, during the continuance of the bankruptcy, make such allowance as may be approved by the creditors to the bankrupt out of his property for the support of the bankrupt and his family, or in consideration of his services if he is engaged in winding up his estate."

Section 4: "Property shall mean and include money, goods, things in action, land and every description of property, whether real or personal."

, and so would vest in the bankrupt's tors again.

AMWELL, L.J.—I thought the objec- aken on behalf of the defendant to solution was a formidable one. The is that jurisdiction must be shewn e proceedings of inferior Courts, ugh it is assumed in superior Courts. this resolution ought to shew that s competent in the creditors to pass should not like to say that the cre- could not give furniture to a bank- I do not think that the Legisla- ontemplated a wholesale present of ture to the value of 60*l.* as has been here. I think therefore that very bly that is not within the compe- of the creditors, but I am inclined nk that as the resolution was never ide and was acted on by the trustee, ankrupt became the legal owner of roperty. The bankrupt was in effect o take the furniture and to use it as eased. Now the bankrupt has taken rniture under that permission and uthority alone, and he has disposed y a bill of sale to the plaintiff. The aff, therefore, has a good title against rustee, not by estoppel, which sup- that the truth is one way but that me reason it may not be set up, but sequence of the truth and reason of atter. The trustee gave the bank- leave to take the furniture, and he , and the plaintiff acquired it from ankrupt without any notice of in- y of title. Suppose the trustee were im the goods, he could not maintain tion; *a fortiori* the defendant can- bject to the title of the plaintiff. If lefendant has any title it must be ed from the bankrupt; but the bank- had, after giving the bill of sale, no the defendant sets up *jus tertii*, but *rtius* had no *jus*. The appeal must fore be allowed on that ground at ents.

GALLAY, L.J. — As Lord Justice well doubts whether the resolution alid I should hesitate to give a con- opinion, but it appears to me that s a good resolution. It is not neces- sary to refer to the Bankruptcy Acts of 1849 and 1861, by one of which a bank- rupt had, if he paid a certain dividend, a right to certain property, and by the other of which the creditors were em- powered to decide that he should have certain property given to him, for the question must be decided on section 38 of the Act of 1869 (1). It should be re- membered that these resolutions are not drawn or passed by lawyers. We must not expect to find them always framed in precise language, and we must consider what the creditors really intended to do. The meeting of the 15th of December, when this allowance was made, was sum- moned by a notice which specified the object for which the special meeting was called—that was, to consider the allow- ance to be made to the bankrupt. No creditor could misunderstand the object of that meeting; and so, though the reso- lution itself does not contain the word "allowance," it is, I think, impossible to say that what was granted was not an allow- ance for the support of the bankrupt. The proceedings further shew that almost at the same time as this resolution was passed a dividend of 5*s.* in the pound was paid. I think that this resolution was within the competency of the creditors, and that even if it were not, still it was registered in compliance with the statute, and thus it can only be questioned by proceedings in bankruptcy. This being so, the plaintiff is entitled to succeed.

BRAMWELL, L.J.—I intended to say that I did not think the Legislature contem- plated a wholesale present of 60*l.* to a bankrupt. It intended rather a gift from time to time of a small allowance to a bankrupt. I did not intend to say that the creditors cannot give furniture instead of making a money allowance. I do doubt whether these creditors were con- sciously acting under section 38 of the Bankruptcy Act. I think they were act- ing kindly to a friend.

LUSH, L.J.—I do not think it necessary to decide the question of the competency of the creditors to make this resolution. Let it be assumed that they could not. Still

the plaintiff's right is not thereby affected. The creditors passed the resolution in fact, and the bankrupt having received the furniture borrowed money from the plaintiff, who had no notice that there was anything which prevented the bankrupt from having a right to deal with this furniture. The bankrupt then mortgaged this furniture by a bill of sale to the plaintiff, so that the property in the goods passed, and the plaintiff had a title perfect and complete to the goods in question. Even if the creditors were wrong in passing the resolution, and even if they could have reclaimed the furniture from the bankrupt, still they could not reclaim it from a third party who had no notice. The raising of money on the furniture was an act of ownership which the creditors had authorised. Then the bankrupt handed the goods to the auctioneer. That was wrong, but it could not divest the plaintiff of the title which he had. The defendant sold the goods, and gave the bankrupt the money. That is his misfortune; but the law says that an innocent person who innocently disposes of the property of some one else without leave or authority is liable to that person. The defendant, therefore, is undefended in this action, and the appeal must be allowed.

Solicitors—W. Maynard, for plaintiff; Popplestone & Beddoe, for defendant.

[IN THE COMMON PLEAS DIVISION.]

1880. Dec. 2, 3. ANDREW *v.* THE SWANSEA CAMBRIAN BENEFIT BUILDING SOCIETY.

Building Society—Charge upon "all the funds, assets and effects of the society" — Foreclosure — Winding-up — Building Societies Act, 1874—*Companies Acts*, 1862 *and* 1867.

The winding-up provisions of the Companies Acts, 1862 *and* 1867 *are applicable to societies registered under the Building Societies Act*, 1874.

The defendants were an incorporated society established under the Building Societies Act, 1874. *The directors, being empowered by the rules of the society to borrow money, accepted a loan from the plaintiff, giving as security a bond, by which it was declared that "all the funds, assets and effects of the society shall be held liable for the repayment."*

The defendants failing to repay the loan, the plaintiff sued them on the bond, and having recovered judgment commenced an action of foreclosure in the Court of Chancery, which action was pending when a petition was filed in the County Court, and an order was made for the winding up of the defendant society. The County Court Judge having refused to grant the plaintiff leave to continue the action of foreclosure,—

Held, *that the appeal would lie by virtue of section* 43 *of the Companies Act*, 1867, *but that the action of foreclosure ought not to be allowed to proceed, for that the security did not amount to a mortgage.*

Appeal by motion, under 38 & 39 Vict. c. 50. s. 6, from the decision of the County Court Judge of Glamorganshire in refusing leave to the plaintiff to proceed with an action of foreclosure against the defendants pending the winding up of the defendant society.

The defendants were an incorporated society established under the Building Societies Act, 1874 (37 & 38 Vict. c. 42), at Swansea. The object of the society, as stated in the rules, was "for the purpose of raising by monthly subscriptions a fund to make advances to members on security of freehold, leasehold or copyhold estates by way of mortgage." By rule 5 the directors had power to borrow money for the purposes of the society upon such terms as they might think fit.

On the 4th of October, 1877, the plaintiff lent the society 400*l.*, and received in exchange a bond, by which the society covenanted to repay the amount three months after demand, and half-yearly interest at the rate of six per cent., and by which it was declared that "all the funds, assets and effects of the society shall be held liable for the repayment of the 400*l.* and interest."

In April, 1879, the plaintiff commenced an action on the bond, and recovered

ent against the society for the sum
l., being principal and interest due
bond. On the 15th of July, 1879,
aintiff commenced an action of fore-
e in the Rolls Court against the
r, which action was pending when a
n was filed in the County Court of
rganshire at Swansea, and an order
ade for the winding up of the society.
e 4th of March the plaintiff applied
County Court Judge at Swansea
ve to continue the action of fore-
e.

was contended before the County
Judge that the action ought not to
oceeded with, on the ground that
nd was not a specific charge on the
ty of the society, and was not a
age; and it was also shewn that
creditors to the amount of 2,885*l.*
d against the society on similar

behalf of the plaintiff it was con-
l that, on the authority of *In re*
Lloyd & Co. (1), where an order
een made to wind up a company, a
agee who has commenced an action
reclosure or sale against a company
to have leave, under section 87 of
ompanies Act, 1862, to proceed with
tion, unless the liquidator of the
ny offer the mortgagee foreclosure
at once without any further proceed-
the action, or shew some special
d for depriving him of his rights.
learned County Court Judge dis-
d the application, saying, "I am of
n that I ought not to interfere or
rcise a discretion by interfering with
inding-up."
plaintiff subsequently obtained a
alling on the defendants to shew
why the judgment of the County
Judge should not be set aside, and
laintiff be at liberty to proceed with
reclosure action.

Intyre and *Brynmor Jones* shewed
.—There is no appeal from the
ty Court. The defendant society is
porated under the Building Societies
1874, and is being wound up by the
under section 32 (2), which by sec-

tion 4 (3) is the County Court. The Act gives no power of appeal—*Davis on Building Societies*, p. 310, 2nd ed. Even if there is a right of appeal it must be on a point of law, and this is an appeal on a question of fact, upon which the County Court Judge has exercised his discretion.

In any event the decision of the County Court Judge was correct. The security is not a mortgage, but rather a very general bill of sale. It is a right to be paid out of the assets of the society, which can be better enforced in the winding-up than in a foreclosure suit. *In re David Lloyd & Co.* (1) is distinguishable, the circumstance of that case amounting to a special mortgage.

Cave and *M. R. Phillips*, for the plaintiff.—The winding-up provisions of the Companies Acts, 1862 and 1867, apply to societies registered under the Building Societies Act, 1874; because they are not expressly excluded, and there is no other mode of winding them up. The Companies Act, 1867, by section 41, authorises winding-up proceedings to be had in the County Court, and section 43 (4) gives the right of appeal which is now brought from the decision of the County Court Judge refusing leave to go on with the action.

It has been contended that this is not a mortgage, and the plaintiff cannot rank in priority over the rest of the creditors of the defendants; but this is properly a matter to be decided in the Court of Chancery and not by the County Court Judge. *In re David Lloyd & Co.* (1) is on all

Law Rep. 6 Ch. D. 343.

37 & 38 Vict. c. 42 (Building Societies Act, 1874), s. 32: "A society under this Act may terminate or be dissolved (sub-section 4) by winding-up, either voluntarily under the supervision of the Court, or by the Court, if the Court shall so order."

(3) Section 4: "The Court in this Act means in England the County Court of the district in which the chief office or place of meeting for the business of the society is situate."

(4) The Companies Act, 1867 (30 & 31 Vict. c. 131), s. 2, enacts that the Act is to be construed with 25 & 26 Vict. c. 89 (the Companies Act, 1862).

Section 43: "If any party in a winding-up under this Act is dissatisfied with the determination or direction of a Judge of a County Court on any matter in such winding-up, such party may appeal from the same to the Vice-Chancellor named for that purpose by the Lord Chancellor by general order."

fours with the present case, and it was there laid down that a mortgagee ought to have leave to proceed with his action, except in special cases or unless the same relief is given to him in the winding-up as he would have in the action. That case was followed by *In re The Longdendale Cotton Spinning Company* (5), where certain debenture-holders of a company which was being wound up commenced actions of foreclosure, and the Master of the Rolls said that the mere fact that a winding-up order has been made does not confer upon the company the right of preventing a mortgagee from realising his security. In *In re The Marine Mansions Company* (6), the application was by the holders of debentures for which the company pledged "the property belonging to us, with all the buildings and stock on and connected with it, and all the receipts and revenues to arise therefrom;" and further declared that the entire debenture loan and interest should be a first charge on "our undertaking and property, and receipts and revenues aforesaid;" and it was held that the effect of the debentures was to give the holders a charge in priority to other creditors upon the land and property of the company. In *In re The Florence Land and Public Works Company* (7) certain obligations by which the company bound "themselves, their successors and assigns, and all their estate, property and effects" were held to constitute a charge on the property of the company. It is not necessary for the plaintiff to shew this document is a mortgage; it is sufficient to shew he has good ground for contending it is a mortgage or in the nature of a mortgage, to entitle him to have the issue in the action tried before the Vice-Chancellor, and not summarily disposed of by the County Court Judge.

DENMAN, J.—For some time during the argument I thought there would be considerable difficulty in shewing we had jurisdiction to entertain this appeal, but the argument of the plaintiff's counsel has satisfied me that, though there is no provision to be found expressly indicating that the Companies Acts of 1862 and 1867 are applicable to such a society as this, yet looking at the whole of the statutes and the orders which have been made under them, it would be impossible to work the present Building Societies Act without holding the winding-up provisions of the Companies Acts, 1862 and 1867, to be applicable to the winding-up provisions of that Act, and that were we to hold otherwise we should in effect be repealing those Acts. There must, therefore, be an application of the Companies Acts to the Building Societies Acts for such purposes as those with which we are now dealing; and I am satisfied that under section 43 of the Companies Act, 1867 (4), an appeal lies from the refusal of the County Court Judge to allow this action of foreclosure to proceed. It appears to me also from the terms of section 43 that the appeal cannot be confined to a question of law, but that it includes questions of discretion; because in every case where there has been an appeal from a Vice-Chancellor to a Court of Appeal, there was always an appeal upon matters of discretion as well as upon other matters, and I apprehend there can be no doubt but that section 43 involves an appeal upon a matter of discretion.

But the document on which the plaintiff relies, though in one sense a document creating a charge—that is, making the "funds, assets and effects" of the society liable for the repayment of the deposit—yet is not a document on which a foreclosure decree could be made. It is impossible to say what would have to be foreclosed. If it could be made the subject of a foreclosure suit it would compel the Court to order that everything belonging to the society should be made liable for the repayment of this 400*l*. It is further shewn that there are many similar documents, and it could never be intended they each should have the effect which the plaintiff has contended this one should have.

I have listened attentively to the cases which have been cited, but in all of them the documents in question appear to contain words of very different cogency

(5) 48 Law J. Rep. Chanc. 54; Law Rep. 8 Ch. D. 150.

(6) 37 Law J. Rep. Chanc. 113; Law Rep. 4 Eq. 601.

(7) 48 Law J. Rep. Chanc. 137; Law Rep. 10 Ch. D. 531.

present. In *In re David Lloyd's* (1) there was a mortgage in the st sense, a mortgage of property was defined. In most of the other were words which could have been nstrued as to enable the person who ndeavouring to foreclose to lay his upon specific property and say, is the property which by my bond my mortgage I had secured to

the present case there is nothing of rt. It is declared that "all the , assets, and effects of the society" be held liable for the due repay- of the deposit. Many of these have been given to different per- and it would be most unfair to any one bondholder to appropriate self by a foreclosure suit, in priority the other creditors similarly cir- anced, "all the funds, assets and " of the society. Therefore, whe- it be discretion or strict right, the lant has, in my judgment, no right roceed with his foreclosure suit. ese grounds I am of opinion that cision of the County Court Judge to be supported, and that we not to interfere with his decision.

DLEY, J.—I am entirely of the same n. By the action of foreclosure laintiff raises questions of a cha- which might be much more con- ntly and properly determined in the ng-up, and then seeks for foreclosure the funds, assets and effects of the lant society, which it seems to me t be granted. This document is the least like the mortgage in *In re Lloyd* (1) or *In re The Longdendale Spinning Company* (5). I appre- there is no doubt that if a creditor n ordinary mortgage the Court will nterfere if he wishes to foreclose, think the holder of this security most an equitable charge entitling o be paid out of the assets in priority e other creditors. It is when the y is being wound up, assuming that mpanies Acts, 1862 and 1867, apply, ection 87 (8) comes into operation and stays the action, which cannot then be proceeded with without the leave of the Court having charge of the winding-up. The plaintiff goes to the Court in which this company is being wound up, which is the County Court, and asks for leave to proceed. The County Court Judge declines to give that leave, and the plaintiff now appeals from his decision.

The first question which arises is, whether the Companies Acts of 1862 and 1867 apply at all. If they do not apply, then the logical consequence is that there was no necessity for going to the County Court Judge to stay the action. He would have no right to entertain the case, and it would not be competent to him either to grant or refuse the application, and an appeal would be wrong. Now is that so? The question, which is not altogether free from difficulty, arises in consequence of the mode in which section 32 of 37 & 38 Vict. c. 42 (2) is expressed. That section indicates the way in which a society of this sort may be dissolved, but there is nothing in the section either incorporating or referring to the winding-up provisions of the Companies Acts, 1862 and 1867. Perhaps it is a pity this was not done, as it would have saved all controversy. The expression which is wanted is found in the Industrial and Provident Societies Act (39 & 40 Vict. c. 45. s. 17), which expressly makes the winding-up provisions of the Companies Act, 1862, applicable to societies registered under that Act (9). Whether there has been a slip or blunder I do not know, but at all events it is plain enough that this Building Act has no such reference. The argument of the plaintiff is this, that while the company is to be wound up by the County Court,

25 & 26 Vict. c. 89 (Companies Act, 1862), "When an order has been made for winding mpany under this Act, no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the Court, and subject to such terms as the Court may impose."

(9) 39 & 40 Vict. c. 45. (the Industrial and Provident Societies, 1876), s. 17: "With respect to the dissolution of registered societies, the following provisions shall have effect—(1) A society may be dissolved by an order to wind up the society, or a resolution for the winding up thereof, made as is directed in regard to companies by the Companies Act, 1862, the provisions whereof shall apply to any such order or resolution, except that the Court, having jurisdiction in the winding-up, shall be the County Court," &c.

and any rules which the County Court may make, under these circumstances it adopts the orders and rules in Chancery under the Acts of 1862 and 1867; on the other side, the argument is, that as this Building Act, 1874, does not incorporate the Companies Acts of 1862 and 1867, therefore those Acts do not apply to the winding-up, but all that does apply is section 32 of the Building Societies Act, 1874, and the orders and rules in Chancery made by the Acts of 1862 and 1867. If that argument were to prevail the result would be curious. The rules and orders of Chancery made under the Companies Acts of 1862 and 1867 are utterly unworkable without the Acts themselves; they are based upon those Acts, and the Acts and the rules form a sort of code for winding-up, the one quite unworkable without the other. The result is one to be avoided, and it appears to me the proper interpretation is, that Building Societies Acts can be put under the Acts of 1862 and 1867 by virtue of clauses in those Acts relating to industrial companies, and the true effect of section 32 of the Building Societies Act, 1874, is to my mind simply to substitute the County Court for the Court of Chancery. There is no alternative between this interpretation and the one which would make the Acts of 1862 and 1867 unworkable. It follows that this action is stayed by section 87 of the Companies Act, 1862, and cannot proceed without leave of the County Court Judge.

It is then said there is no appeal from that Court to this, but that I think is plainly answered by section 43 of the Companies Act, 1867. That section was inserted in order to give appeals from the County Court in matters of winding-up to the then Court of Chancery. It had been decided that there was no appeal to a Court of law in a winding-up—*Henderson* v. *Bamber* (10), but that defect was cured by the 43rd section of the Companies Act, 1867, which gave an appeal in winding-up matters to the Court of Chancery, which in those days knew much more about such matters than the Courts of common law. The Judicature Act transfers the appeal to us, and therefore I feel no difficulty in holding there is an appeal in the present case.

It was further contended before us that, the decision of the County Court Judge being discretionary, there could therefore be no appeal. In one sense the decision was no doubt discretionary, but it is not like an order as to costs, and this has been so decided by the Court of Chancery more than once. They used, as is found in many cases, to reverse the decisions of the Vice-Chancellors on this very subject. Indeed, I rather think that the section is not a new one, but that it is taken from an old section of the Act of 1856, and there are a great number of cases to be found in the books in which orders under it have been appealed from and sometimes successfully. It is, therefore, not such a matter of discretion as in other matters from which there is no appeal.

Ought then this action to be allowed to proceed? Bearing in mind this is not one isolated security, but one of a series of similar securities, are these assets to be collected and sold and the receiver appointed in a suit in Chancery, or is it to be done under the winding-up? The latter course appears to me by far preferable: by it the plaintiff will get everything to which he is entitled, and any dispute as to priority can be disposed of by the County Court and made the subject of appeal to the High Court. To my mind this is utterly unlike an ordinary mortgage. It is an equitable charge upon the assets which can only be made available in the winding-up or by a process similar to it. It appears to me there ought to be a refusal to allow a double winding-up action or proceeding to take place. For these reasons I am of opinion the appeal ought to be dismissed.

Rule discharged. Leave to appeal refused.

Solicitors — John Davies, agent for Hartland, Davies & Isaac, Swansea, for plaintiff; E. R. Phillips, for defendant.

(10) 35 Law J. Rep. C.P. 65.

N THE COURT OF APPEAL.]

81. THE NEW ZEALAND AND AUSTRALIAN LAND COMPANY *v.* WATSON AND ANOTHER.*
3, 9, 28.

ipal and Agent—Relation of Sub- undisclosed Principal—Consignor nsignee—Right to follow Proceeds signment in the hands of Third

plaintiffs sent goods to London to M. r sale. M. & T., having no London old the same through the defen- ndorsing to them the bills of lading he plaintiffs had previously indorsed T. The defendants paid the pro- f these sales into their general ac- t the bank, but kept the result of les distinct in their own books. M. d one house at Glasgow and another h. The plaintiffs dealt with the v house alone; the defendants with M. & T. stopped payment at a time e Glasgow house was not and the house was indebted to the defen-

plaintiffs sued the defendants to re- balance, the result of sales of their which the defendants had not re- to M. & T. The jury found that intiffs did not through M. & T. the defendants to sell and act for ut that the defendants knew that . were acting as agents:—

(reversing the judgment of FIELD, *t the plaintiffs could not recover; ere was no privity of contract be- he plaintiffs and the defendants; defendants were not in a fiduciary to the plaintiffs, and therefore that ntiffs could not follow the identified of their goods in the hands of the nts.*

al from the judgment of Field, J., her consideration, after trial with

The case is reported 49 Law J. .B. 842 (*sub nom. The New Zealand stralian Land Company* v. *Ruston other*).

statement of claim alleged that intiffs through their agents em-

ployed the defendants to sell the cargoes of three vessels, and to account to the plaintiffs for the proceeds; that the defendants accepted the employment, sold the goods, and received the proceeds, but that they declined to pay the same to the plaintiffs.

The statement of defence denied that the defendants were employed by the plaintiffs, and alleged that they were employed by Matthew & Thielmann, who acted as principals in the matter; that the defendants were only liable to account to Matthew & Thielmann; that they had accounted to them, and that, on a balance of accounts between the defendants and Matthew & Thielmann, only 121*l.* 10*s.* was due, which the defendants had paid over to the trustee of the estate of Matthew & Thielmann.

It appeared at the trial that the plaintiffs were landowners in New Zealand, having offices in Glasgow. Matthew & Thielmann were merchants and factors at Glasgow and Leith. The defendants were corn-factors and brokers in London. The plaintiffs shipped wheat in New Zealand under bills of lading deliverable to themselves in London. These bills were indorsed to Matthew & Thielmann at Glasgow, with which house alone the plaintiffs did business, in order that they might sell the goods in London. Matthew & Thielmann effected sales by indorsing the bills of lading to the defendants, who charged them a commission of two per cent. Matthew & Thielmann delivered to the plaintiffs accounts of the sales, debiting them with all expenses and charging a *del credere* commission of three per cent., and then remitted the balance by cheque.

The plaintiffs knew that Matthew & Thielmann employed brokers to effect these sales, but they were not parties to those contracts, and their names did not appear in the transactions. The defendants paid the proceeds of the sales into their general account at their bankers, and made general remittances to Matthew & Thielmann, with whom they had business relations both at Glasgow and Leith. The defendants' books also shewed the amounts received in respect of each cargo shipped by the plaintiffs. Matthew

m Bramwell, L.J.; Baggallay, L.J.; t, L.J.

& Thielmann stopped payment at a time when they had received and sold through the defendants, but had not accounted for the proceeds of, three cargoes of wheat belonging to the plaintiffs, and at a time when they were indebted to the defendants on their account with the Leith house, but not on their account with the Glasgow house. On a general balance of both accounts the defendants owed Matthew & Thielmann 121*l.* 10*s.*

The plaintiffs brought this action to recover a balance of 2,571*l.* 8*s.* 6*d.* after giving the defendants credit for all sums remitted by them to Matthew & Thielmann in respect of the produce sold. The defendants claimed to set off against this balance amounts due to them from Matthew & Thielmann in respect of transactions between them.

Two questions were left to the jury: First, Did the plaintiffs through their agents employ the defendants to sell and account for the proceeds to the plaintiffs; and did the defendants accept that employment and sell for the plaintiffs? Second, Did the defendants know or have reason to believe that Matthew & Thielmann were acting in these sales as agents for another? To the first question the jury answered No, and to the second Yes.

Field, J., gave judgment for the plaintiffs.

The defendants appealed.

O. Russell and *Finlay*, for the appellants.—The findings of the jury negative the foundation upon which the statement of claim is based: they shew that the defendants were not employed by the plaintiffs, that the defendants never received any money for the use of the plaintiffs; and thus the claim of the plaintiffs must fail. There was no relation of principal and agent between the plaintiffs and the defendants, nor was there any privity between them—*Robbins* v. *Fennell* (1), *Stephens* v. *Badcock* (2). The judgment of the learned Judge is based on *Re Hallett's Estate* (3); but there is a clear distinction between the cases, inasmuch as there the relation of trustee and *cestui que trust* existed, whereas no such relation existed here. There was there a fund which was distinctly earmarked, and that is not so here—*Schmaling* v. *Thomlinson* (4), *Cull* v. *Backhouse* (5), *Cobb* v. *Becke* (6), *Fish* v. *Kempton* (7), *Prince* v. *The Oriental Bank* (8), *Armstrong* v. *Stokes* (9), *Mackersy* v. *Ramsay* (10), were also cited.

H. Matthews and *Barnes*, for the plaintiffs.—The defendants admit that they have received the money claimed by the plaintiffs, and they admit that they received it in respect of cargoes shipped by the plaintiffs and sold for the agents of the plaintiffs. These cargoes were the property of the plaintiffs, and remained their property until delivered to the purchasers through the defendants. Matthew & Co. had implied authority to employ agents to dispose of the plaintiffs' goods. The defendants either received the money as agents for the plaintiffs, or else they have converted the plaintiffs' goods. They were employed to sell cargoes which they knew belonged to some one other than Matthew and Co. They sold for that person, and they are thus placed in a fiduciary position to that person, who is, in the present case, represented by the plaintiffs; and then, on the authority of *Re Hallett* (3), they are responsible to the plaintiffs for the produce of those goods. *Schmaling* v. *Thomlinson* (4), *Fish* v. *Kempton* (7), do not apply, as those cases were decided on the peculiar relation of solicitor and client, a relation in which there could be no lawful delegation of authority. If Matthew & Co. were agents for sale, and if they sold the goods of the plaintiffs, then the plaintiffs can intervene and claim the proceeds—*Rabone* v. *Williams* (11), *Sims* v. *Bond* (12). There is no difference between a contract of sale and one of agency, and Matthew & Co. made the latter instead

(1) 11 Q.B. Rep. 248; 17 Law J. Rep. Q.B. 77.
(2) 3 B. & Ad. 354.
(3) 49 Law J. Rep. Chanc. 415; Law Rep. 13 Ch. D. 696.
(4) 6 Taunt. 147.
(5) Ibid. 148, *note* a.
(6) 6 Q.B. Rep. 930; 14 Law J. Rep. Q.B. 108.
(7) 7 Com. B. Rep. 687; 18 Law J. Rep. C.P. 206.
(8) 47 Law J. Rep. P.C. 42; Law Rep. 3 App. Cas. 325.
(9) 41 Law J. Rep. Q.B. 253; Law Rep. 7 Q.B. 598.
(10) 9 Cl. & F. 818.
(11) 7 Term. Rep. 360 *n*.
(12) 5 B. & Ad. 389.

e former. The vendors are not con-
d as to which it is—*Mann* v. *Fores-*
3), *Maanss* v. *Henderson* (14).
RAMWELL, L.J.—That shews that the
tiffs could perhaps sue those to whom
efendants sold.]
t there was here authority to make
acts of sub-agency—*Lanyon* v.
hard (15). Matthew & Co. were
l to account to the plaintiffs for the
eds, and their sub-agents can have no
s other than those of Matthew & Co.
ETT, L.J.—In insurance it is settled
broker may employ another broker;
hat principle does not hold good in
y.]
ere is, however, here express per-
on—*Westwood* v. *Bell* (16). *Duer*
surance (vol. ii. p. 355) shews that
tract of sub-agency made by the
s of the plaintiffs is really made for
laintiffs, and they can claim all the
it of that contract.
the property of the plaintiffs is trust
rty in the hands of Matthew & Co.,
the plaintiffs have a right, if they
armark that property or its proceeds,
ce those proceeds into the hands of the
dants and to recover them. The de-
nts are bound to keep them distinct;
had notice that the goods were not
roperty of Matthew & Co.—*Ex parte*
ton (17). This claim is founded
n contract, but in respect of property
ible and traced. The defendants sold
n specific cargoes; they received
y for those cargoes; they remitted
ic sums and credited Matthew & Co.
those sums in respect of the produce
plaintiffs—*Ex parte Cooke* (18).
on v. *Willing* (19), *De Bussche* v.
20), *Ryalls* v. *Rolls* (21) and *Ex*
Falk (22), were also cited.

Finlay, in reply.—

[BRAMWELL, L.J.—The Court does not require to hear any further argument on the question of privity.]

The cases which are relied on by the plaintiffs turn on bankruptcy doctrines and might apply if Matthew & Co., being bankrupt, the question was whether the money in question was to go to the plaintiffs or to form part of the general assets. The present case is that put by Thesiger, L.J., in *In re Hallett* (23), for here there was "no trust, no duty in reference to the moneys themselves beyond the ordinary duty of a man to pay his debts." *Ex parte Kingston* (17) was a case of bankruptcy, and the money there was so earmarked, so paid into the bank and so recovered, as to make the case very different from that of the plaintiffs' here. *Ryalls* v. *Rolls* (21) does not affect the question of the rights of set-off in the case of an assignment.

Cur. adv. vult.

BRAMWELL, L.J. (on March 28).—I am of opinion that this judgment cannot stand. I cannot agree with the decision of Mr. Justice Field. The statement of claim alleged that the plaintiffs, through their agents, retained and employed the defendants to sell certain quantities of grain, and that the defendants accepted the said employment and received the goods for that purpose.

This was traversed by the statement of defence, and the jury found that the statement was not proved. Nevertheless Mr. Justice Field felt himself bound to give judgment for the plaintiffs, and that on a ground which I cannot follow. The learned Judge thought that the jury were right, and I may say that we think so also. It is certain that the plaintiffs employed Matthew & Thielmann on one set of terms, and that Matthew & Thielmann employed the defendants on another set of terms, for the terms of payment and the commission were both different. It is conceded that if the defendants had sold these cargoes improperly, the plaintiffs could not sue them, they could only sue Matthew & Thielmann. If (which is

4 Campb. 60.
1 East, 335.
2 Campb. 597.
4 ibid. 349.
40 Law J. Rep. Bankr. 91; Law Rep. 6 App. 632.
46 Law J. Rep. Bankr. 52; Law Rep. 14 123.
3 Bing. N.C. 814.
47 Law J. Rep. Chanc. 381; Law Rep. 8 286.
2 White & Tu. L. Ca. (ed. 5), at p. 771.
Law Rep. 14 Ch. D. 446.

(23) 49 Law J. Rep. Chanc. at p. 426; Law Rep. 13 Ch. D. at p. 724.

a supposable case) the defendants had to sue for their commission, they again could only sue Matthew & Thielmann, and not the plaintiffs. It is therefore conceded that there was no privity of contract, and that the verdict was on the facts right. Mr. Justice Field thought, however, that he was bound to give judgment for the plaintiffs on principles of law. He considered that the defendants were sub-agents; and so they were—that is right; but then Matthew & Thielmann had authority to employ sub-agents. The learned Judge then made a comparison and said that the case is as though it were the case of a principal and agent; and he said that, as a principal can intervene in a contract which a broker has made, and as he can sue the parties with whom the contract is made, so here the plaintiffs can sue the defendants. But although a principal can so intervene, the reason is, that a broker is a person employed to make a contract between two principals, whereas in the present case Matthew & Thielmann were not employed to make a contract of brokerage between the plaintiffs and the defendants. The learned Judge says, "The owner of an estate in England employs a manager at a salary to realise the produce of his estate, . . . and the latter employs a broker, or factor, or agent on commission to effect the sale; but it cannot for a moment be supposed that the original principal may not at any time before the sub-agent has accounted to the mesne agent . . . . intervene and claim the proceeds."

Now the owner of an estate employs a manager to manage, but not to sell. Such a manager, however, has authority to employ an agent to sell, and so has authority to create the relation of principal and agent. I think that there was no contract of agency here; and I would ask, If there were, what were the terms of it? The plaintiffs never authorised anybody to employ any person save on a *del credere* commission.

Then Mr. Justice Field says that there was "a second finding of the jury"—that is, that the defendants knew Matthew & Thielmann were acting as agents; and he holds that it "conclusively entitles the plaintiffs to judgment in respect of their rights as owners of the cargoes, and as such entitled to follow the proceeds of the property in the hands of the defendants in their fiduciary character of agents and trustees."

Now I do not wish to quarrel with any of the doctrines of trusts and fiduciary relations; but I should be very sorry to introduce those doctrines into commercial transactions—into matters of contracts such as these. I think that there is no fiduciary character here and that the defendants do not stand in the relations of trustees to the plaintiffs: there is no trust in this case. I therefore differ from both the grounds on which the judgment of Mr. Justice Field is based. Then the counsel for the respondents (the plaintiffs) took a new point before us. They said that the plaintiffs owned these goods, that they could therefore follow the proceeds if they could trace them. It was said that this was true at common law as at equity. That is so; but I must observe that no such case was made in the statement of claim, or before the jury, or before Mr. Justice Field on further consideration. Now if pleadings are to be of any use, a party ought to be bound by the case which on them he sets up against the defendant, and the defendant ought to know what he has to meet. If this be not so, then pleadings are but a delusion and mockery. Then it is said the pleadings should be amended; but I am of opinion that this case is not within the rule which allows pleadings to be amended so as to decide the real point in controversy in the case, and the real controversy in this case was whether the defendants were liable to the plaintiffs on a contract. It is inconvenient that a new point should be raised in this Court for the first time, and I should be prepared to decide this case on that ground; but I am prepared to decide the case on the merits also. I agree that the produce of the goods can be followed if they can be traced, and that on the authority of the cases cited. If the defendants had sold the goods but had chanced still to have the bills of lading in their possession, the plaintiffs could come and ask for them. But the defendants allege here that they are only

to account for what remained in hands after they had adjusted all accounts with Matthew & Thiel- . I agree with that. Now Matthew ielmann had two houses of business) at Glasgow and another house at ; and it was in respect of the former ess that the plaintiffs employed them. also had another house of business ıith; they employed the defendants spect of both houses. The defen- kept two accounts current with , and when Matthew & Thielmann ed they were indebted to the defen- on the Leith business account and ɔn the Glasgow business account. ɔlaintiffs claim to follow the proceeds e goods in the defendants' hands. ıot think that they can do so. The consequence would be that parties l alter their system of book-keeping ; would lead to confusion. I think fore this appeal must be allowed. I ıeired to add that Lord Justice Brett s with this judgment.

ɔGALLAY, L.J.—I am of the same ɔn. Reliance has been placed by ɔppellants on *Hallett's Case* (3).) is no question as to the principle ıt case. It is well understood that rty or the proceeds of it can be ed if the property can be identified) hands of an express trustee or of other person holding a fiduciary on. There is no fiduciary relation the defendants were not fiduciaries plaintiffs; they were only fiduciaries, ll, to Matthew & Thielmann, so that uthority of *Hallett's Case* (3) does ɔply to the facts of this case.

udgment reversed and entered for defendants.

ıs—Young, Jones, Roberts & Hale, for ıtiffs; Stibbard, Gibson & Co., for defen- s.

[IN THE QUEEN'S BENCH DIVISION.]

1881. March 2. April 12. } THE NATIONAL PROVINCIAL BANK OF ENGLAND *v.* HARLE AND OTHERS.

Chose in Action—Right to Sue—Assignment by way of Mortgage of a Mortgage-debt—Judicature Act, 1873, *s.* 25. *sub-s.* 6.

An assignment by deed of a mortgage debt of 1,380*l.*, *with the interest and all securities, and all right, title, interest and property of the assignor therein, to secure the repayment of a sum due from the assignor to the assignee, and any further sum which might be due, not exceeding in the whole* 1,200*l.*, *is not an "absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only)" of a debt, and the assignee cannot sue upon it.*

Demurrer by the plaintiffs to the statement of defence of Harris, one of the defendants.

The statement of claim set out a mortgage dated the 29th of June, 1877, by the defendants Hall and Harris, to the defendant Harle of certain premises to secure the repayment of 1,380*l.* with interest, which sum the defendants Hall and Harris covenanted to pay to the defendant Harle, his executors, administrators and assigns. On the 30th of October, 1879, by an indenture the defendant Harle assigned and transferred to the plaintiffs all the mortgage debt of 1,380*l.*, and the interest, and all securities, and all right, title, interest and property of the defendant Harle to secure the repayment to the plaintiffs by the defendant Harle of 939*l.* 9*s.* 3*d.*, and any further sum not exceeding 1,200*l.* which might become due from Harle to the plaintiffs. The plaintiffs claimed 984*l.* 19*s.* 11*d.* The defendant Harris put in a statement of defence to which the plaintiffs demurred, but which it is immaterial to set out, as the statement of claim was held bad.

A. Wills (*J. A. Foote* with him), for the plaintiffs.—One of the points taken by the defendant is that the plaintiffs are not entitled to sue. It is, however, contended that the indenture of the 30th of October, 1879, was an "absolute assign-

ment" (not purporting to be by way of charge only) within the meaning of section 25, sub-section 6 of the Judicature Act, 1873. The Act excepts a mere appropriation, not passing the property, from its operation, but not a mortgage. If it had meant to except mortgages it would have said so. There is no proviso in the deed of assignment for the reassignment of the debt.

Cave (*Dugdale* with him).—This is not an absolute assignment, it is a charge. The Judicature Act applies only to cases of assignment where the assignor retains nothing. Here he retains a right to an account, and the assignment is only to the extent of 1,200*l.*, the debt assigned being 1,380*l.* He cited *Hammond* v. *Messenger* (1).

Wills, in reply.

Cur. adv. vult.

POLLOCK, B. (on April 12), after observing that, in view of the result at which he had arrived, it became unnecessary to give any decision upon the demurrer to the defence, read the following judgment:—

In this case there was a demurrer by the plaintiffs to the statement of defence of the defendant Harris, who had pleaded separately. Upon the argument of this demurrer, however, an objection was taken by counsel for Harris to the plaintiffs' statement of claim, which it was alleged disclosed no legal cause of action.

The facts as they appeared upon the plaintiffs' statement of claim are as follows: The plaintiffs are bankers at Leeds, and Johnson Harle, who was one of the defendants in this action, on the 14th of September, 1878, deposited with them as security for the balance of a banking account an indenture of mortgage. This mortgage, which was dated the 29th of June, 1877, was made between the defendants John Hall and Peter Harris, of the first part, and the defendant Johnson Harle, of the second part, and the effect of it was as follows:—

The defendants John Hall and Peter Harris granted and assigned to the defendant Johnson Harle certain premises therein described by way of mortgage, and (subject to a prior mortgage therein recited) to secure the repayment to Johnson Harle of the sum of 1,380*l.*, with interest thereon at five per cent. per annum, then due and owing from John Hall and Peter Harris to Johnson Harle, and they, John Hall and Peter Harris, for themselves, their heirs, executors and administrators, covenanted with Johnson Harle, his executors, administrators and assigns, that they, John Hall and Peter Harris, or the survivor of them, or the heirs, executors or administrators of such survivor, their or his assigns, would, on the 29th of December, 1877, pay or cause to be paid to Johnson Harle, his executors, administrators and assigns, the sum of 1,380*l.*, together with interest thereon at the rate mentioned from the 28th of June, 1877, and would further pay interest at the rate of five per cent. per annum upon so much of the principal sum of 1,380*l.* as should remain unpaid after the 29th of December, 1877, until the principal sum should be paid off and discharged.

On the 30th of October, 1879, the defendant Johnson Harle was indebted to the plaintiffs in respect of his banking account in the sum of 939*l.* 9*s.* 3*d.*, and thereupon, by an indenture bearing date the 30th of October (to which the plaintiffs by their statement of claim refer), Johnson Harle assigned and transferred to the plaintiffs all the principal sum of 1,380*l.* due and owing on the security of the indenture mentioned in the second paragraph of the statement of claim, and the interest thenceforth to become due for the same, and all securities for the principal sum and interest, and all benefit and advantage thereof, and all right, title, interest and property of Johnson Harle therein, to secure the repayment to the plaintiffs by Johnson Harle of the sum of 939*l.* 9*s.* 3*d.*, and any further sum, not exceeding in the whole 1,200*l.*, which might thereafter become due and owing from Johnson Harle to the plaintiffs.

On the 9th of December, 1879, by a further indenture of that date made between Johnson Harle, of the one part, and the plaintiffs of the other part, and indorsed upon the indenture of the 30th of October (to which the plaintiffs by their

(1) 9 Sim. 327; 7 Law J. Rep. Chanc. 310.

ıent of claim referred), it was agreed
ɔclared (amongst other things) that
ıdenture of the 30th of October
l constitute and be a continuing se-
to the plaintiffs, notwithstanding
ettlement of account or any other
r or thing whatsoever, and should
addition to, and should not operate
to prejudice, any other securities
ɔr thereafter held by the plaintiffs
ɹpect of the moneys intended to be
ɔd.

the 31st of October, 1879, express
ı in writing of the assignment was
to the defendants John Hall and
Harris. The statement of claim
ır alleged that there is now due and
; from the defendant Johnson Harle
ı plaintiffs in respect of his current
nt the sum of 984*l.* 19*s.* 11*d.*

ɔn this state of facts it was con-
ł, on behalf of the plaintiffs, that the
of the deed of the 30th of October,
was to create an absolute assign-
by writing under the hand of the
ıor (not purporting to be by way of
e only) of a debt to the plaintiffs
ɹ the meaning of section 25, sub-
n 6 of the Judicature Act, 1873;
hat, as express notice in writing had
given to the defendants Hall and
s, it must be deemed to be effectual
r to pass and transfer the legal right
ı debt from the date of such notice,
ll legal and other remedies for the
within the meaning of that sub-sec-

In the course of the argument it
agreed that I should refer to the
ıment itself as if it had been set out
ll in the statement of claim. The
ntion on the part of the defendant
hat the assignment was not an abso-
ssignment within the meaning of the
:e, but that it was an assignment
ı purported to be by way of charge
and it was pointed out that the
ıssigned amounted to 1,380*l.*, whereas
ebt due from Harle to the bank at
late of the assignment was only
9*s.* 3*d.*, and the further advance
ı was contemplated, and which it was
d should be secured by the assign-
, did not exceed in the whole 1,200*l.*
hough the terms used in the sub-
n referred to are not new, the effect
given to such an assignment of transferring the legal right to a debt is new, and, as far as I can discover, this is the first time that any Court has been called upon to put a construction upon this provision. Looking, however, to the language used and to the well-known principles by which the Courts have been guided when dealing with the assignment of a security by way of mortgage, I have come to the conclusion that the assignment in question is not one that is within the scope of the statute. The words employed are both affirmative and negative. The assignment must be "absolute," and it must not "purport to be by way of charge only." In so far as the premises under mortgage are concerned, the legal estate in them is no doubt conveyed to the plaintiffs by language as full and complete as if the defendants had been purchasers out and out; but in equity it has long been established that the substance of the transaction must be looked to, to see what is its effect, and hence the mortgage debt has always been treated as the principal and the land as the accessory, and it is the assignment of a debt which is dealt with by the statute.

One matter with reference to the language of the sub-section ought, perhaps, to be further mentioned, namely, what is the meaning of the words "purporting to be by way of charge only"? Do they mean an assignment which expresses on the face of it that it is made "by way of charge only," or do they mean an assignment which, coupled with all the surrounding circumstances, shews that it is by way of charge only? Cases may arise which will require a careful consideration of this question. In the present case, however, I do not feel that any great difficulty is presented, because the assignment expressly declares that if the defendant Harle shall pay to the plaintiffs the sum of 939*l.* 9*s.* 3*d.*, which it recites is owing from him to them, and any further sum not exceeding the 1,200*l.*, with interest, which may at any time thereafter be due from the defendant to the plaintiffs, the plaintiffs will then reconvey the mortgaged premises to the defendant. This appears to me sufficiently to indicate upon the face of the assignment that it

"purports to be by way of charge only," so as to bring it within the exception and prevent it from being an absolute assignment within the meaning of the statute.

In the result, therefore, upon this demurrer, there must be judgment for the defendant, with costs. Leave to apply to myself at chambers as to amendment or entry of judgment.

Judgment for defendant.

Solicitors—Wilde, Berger, Moore & Wilde, agents for G. B. & G. H. Nelson, Leeds, for plaintiffs; Torr, Janeways, Torr & Gribble, agents for A. Hailstone, Bradford, for defendant.

[IN THE COURT OF APPEAL.]

1881. March 28. April 13. } INMAN AND COMPANY *v.* BISCHOFF AND OTHERS.*

Marine Insurance — Time Freight — Perils of the Seas—Option to Charterer to Discharge Ship if Unseaworthy.

The Government chartered a ship from the plaintiffs on monthly hire for the space of three months certain, and thenceforward until the Government should cause notice of discharge to be given, such notice to be given when the ship was in port in the United Kingdom. Payment was to be made monthly during such time as the ship should remain in the Government employ, and should efficiently perform the service, one month's freight to be paid in advance, the second payment at the end of two months, and to be a moiety of one month's freight. The Government were empowered, if the ship should become incapable, to retain two months' payment, to put the ship out of pay, or to make an abatement. The plaintiffs insured with the defendants, for three months, the ship and freight outstanding against perils of the seas. The ship sailed on the 22nd of February, one month's freight having been paid in advance. She struck on a rock on the 21st of March, and was so much damaged as to require repairs. These repairs were completed by the 14th of May, but on the 17th of April the Government had discharged the ship at the Cape, and put her out of pay since the 21st of March. In an action to recover the two months' freight,—Held, *that the insurers were not liable to the assured, because although the policy included the freight in question yet the loss was not proximately caused by the perils of the sea.*

Appeal from the judgment of Brett, L.J., at the trial without a jury.

The statement of claim alleged that the plaintiffs were owners of the steamship *City of Paris*; that on the 18th of February, 1879, the Government chartered that ship on certain terms; that on the 22nd of February the plaintiffs insured the *City of Paris* with the defendants by a policy, which was set out; that the policy covered the freight to be earned under the charter-party; that the defendants underwrote the policy with notice of the charter-party; that the ship sailed and struck on a rock, and that in consequence the Government cancelled the charter-party, and the plaintiffs lost two months' outstanding freight; and they sued to recover 7,190*l.* 6*s.* 8*d.* the amount of that freight.

The statement of defence denied these allegations.

It appeared that the *City of Paris* was on the 18th of February, 1879, chartered, by the commissioners for executing the office of Lord High Admiral, from the plaintiffs under a charter-party, which was, as far as is material, to the following effect:—

It provided that the transport regulations of Her Majesty's service should be taken to be incorporated with the charter, and witnessed that the *City of Paris* was chartered for service as a transport "on monthly hire for the space of three calendar months certain, and thenceforward until the commissioners shall cause notice to be given" to the plaintiffs or the person in charge of the ship "that she is discharged from Her Majesty's service, such notice to be given when the ship is in port in the United Kingdom." The plaintiffs covenanted

* *Coram* Lord Coleridge, C.J.; Baggallay, L.J.; and Bramwell, L.J.

the ship should "at all times during ontinuance of this charter be strong, tight, staunch and substantial, both e water and beneath, and in every ct seaworthy."

e commissioners covenanted to pay the hire and freight of the said ship e rate of 25*s.* per ton per calendar h . . . . during such time as the ship shall be continued in Her sty's employ, and shall duly and ntly perform the service for which is hereby engaged." The plaintiffs to receive one month's freight in nce on account, and at the end of nonths a moiety of another month's ht on account, on production of certes of efficiency. It was further ded that if the ship should become able from any defect or cause whatr to perform efficiently the service acted for, then the commissioners t retain two months' payment and the ship out of pay or make an ment, and that if the ship should be "from the dangers of the sea or est, or be driven on shore by accistress of weather or any other cause, thereby lost, damaged, captured or ared incapable of service, . . . such &c., shall be considered as a sea risk, Her Majesty shall not be liable to or be in any manner prejudiced by loss," &c.

e plaintiffs had on the 14th of Feb written to the agents of the defens as follows: "The company's steam-*City of Paris* is about to proceed on rnment charter to Natal, and we be glad if you would kindly inform hat your rate would be for three hs on stores and on freight outling, the first month being paid in nce."

ter some further correspondence a y was effected with the defendants the 22nd of February for three dar months from the 20th of Feb to the 19th of May. It provided the "ship's goods and merchandise, for so much as concerns the assured greement between the assured and ers in the policy are and shall be ed at on freight outstanding." The s were "of the seas and of all other perils, losses and misfortunes to the goods, merchandises and ship or any part thereof." "The ship and freight are warranted free from average under three per cent., unless general, or the ship or craft is stranded, sunk or on fire."

The policy did not refer to the charter-party, nor did it appear that the defendants had express notice of the terms of the charter-party.

The *City of Paris* sailed on the 22nd of February, and one month's pay was paid in advance. She struck on a rock on the 21st of March, and received considerable damage. She was surveyed, and a report was made that after being repaired she would be fit to proceed. The troops on board were trans-shipped, the stores being left on board. The repairs were commenced in April; but on the 14th of April the senior naval officer at the Cape gave notice to the captain of the *City of Paris* that she would be discharged from Her Majesty's service as soon as the stores were removed, and on the 17th of April he gave the following notice:—

"The hired transport No. 11 being now cleared of all Government stores and fittings, you are acquainted that the *City of Paris* is this day discharged from Her Majesty's service." He also gave on the same day a certificate of efficiency in the usual form, to which was appended the following note: "The *City of Paris* was discharged from Her Majesty's service on the 17th of April, 1879, having been retained so long on account of the removal of Government stores. Inefficient since the 21st of March, 1879, having touched the Roman Rock and sustained much damage."

The repairs were completed, and a certificate of efficiency given on the 14th of May, when the captain gave notice to the Government officials that he was ready to proceed as directed. The Government officials answered that the *City of Paris* had been discharged, and had been off pay since the 21st of March. The ship then proceeded home, and the Government made her owners an allowance for coals in consideration of their withdrawing any claim to compensation. The jury having been discharged, Brett, L.J., found "that the injury was such as

made it reasonable for the Government to decline to carry troops in that ship until the repairs were made, that there was no unreasonable delay in the doing of the repairs," and therefore, in his opinion, "according to law the Government was justified in throwing up the charter-party, and the loss of the freight was the result of the injury, which arose from the sea peril, which was a sufficiently proximate cause of the loss;" and he held that the plaintiffs were entitled to recover for the loss of freight as from the 21st of March, and gave judgment for them for that amount.

The defendants appealed.

C. Russell and *Cohen* (with them *Barnes*), for the appellants.—The defendants, the insurers, are not liable, for freight of the peculiar character which the freight in this case was, is not covered by this policy; but even if it were covered still the freight was not in this case lost by the perils of the seas. The policy in this case does not cover this peculiar kind of freight; it does not cover a time charter-freight at all, and certainly not this time freight, only ordinary time freight—*Havelock* v. *Geddes* (1), *Ripley* v. *Scaife* (2). The only thing insured against was the risk of the total loss of the ship; it is not clear what the nature of the outstanding freight was. The charter-party cannot be incorporated into the policy, for it is not referred to in it. It is true that the subject-matter may be identified by reference to the policy—*Halhead* v. *Young* (3); but that is not what it is proposed to do here. Further, the freight was not lost by the perils insured against. When it is desired to insure against particular risks it is done by inserting such words as "risks as per bill of lading." The only risks insured against are the enumerated risks, and this freight was lost by the act of the Government in exercising the option reserved by the charter-party—*Taylor* v. *Dunbar* (4). The loss of freight was occasioned by the inherent quality of the subject-matter insured. *Jackson* v. *The Union Marine Insurance Company* (5) may be relied on by the plaintiffs, but it does not affect the defendants, for there was there a mutuality of discharge. It cannot be contended that the underwriters were put on enquiry, for that doctrine does not apply to insurance cases, inasmuch as the assured are bound to supply all the necessary information—*Harrower* v. *Hutchinson* (6), *Bates* v. *Hewitt* (7).

Gully and *French* (with them *Hamilton*), for the plaintiffs.—The plaintiffs lost two months' freight owing to damage received from perils of the seas, and this insurance is an insurance against the loss of outstanding freight.

[COLERIDGE, C.J.—The Court does not desire to hear argument on the question whether the policy covers time freight. This charter-party gives a right to one party to prevent the freight from being earned in certain circumstances; but is that a peril of the sea?]

The perils of the sea prevented the freight being earned, for but for the injuries received by the perils of the sea the freight would have been earned.

[COLERIDGE, C.J.—The perils of the sea caused the exercise of the option; but is that option a peril of the sea?]

The charter-party must be read with the policy, and the underwriter must be taken to have notice of all the risks, as stated by Blackburn, J., in *Allison* v. *The Bristol Marine Insurance Company* (8). The loss incurred is the result of the option caused by the perils of the sea. The freight accrued *de die in diem* while the ship was efficient. The damage to the ship was caused by the perils of the sea, which thus prevented this freight being earned, therefore they caused the loss of the freight, and that loss is covered by the insurance.

Cur. adv. vult.

(1) 10 East, 555.
(2) 5 B. & C. 167.
(3) 6 E. & B. 312; 25 Law J. Rep. Q.B. 290.
(4) 38 Law J. Rep. C.P. 178; Law Rep 4 C.P. 206.
(5) 44 Law J. Rep. C.P. 27; Law Rep. 10 C.P. 125.
(6) 39 Law J. Rep. Q.B. 229; Law Rep. 5 Q.B. 584.
(7) 36 Law J. Rep. Q.B. 282; Law Rep. 2 Q.B. 595.
(8) Law Rep. 1 App. Cas. 209, at p. 231.

Inman & Co. v. *Bischoff* (*App.*), *Q.B.*

BRAMWELL, L.J. (on April 13), read the judgment of the Court.—The first question argued in this case turned on the clause in the charter-party that "if at any time it shall be made to appear to the commissioners that the ship became incapable from any defect or cause whatsoever to perform efficiently the service contracted for, then it shall be lawful for the commissioners to retain in arrear the pay of the ship for two months, and to put the ship out of pay."

The ship having become disabled by perils of the seas, and requiring repairs, the doing of which would last a considerable time, the commissioners, acting under this clause, did put the ship out of pay; and the plaintiffs said the freight was lost, and lost by perils of the seas.

The defendants answered that either the commissioners had no power to do what they did—and if not the freight was not lost—or that they had, and if so the freight was not lost through the perils of the seas, but through the peculiar powers given to the charterers.

This argument supposes that the charter-party may be read as though set out in the policy. No doubt it not only may but must be looked at, and for the purposes of this question at least may be read as though set out in the policy. But what then? The question still arises, Was the loss of the freight a loss by perils of the seas? We are of opinion that it was not. We are of opinion that but for the particular clauses in this charter-party freight would have continued to be earned, notwithstanding perils of the seas. It must be carefully borne in mind that the hiring was not for three months merely, but was for an indefinite time, namely, till notice should be given by the commissioners when the ship should be in a port in the United Kingdom; with a provision that the minimum term of hiring should be three months.

Now it is clear, on reason and authority, that but for the clause enabling, if it does enable, the commissioners to put the ship out of pay she would have continued on it till she returned to the United Kingdom and was discharged, including the time necessary for repairs. That this is so is strengthened by the consideration of the provision in the charter-party, "that the ship shall at all times during the continuance of the charter-party be strong, firm, tight, staunch and in every respect seaworthy;" for that involves necessary repairs being done to the ship during the time included in the charter-party.

But for the clause in question, therefore, the time in the charter-party would have run during the time of those repairs and till the ship was discharged in a port in the United Kingdom.

The perils of the seas, therefore, have not caused the loss of freight. They are the *causa sine qua non*, but not the *causa causans*—not the proximate cause of the loss.

Suppose there had been a clause that the ship might be put out of pay if she stranded, and she had stranded, not been injured, but put out of pay. That would have been a loss in one sense by perils of the seas, no less than this, but clearly not covered by the policy.

Mr. French, however, took another point. He said, and apparently correctly, that the charter-freight accrued *de die in diem*, but only while the ship "duly and efficiently performed the service;" that perils of the seas had prevented such due and efficient performance, and so the freight was lost by such perils. We are of a different opinion. There is no exception of perils of the seas in the charter-party to excuse the shipowner, but the clauses which say when he shall be liable, by implication, exclude a liability caused by perils of the seas. Those words "duly and efficiently perform," &c., do not constitute a condition precedent. That is manifest from this, that if they did, then, though the service was rendered, but not duly and efficiently, the plaintiffs would not be entitled to any payment. For example, if through mismanagement or even misfortune, five weeks were consumed in doing what could be done in four, no payment would be due. This cannot be. The remedy in such case is by cross action or putting the ship out of payment, the power to do which makes the construction contended for the less needful and probable. Fur-

ther, the payment is to be monthly, and the second payment is to be after the ship has been two months in the service from the commencement of the service, and is to be a moiety of one month's freight.

This is inconsistent with the contention of Mr. French. It may be asked what is the meaning of the words. The best answer I can give is to say about the same as the meaning in a lease of the words that "the lessee well and truly paying rent and performing covenants may quietly enjoy," &c. We think then that the plaintiffs fail on this ground also, and the judgment must be reversed.

This renders it unnecessary to consider other questions, but we may add we are quite of opinion that this policy includes such a freight as that in the charter, namely, a time freight.

Appeal allowed.

Solicitors—Gregory, Rowcliffe & Co., agents for Hill & Dickinson, Liverpool, for plaintiffs; Waltons & Bubb, for defendants.

[IN THE COURT OF APPEAL.]

1881. April 12. } EATON *v.* BASKER AND OTHERS.*

Corporation—Contract not under Seal—Local Authority—Public Health Act, 1875, *s.* 174—"*Contract whereof the value or amount exceeds* 50*l.*"

An urban sanitary authority, upon an outbreak of scarlet fever in its district, agreed with the plaintiff, a medical practitioner, by a contract not under seal, to pay him for attending to the fever patients at the rate of 5*s.* 3*d. per day for each of the tents in which the patients were received. There were at first two tents, but others were afterwards added. His charges amounted to* 97*l.* 7*s.* 9*d.*

In an action against the urban authority to recover this amount,—

Held (*reversing the judgment of* STEPHEN, J.), *that the agreement between the plaintiff and the defendants was not a contract "whereof the value or amount exceeds* 50*l.*," *within the meaning of the Public Health Act*, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 174, *and therefore the plaintiff was entitled to recover.*

Hunt *v.* The Wimbledon Local Board (48 Law J. Rep. C.P. 207; Law Rep. 4 C.P. D. 48) *distinguished.*

Appeal by the plaintiff from the judgment of Stephen, J., on further consideration, reported *Ante*, p. 194, where the facts are fully stated.

Finlay, for the plaintiff.—Section 174 of the Public Health Act, 1875 (38 & 39 Vict. c. 55) (1), does not apply to the contract in this case, and the plaintiff is entitled to recover from the corporation of Grantham for the services which he has rendered to them.

[LUSH, L.J.—By sub-section 4 of the same section, "Before any contract of the value or amount of 100*l.* or upwards is entered into by an urban authority, ten days' public notice, at the least, shall be given, expressing the nature and purpose thereof and inviting tenders for the execution of the same." Suppose the amount here were 100*l.*, how could this provision apply?]

There is not only one contract here, but several contracts; and, even if this is not so, the section can only apply to contracts, the value or amount whereof, at the time when they are made, exceeds 50*l.* This is not the case here, for the plaintiff's services might have terminated when less than 50*l.* had become payable.

J. C. Lawrance and *Dugdale*, for the defendants.—The decision of this Court in *Hunt* v. *The Wimbledon Local Board* (2) shews that section 174 applies.

[LUSH, L.J.—In that case the plans were assumed on all hands to be worth more than 50*l.*]

The decisions on section 10 of the

* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Lush, L.J.

(1) 38 & 39 Vict. c. 55. s. 174: "With respect to contracts made by an urban authority under this Act, the following regulations shall be observed, namely—(1) Every contract made by an urban authority, whereof the value or amount exceeds 50*l.*, shall be in writing and sealed with the common seal of such authority."

(2) 48 Law J. Rep. C.P. 207; Law Rep. 4 C.P. D. 48.

r. Basker (App.), Exch.

f Frauds, which are collected in *on Sales* (3), shew that there is contract. In *Baldey* v. *Parker* royd, J., says, "This was all one on, though composed of different At first it appears to have been a for goods of less value than 10*l.*, ie course of the dealing it grew ract for a much larger amount. therefore, it was one entire con- hin the meaning and mischief of ute of Frauds, it being the inten- that statute that where the con- her at the commencement or at lusion, amounted to or exceeded e of 10*l.*, it should not bind unless isites there mentioned were com- ith." That reasoning is exactly le in the present case. Whether 174 applies or not, this contract t common law, not being under of the corporation. There is no on in this respect between exe- d executory contracts—*Church* v. *erial Gaslight and Coke Company* *Lindley on Partnership* (6). y was not heard in reply.

WELL, L.J.—I think this judgment e maintained. In the first place e to consider whether this is a "whereof the value or amount 50*l.*," within the meaning of 38 ct. c. 55. s. 174; that must mean ct for an amount which exceeds he time of making the contract— ls are not "shall exceed" or "may " There was not a separate con- each day, but a contract for so the service lasted, at the rate of per day per tent. I do not say plaintiff could not have sued *de em* to recover each separate sum ame due; but it was one contract. e it might involve over 50*l.*, but unt might be less. The plaintiff ave withdrawn before what he had had amounted to 50*l.*, or the defen- night have discharged him. In ng judgment in the Court below , J., said, "An attempt was made to shew that the contract was not one of which the value or amount exceeded 50*l.* when it was made, as it was a contract for 5*s.* 3*d.* per tent per day, but I think that it became a contract, the value or amount of which exceeded 50*l.* as soon as the amount due to Mr. Eaton exceeded 50*l.*" (7). But suppose Mr. Eaton, after his services had continued for twenty days, had said, "Pay me for the services I have rendered" (which he would have had a right to do), what would have become of the contract? Suppose it does not come within section 174, it is contended that the contract is one which at common law must be under seal, and the judgment of Lord Justice Cotton in *Hunt* v. *The Wimbledon Local Board* (2) is quoted in support of that contention. Possibly it might be said on behalf of the defendants that the statute has not said that other contracts may be by word of mouth, but only that particular contracts shall not be so made, and therefore that if the statute does not apply the common law rule does. I think that contention is got rid of by holding, as I do, that this is a contract which a corporation can make by word of mouth. It is not within the statute, and, if the common law rule is not excluded, it would not preclude a corporation from making such a contract as this by parol. As to the members, it is clear that if judgment goes against the corporation there is no case against the members individually. Therefore the judgment in their favour must be sustained, but the judgment in favour of the corporation must be reversed, and judgment must be given against the corporation.

BAGGALLAY, L.J.—As to the members the appeal fails. I agree with Mr. Justice Stephen as to that question. As to the corporation, on the main point I agree with Lord Justice Bramwell. I am not sure that the statute does not exclude the common law rule, that a contract by a corporation must be under seal.

LUSH, L.J.—I am also of opinion that the judgment cannot be sustained. It all turns on the provisions of section 174.

) Pt. ii. c. iii. p. 106, 2nd ed.
) 2 B. & C. at pp. 42, 43.
) 6 Ad. & E. 846.
) Bk. ii. c. i. s. 6, p. 353, 4th ed.

(7) *Ante*, p. 196.

Eaton v. *Basker* (*App.*), *Exch.*

That section must mean an amount known at the time when the contract was made, and I think here that the amount could not have been known at the time of the making of the contract. I think it is like the cases under section 4 of the Statute of Frauds, in which it has been held that it is not enough that the contract could last for more than a year, but the person seeking to avail himself of the statute must shew that the contract was incapable of performance within a year. So here the contract must be incapable of being for a sum under 50*l.* in order to make the statute applicable. In *Hunt* v. *The Wimbledon Local Board* (2) the action was to recover payment for plans, which would exceed 50*l.*, and this was known to all parties at the time of the making of the contract.

Here when the order was given it was not known how long the fever would last or what the plaintiff's claim would amount to—whether it would be for 5*l.* or 10*l.* or 50*l.* or more. Therefore the plaintiff is entitled to recover against the corporation, but not against the individual members.

Judgment reversed as to the corporation, and affirmed as to the other defendants.

Solicitors—Routh, Stacey & Castle. agents for Henry Thompson & Sons, Grantham, for plaintiff; Bolton, Smith & Co., agents for Henry Beaumont, Grantham, for defendants.

[IN THE QUEEN'S BENCH DIVISION.]

1881. March 25. PLOMESGATE UNION (*appellants*) *v.* WEST HAM UNION (*respondents*).

Poor—Settlement—Residence for Three Years—"Parish"—39 & 40 Vict. c. 61. *s.* 34.

[For the report of the above case, see 50 Law J. Rep. M.C. 51.]

[IN THE QUEEN'S BENCH DIVISION.]

1881. Feb. 23. PAYNE *v.* FERN.

Bill of Sale—Property in Goods assigned—Power of Grantee to seize Goods removed from Grantor's Premises.

By the provisions of a bill of sale assigning to the plaintiff all the goods and chattels on the grantor's premises, the latter and his assigns were to be allowed to hold and possess the said goods, so long as no default in payment was made, nor any act occasioning the proviso for entry to be put in force by the grantee was done by the grantor or his assigns. The grantee had the power of entry on to the grantor's premises and of taking possession of the goods in the event of the grantor making default in payment, or in the event of the grantor removing the goods before the money secured by the bill of sale should be fully paid.

While part of the money remained unpaid the grantee sold some of the goods to the defendant, and delivered them to him off the premises:—

Held, *in an action for conversion of the grantee's goods, that the grantor could not give to the defendant any valid title to the goods, the general property in which had been conveyed to the grantee, and that the latter was entitled to demand them wherever they might be.*

This was an action brought to recover damages for the conversion by the defendant of certain live stock, a cart, a ladder and other chattels, which had been previously assigned to the plaintiff under a bill of sale by one Griffin, a farmer, to secure the payment of 26*l.*, advanced by the plaintiff to him.

The bill of sale contained an assignment of goods in the usual form, but did not contain any express covenant by the mortgagor not to sell the goods comprised in it; but there was a provision making the bill of sale absolutely void if the mortgagor should, on demand made to him or his assigns, pay the 26*l.* There was a further clause, that if the mortgagor should make default in payment of the 26*l.*, or in case he should assign or remove or permit to be removed the said goods, before the money secured

ss v. Fern, Q.B.

y should be fully paid, it should be for the plaintiff to enter the pre- of the mortgagor, and take and possession of the goods assigned to id dispose of the same. A further o was, that until the mortgagor or signs should make any default or y act in consequence whereof the o for re-entry should be put in it should be lawful for the mort- and his assigns to hold and possess ods.

ile 14*l.* was still due from Griffin, August, 1880, sold and delivered premises, among other things, the goods and chattels, the subject of esent action, to the defendant for hich was paid or settled in account. laintiff at once demanded the goods the defendant, but he declined to r them up.

s action was then brought, and on for trial at Gloucester before ms, J., who directed the jury that r thought that the sale was not in the ordinary course of business ust find for the plaintiff. Accord- s verdict was given for 15*l.*

inquet moved for a rule for a new n the ground of misdirection.—The ff here could only exercise his of seizure so long as the goods on the premises; he could not follow on to defendant's premises.

LD, J.—Was not the general pro- in the grantee of the bill of sale?] property was subject to be divested Griffin sold the goods. The latter ot bound by any covenant not to nd the plaintiff had the right to n the premises only.

NISTY, J.—How could Griffin part the property which was in the iff? The defendant could shew no he could only have what Griffin give him.]

LD, J.—I am of opinion that there l be no rule, and that the learned was quite right. The plaintiff money to a person, and takes, as curity, the property in certain These goods were stock, live nd, on the premises at the time of the assignment. The defendant now, having the same goods in his possession, refuses to deliver them up to the owner. This is a conversion, and gives plaintiff a right of action. Mr. Bosanquet admitted that the plaintiff had the property in the goods, and could not really dispute that he had the right of possession.

Now I quite agree with the judgment of Lord Justice Lush and Mr. Justice Manisty in *The National Mercantile Bank* v. *Hampson* (1), that a farmer who has given a bill of sale, but who is allowed to carry on his business in the ordinary way, may, in the course of that business, sell stock included in the bill of sale from off the premises, there being in effect an implied licence that he should do so, and be able to give a valid title to purchasers; and so far and in such a case the grantee of the bill of sale does lose his rights over the property. But that is not the case for the defence set up here. The condition in this bill of sale being that if the grantor remove any stock off the premises the grantee may enter on the premises and seize goods, extends also to this, that he may seize the goods not only while on the premises, but if they have been removed off.

The security might be rendered absolutely worthless were the defendant's contention to prevail, namely, that so soon as anything was moved outside the gate the right of possession could no longer be enforced by the person who, nevertheless, still retained the property in the goods so removed.

MANISTY, J., concurred.

Rule refused.

Solicitors—W. A. Holcombe, agent for T. E. Jones, Manchester, for plaintiff; Chester & Co., agents for Cooper & Chawner, Uttoxeter, for defendant.

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(1) 49 Law J. Rep. Q.B. 480; Law Rep. 5 Q.B. D. 177.

[IN THE COURT OF APPEAL.]
(*Appeal from the Common Pleas Division.*)

1881. Feb. 23, 24. } LATTER *v.* BRADDELL AND WIFE AND ANOTHER.*

Assault—Consent—Submission.

The plaintiff's mistress requested a doctor to examine the plaintiff, who was a domestic servant, in order to ascertain whether she was pregnant. The plaintiff objected to the examination, but undressed by the doctor's orders, and submitted to be examined. The doctor examined her, and ascertained that she was not pregnant. He used no violence or threats and did nothing more than was necessary for the examination. The mistress was not present.

The plaintiff sued her master and mistress and the doctor for assault. At the trial the Judge directed a verdict for the master and mistress, and the jury found a verdict for the doctor :—

Held (*affirming the order of the Common Pleas Division*), *that there was no evidence against the master and mistress, that the verdict in favour of the doctor was right, and that a rule for a new trial was rightly discharged.*

Appeal by the plaintiff from the discharge of a rule for a new trial in the Common Pleas Division, Lopes, J., being of opinion that the rule ought to be made absolute, and Lindley, J. (who tried the case at the Manchester Assizes), that it ought to be discharged. The facts and evidence are fully stated in the report in the Court below, *Ante*, C.P. 166.

Murphy and *Morten*, for the plaintiff, supported the appeal, and referred to *Lucas* v. *Mason* (1) and *Christopherson* v. *Bare* (2).

Addison and *French*, for the defendants, were not called on.

BRAMWELL, L.J.—I am of opinion that Mr. Justice Lindley was right; in fact, I may almost say that he was more than right, for it seems to me that he might have directed a verdict for the defendant, Dr. Sutcliffe; but if there was any evidence, his direction to the jury was right, and their finding was right, although it may be a practical hardship. Very likely the plaintiff thought the defendants had a right to have her examined; but the truth is, she submitted to it, and it is impossible to say the jury were wrong in finding that she submitted. She may have submitted under an erroneous notion of law, but it was not through fear of violence. It seems to follow that if the verdict for Dr. Sutcliffe was right the other defendants are entitled to a verdict. I think Mr. Justice Lindley was right in telling the jury that there was no evidence against Captain and Mrs. Braddell. There could only be evidence against them if the plaintiff submitted through fear of violence, and if what was done was done by their order.

BAGGALLAY, L.J.—I am of the same opinion. The argument for the plaintiff is on the ground of misdirection in withdrawing the case against Captain and Mrs. Braddell from the jury, and on the ground that the verdict in favour of Dr. Sutcliffe was against the weight of evidence. I think the verdict as to Dr. Sutcliffe was right. As to Mrs. Braddell I am not satisfied that she did more than tell Dr. Sutcliffe to do what might be necessary and proper. Order XXXIX. rule 3 would be fatal to the appeal, for no wrong was occasioned, even if there was misdirection.

BRETT, L.J.—I am of opinion that Mr. Justice Lindley was right. The doctor could only be liable if he did what he did without the consent or submission of the plaintiff; and Captain and Mrs. Braddell could only be liable if they authorised the doctor to do what he did, and he did it, without such consent or submission. I think there was no evidence against Captain and Mrs. Braddell. As to the doctor, there might be a case against him, though there was not a case against the other defendants. Then, was there any case for the jury as against Dr. Sutcliffe? I think Mr. Justice Lindley would have been justified in withdrawing

* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Brett, L.J.

(1) 44 Law J. Rep. Exch. 145; Law Rep. 10 Exch. 251.

(2) 11 Q.B. Rep. 473; 17 Law J. Rep. Q.B. 109.

Braddell (App.), C.P.

om the jury. To make out an Dr. Sutcliffe, the plaintiff must he used violence, or that she nable cause to believe that he tening violence. I think the lown in the judgment of Mr. indley in the Court below is Even if there was any evidence r. Sutcliffe I think there was ection; and if the verdict as to right the withdrawal from the he case against Captain and ldell was immaterial, because, cliffe did not assault the plain- s not matter if they authorised

Judgment affirmed.

Shaen & Roscoe, for plaintiff; Toulth & Fuller, agents for Atkinson, Paterson, Altrincham, for defendants.

QUEEN'S BENCH DIVISION.]

THE MERSEY DOCKS AND HARBOUR BOARD *v.* LUCAS.

tax—"Profits"—Statutory Re--Corporations.

pellants were constituted, by Act ument, a corporation for the nt of the Mersey Dock Estate. Act the surplus revenue of the , which was derived from dock after payment of interest on rrowed, was to be applied towards fund for the extinguishment of the moneys spent in the construction , and for no other purpose what- Held, that these surplus moneys, der the statute, could only be ap- particular manner for the pur- ducing the past debt, and were ible as profits, could not be as- he income-tax.

tated for the opinion of the der the Customs and Inland Act, 1874 (37 & 38 Vict. c. 16. o the extent of the liability of ants to income-tax.

appellants are the Mersey Docks and Harbour Board or Corporation, constituted by Act of Parliament for the management of the Mersey Dock Estate. There are twenty-eight members of the Board, four of whom are appointed by the Mersey Conservancy Commissioners, and the remainder are elected by the dock ratepayers.

2. The estate of the appellants consists of property at Liverpool and Birkenhead, and comprises wet docks, graving docks, warehouses, quays, sheds, houses occupied by dock masters and other servants of the Board, lands acquired under the authority of Parliament for dock purposes, workshops, cranes, machinery, railways and buildings used for and known as the dock offices.

3. The estate is vested in the appellants by virtue of the Mersey Docks and Harbours Act, 1857. There are no shareholders nor any persons individually interested or entitled to share the surplus (if any) that may arise from the estate.

4. A large part of the estate has been acquired and constructed by means of money borrowed from time to time in that behalf on the security of the rates hereinafter mentioned, under statutory powers. These loans are represented by bonds of the board, bearing interest. The amount of the debt is about 14,000,000*l.*

5. The revenue of the appellants is derived from the under-mentioned sources, the assessment collection and application of the same being directed and controlled by Act of Parliament:—

(1) Dock tonnage rate on ships entering into or leaving the docks.

(2) Dock dues on goods imported into or exported from the port of Liverpool, and brought into the docks, or landed at, or deposited upon or carried over any of the appellants' quays, piers, landing stages or land.

(3) Town dues on goods imported into or exported from the port of Liverpool.

(4) Anchorage dues on vessels anchoring in the Mersey.

(5) Harbour rates paid by vessels entering or leaving the Mersey, but not using the appellants' docks.

(6) Charges for unloading and housing in and delivering from the appellants' warehouses goods from vessels.

(7) Quay rents levied in respect of goods not removed by the owners from the quay within the prescribed time, and rents for quay space occupied by owners of goods by permission of the board.

(8) Rental of various properties belonging to the board, and occupied for the storage of timber, as shipbuilding yards, stores, coal-yards, &c.

(9) Payments made by shipowners for the special appropriation to their use of quay space.

(10) Charges made for the use of cranes and machinery, and tolls levied for the use of the appellants' dock railways.

6. Subject to certain provisions of the Mersey Docks and Harbour Act, 1857, which are not material for the purposes of this case, and subject also to certain special directions hereinafter mentioned, the application of the revenue of the appellants is governed by the 284th section of the Mersey Dock Act and Consolidation Act, 1858. In that Act (section 3) the word "rates" is defined as including "dock rates, tonnage rates, graving-dock rates, harbour rates, wharf rates, warehouse rates, town dues, anchorage dues and other rates and dues, or payments in the nature thereof, payable to the board."

By the said 284th section it is provided as follows:—

"All the moneys which shall be collected, levied, borrowed and raised or received by the board under or by virtue of this Act or the said Act, the application of which may not be otherwise expressly directed, shall be applied by the board in any order with respect to priority of such application as they shall deem expedient for the following purposes, some or all of them; that is to say:—

"In payment of all expenses and charges of collecting rates.

"In payment from time to time of all interest accruing due on moneys borrowed and to be borrowed, and in payment of the Mersey Docks annuities, hereinafter authorised to be granted according to the respective priorities of such moneys and annuities under this Act.

"In the construction of works authorised to be erected, established and maintained by the board, and in supporting, maintaining and repairing the same, and in carrying into execution all the provisions of this Act, and of the Mersey Docks and Harbour Act, 1857.

"And in the general management, conducting, securing, preserving, improving, amending, maintaining and protecting the Mersey Dock Estate.

"And the residue or surplus of all such moneys which shall remain after such application thereof as aforesaid, shall from time to time be applied in or towards the repayment of all principal moneys which shall have been borrowed by, or shall be due by, the board, and in or towards the purchasing up and extinguishing of the Mersey Dock annuities, in the manner hereinafter directed, until all such principal moneys shall have been repaid, and all Mersey Dock annuities shall have been purchased up and extinguished; and when by the means last mentioned all such principal moneys shall have been repaid, and all such dock annuities shall have been purchased up and extinguished, then and in such case the board shall, and they are hereby required to lower and reduce the rates hereby authorised to be taken, so far as the same can be done in the then state of the docks, and leaving sufficient for the payment of the expenses of collecting the rates, and the supporting, maintaining and repairing the docks, and the general management, conducting, securing, preserving, improving, amending, maintaining and protecting the Mersey Estate."

And "except as aforesaid, such moneys shall not be applied by the board for any other purpose whatsoever."

7. By the 285th section of the same Act it is provided as follows:—

"Nothing in this Act contained shall alter or affect the question of the liability of any of the docks vested in the board to parochial or local rates, but the same shall in all respects be judged of

termined as if this Act had not assed."

he special directions as to the ap- on of the revenue of the estate so they are material to this case, re- the application of moneys to a g fund for the repayment of the al moneys of the debts, and are ied in the 4th section of the r Docks (Money) Act, 1859, which llows:—

order to make provision for the ient of the principal moneys which lready been borrowed, or which reafter be borrowed by the board the authority of Parliament, be it d that after payment in each year charges and expenses attending llection of rates, or incidental , or to the recovery thereof, and ayment of all interest accruing moneys for the time being form- harge upon such rates, and of the nnuities authorised to be granted board, and after payment of all s and expenses of supporting, ining and repairing the works au- d to be erected, established and ined by the board, and of the l management of the Mersey Dock , and of all reasonable expenses ary for conducting, securing, pre- , improving, amending, maintain- d protecting the same, the board early, and every year subsequent 24th day of June, 1860, apply the s (if any) of the rates which shall in their hands after such pay- as aforesaid, to the extent of 0*l.*, or such less amount as the rplus shall be equal to, in or to- the repayment of some or any of incipal moneys which shall then come due and payable, and in the sing up and extinguishing of the Dock annuities which may be xisting, according to the respec- iorities of such moneys and an- , until all principal moneys due on urity of the rates shall have been and all Mersey Dock annuities ave been purchased up and extin- d, and subject to the provisions contained, all rates and other s which shall be collected, levied, borrowed or received under, or by virtue of, the said recited Acts, or either of them, or of this Act, the application of which may not be otherwise expressly directed, shall and may be applied by the board according to the provisions for that purpose contained in section 284 of the Mersey Dock Acts Consolidation Act, 1858."

The word "rates" in the above section has the same meaning as is assigned to it by the Mersey Dock Acts Consolidation Act, 1858.

9. The appellants (as directed by the above-mentioned Act, 1857) make up year by year an account shewing their total receipts and expenditure, and the appropriation of the surplus (if any) of the former over the latter. If, after payment of interest on the debt and providing for the prescribed sum to be placed to the sinking-fund account, there remains any balance to the credit of the general account, the amount is carried forward to the next year's account and employed for the general purposes of the trust and in meeting accruing liabilities.

10. In the annual account—which was made up to the 1st of July, 1872—the total amount of the net receipts of the appellants was 697,964*l.*, and out of that sum, after providing for the payment of interest on the debt, the sum of 100,000*l.* was placed to the sinking fund account, and a surplus was carried forward to the next year's account.

11. By the Act 36 & 37 Vict. c. 18, income-tax at the rate of threepence in the pound was imposed for the year commencing the 6th day of April, 1873, in respect of all property, profits and gains mentioned or described as chargeable under schedules A, C, D or E of the Act 16 & 17 Vict. c. 34, and all such provisions contained in any Act relating to income-tax as were in force on the 5th day of April, 1873, were made applicable to the income-tax so imposed.

The provisions of the Acts relating to income-tax which have the most material bearing upon the question in this case, are No. III. of schedule A in section 60 of 5 & 6 Vict. c. 35, section 102 of the same Act and section 8 of 29 & 30 Vict. c. 36.

In making a return for assessment of income-tax by the commissioners acting under schedule D for the year 1873–74, the liability of the appellants was stated at the amount due and payable by them for interest on the debt during the year of assessment, being the sum of 532,252*l.*

The respondent was dissatisfied with the amount stated in the return, and by surcharge the sum of 532,252*l.* has increased to 697,964*l.* as the profits of the preceding year of the concern under the management of the appellants.

The appellants gave notice of appeal to the commissioners, and upon the hearing of the appeal contended that the liability to income-tax (if any) did not extend beyond the sum which was paid as interest upon the debt, and ought not to extend to the said sum of 100,000*l.* carried from the revenue to the sinking fund account, or to the surplus carried forward to the next year's account. On the other hand it was contended on behalf of the respondent that under the provisions of the Income-Tax Acts the appellants were liable to assessment to income-tax in respect of the profits arising or accruing to them from the concern under their management, and not in respect of interest due or payable by them, and that for the purpose of ascertaining the amount for such assessment, the total amount of their receipts should be taken, from which there should be deducted the cost of working, maintaining and repairing the sources of income, but not the interest payable upon the debt, nor the sum of 100,000*l.* The commissioners confirmed the surcharge in the sum of 697,964*l.*, and the question for the opinion of the Court was, whether the assessment made upon 697,964*l.* was the proper assessment, or whether it should have been made upon the sum of 532,252*l.*

Benjamin and *Bigham*, for the appellants.—Inasmuch as under the special Acts the profits accruing to the corporation are not to be applied to anybody, such profits are not liable to be assessed under the Income-Tax Acts. None of the surplus income is available as profits, but goes to pay off debts which the corporation are bound under the special terms of the Act of Parliament to get rid of by these means. The point raised is completely covered by the decision in *The Glasgow Corporation Water Commissioners* v. *The Solicitor of Inland Revenue* (1), determined in the Court of Session in 1875. There the Glasgow Water Commissioners were authorised under a local Act of Parliament to borrow money on annuities and mortgages, and to acquire the works of certain private water companies, and were required to levy a rate sufficient along with the other income to cover all annual expenses, including a sum of not less than one per cent. on the money borrowed, to be accumulated as a sinking fund for the redemption of the annuities and mortgages, and to be applied to no other purpose, any balance to be applied to reduce the rates of the following year. And the Court held that the surplus, after paying expenses, was not assessable as profits under the Income-Tax Acts. The respondents will doubtless endeavour to bring the present case within the principle laid down in *The Attorney-General* v. *Black* (2), where the Brighton Corporation were held liable to pay income-tax in respect of a coal duty levied by them. But in that case the duty was of the nature of a toll, and was levied from whatever persons landed coals, whether inhabitants of Brighton or strangers. Moreover, that case was decided in 1871, and was cited and relied on by the Crown in *The Glasgow Corporation Water Case* (1), but was distinguished by the Judges. The Lord President, in delivering the judgment of the Court, said, in reference to *Black's Case* (2), "There it must be observed the commissioners were making a profit out of a tax levied upon the lieges generally, and were applying the proceeds of that tax for the benefit of the community which they represented, and therefore they were held, most justly I think, to be making profit, no doubt not for individual profit, but for corporate benefit." And Lord Ardmillan said, "Where there is an excess of revenue over the neces-

(1) Court of Session Cas. (4th ser.) vol. ii. p. 708.

(2) 40 Law J. Rep. Exch. 194; Law Rep. 6 Exch. 78.

xpenditure for distribution, if a
ny voluntarily uses that excess of
ie to pay off their debt by the for-
n of a sinking fund, a question
very well be raised whether, that
their voluntary use of funds which
have been profit if not so applied,
night not still be liable for income-
But here the statute, not the will
company, applies the whole excess
erection of the sinking fund, and
atutory result of the application of
noney is the ultimate diminution,
may be, the ultimate extinction, of
ssessment. The statute not only
rises but directs the appropriation of
oney, and that being the case, I do
hink that this sum applied under
owers and by the direction of the
e for the purposes of the statute can
sidered as income."

Solicitor-General (with him *The ey-General* and *Dicey*), for the Crown. fallacy of the appellants' argument confounding profits with the way ich profits shall be applied. The alls within the principle laid down *e Attorney-General* v. *Black* (2), it was held that "profits such as were liable to pay income-tax, not-anding an express provision as to anner in which the surplus should be d." With reference to the *Glasgow Case* (1), the judgment of the can be supported on other grounds. a rate was levied on all the inhabit-and if the income had been taxable fect would be to tax a rate—see bservations of the Judges in *The l Revenue* v. *The Glasgow Corpora-as Commissioners* (3), decided in which strongly support the respon-contention.

VE, J.—I am of opinion that the ants are entitled to our judgment. are three Mersey Dock Acts, one 57, which relates to the general ter of the Mersey Docks, and which l not go through, and which also from what sources the revenue is to ived, namely, from dock tonnage, dues, &c., all of which by section 6 of the subsequent Act of 1858 are denominated rates. They are to include dock rates, tonnage rates, graving-dock rates and several others, which I need not enumerate. Then the 284th section of that Act provides in what way the moneys which shall be collected, levied, borrowed and raised or received by the board under and by virtue of either of the two Acts shall be used, and then points out the manner in which they shall be used—that is to say, in the payment of expenses of collecting, the payment of interest, the construction of works and the general management and maintaining of the estate. Then it provides this, upon which the question mainly turns: "The residue or surplus of all such moneys which shall remain after such application thereof as aforesaid shall from time to time be applied in or towards the repayment of all principal moneys which shall have been borrowed by or shall be due by the board, and in or towards the purchasing up and extinguishing of the Mersey Dock annuities in the manner hereinafter directed until all such principal moneys shall have been repaid, and all Mersey Dock annuities shall have been purchased up and extinguished; and when by the means last mentioned all such principal moneys shall have been repaid, and all such dock annuities shall have been purchased up and extinguished, then and in such case the board shall, and they are hereby required to lower and reduce the rates hereby authorised to be taken so far as the same can be done in the then state of the docks, and leaving sufficient for the payment of the expenses of collecting the rates, and the supporting, maintaining and repairing the docks, and the general management, conducting, securing, preserving, improving, amending, maintaining and protecting the Mersey Dock Estate." Then come the words, "And, except as aforesaid, such moneys shall not be applied by the board for any other purpose whatsoever." Now here the appellants are willing to pay, and it is assumed that they will pay, income-tax upon the interest which they pay to the lenders of certain money, and to certain annuities. They do not pay that income-tax upon the profit which

(3) 13 Scottish Law Rep. 556.

they themselves received, but they pay it as interest due by the persons who receive the profit in the shape of interest upon their bonds or the annuities. They take it exactly in the same way as tenants take the income-tax of their landlords. It is a simple mode of securing the duties being paid without any evasion of duty. It does not matter to the person who has to pay the money where the money goes, and therefore it is a more secure way for the Government to take it from the person paying, although the income-tax is really paid by the person for whom the person furnishing the money acts for that purpose as agent. Upon that there is no dispute in this case.

Then the question is, Are they liable to pay income-tax upon this surplus beyond all the moneys which are paid in the reduction or redemption of their debt, and paid in the expense of maintaining and carrying on the undertaking? The argument for the appellants is that that is not in any sense profit to them, that they did not get anything out of it in any sense for themselves, nor did they get it as a body receiving a fund and exercising their volition (if I may use the expression) in its distribution, being able to distribute it to the beneficiary parties they represent, but they get nothing at all. As fast as the money is received it is appropriated by the statute itself to a particular use, and therefore they never get any profit, or, if it can be said that they nominally received it into their hands, and that it in that sense could be called profit, then it is a profit which by force of the statute must immediately pass out of their hands; and therefore it is not a profit in the sense of the Income-Tax Statute.

Now I am of opinion that this is the correct construction of the different clauses of the Act. In addition to the section of the Act of 1858 there is a section in the Act of 1859 which says that the board "shall yearly and every year subsequent to the 24th day of June, 1860, apply the surplus (if any) of the rates which shall remain in their hands after such payments as aforesaid to the extent of 100,000*l.*, or such less amount as the said surplus shall be equal to, in or towards the repayment of some or any of the principal moneys which shall then be due and owing on the security of the rates, and which then have become due and payable, and in the purchasing up and extinguishing of the Mersey Dock annuities which may then be existing according to the respective priorities of such moneys and annuities until all principal moneys due on the security of the rates shall have been repaid;" and "subject to the provisions herein contained all rates and other moneys which shall be collected, levied and borrowed and raised or received under or by virtue of the said recited Acts or either of them or of this Act, the application of which may not be otherwise expressly directed, shall and may be applied by the board according to the provision for that purpose contained in section 284 of the Mersey Dock Acts Consolidation Act, 1858." To put it shortly, therefore, this surplus fund, after being used to pay up all these annuities, and these debts which they owe to the persons who had lent them money, whether upon bonds or in the shape of annuities, or in any other way, is to be applied as directed in the 284th section of the Act of 1858, and that directs, as I have already read, that it shall be applied by the board to lower and reduce the rates, and "except as aforesaid, such moneys shall not be applied to any other purpose whatsoever." Reading that as I do, I have the greatest possible difficulty in seeing what the argument was against the appellants, because it seemed to me an absolute and statutory application for the money, and that the money could not therefore be called profit in the hands of the person who received it, because he was directed to use it for the purpose mentioned in the Act, and the Act of Parliament directed him not to apply it to any other purpose whatsoever. It is said that this provision is subject to paying income-tax; but certainly in words it is not so subject. In the case of the *Attorney-General* v. *Black* (2) there was nothing like the prohibitory clause, which there is in this Act, to say nothing of other differences. There being there a certain surplus which went over to the taxpayers generally, it was

was subject to income-tax on the
l, amongst others, that it was to go
mmon fund—in other words, to the
n profit of the Corporation of
on, and was to be used for all pur-
to which they thought proper to
riate it. That was the distinction
in the *Glasgow Water Case* (1),
was more like the present case than
the *Attorney-General* v. *Black* (2),
gh not as strong as the present
because in that case, as far as I
gathered, there were no such pro-
y words as here occur at the end
284th section. There the words
hat the surplus should be applied in
ng the domestic rate—the water-
It was a water company of a public
, and the surplus was to be applied
ucing the domestic water-rate. The
there held that the surplus was not
o income-tax, and that it was distin-
ible from the previous case of *The*
ey-General v. *Black* (2) on the ground
here was a statutory provision for
plication of the surplus, and that
rplus was not to be applied at the
tion of any body of people, or for
articular benefit of any body of
. It appears to me that, assuming
ase to be good law (and it is not
ed by the Solicitor-General), this
s *a fortiori* considerably stronger
our of the appellants, because it has
elements, as far as I can see, of the
w Water Case (1), and it has, *plus*
this prohibitory clause, that the
shall not be applied to any other
se whatsoever. The only answer
an be applied to these words is,
in some previous cases parochial
have been held to take precedence
tatute directing the application of
n moneys. I do not see how that
any way affect the respondents;
re the liability to pay parochial taxes
ressly maintained, and that fact,
seems to me, tends to strengthen
ppellants' case, for I should cer-
have expected a similar provi-
o have been made as regards the
ent of the income-tax had the Legis-
so intended. For these reasons I
opinion that the appellants are en-
to our judgment,

LINDLEY, J.—I am of the same opinion. I think *prima facie* the Solicitor-General's argument was well founded; that looking at the word "profit" in the Act, that means what "profits" ordinarily mean, namely, the balance of receipts over expenditure necessary to make the income; and when you have got profits in that sense, without anything further, income-tax is doubtless payable. But, after all, in dealing with any particular case where you have several Acts of Parliament to consider, you must consider them all together. Now there is a general Act passed since the special Act, which says how certain receipts are to be applied, and says negatively that those moneys so received are not to be applied in any other way. To make it plainer still, there is a provision to the effect that nothing in that Act shall exempt this Board from liability to parochial or local rates. All we have to do is to construe this Act of Parliament; and it appears to me it is quite impossible to hold that the combined effect of the three special Acts of Parliament and the Income-Tax Act is to make income-tax payable out of these receipts, or any portion of them. I rely upon the general words of this Act of Parliament, and the authorities do not appear to me to throw much light upon it. The *Gas Works Case* (3) turned upon Acts of Parliament which have not got those negative words, and without those the decision in the *Gas Works Case* (3) might perhaps be applicable. I rely entirely on the wording of this special Act of Parliament, which is inconsistent with the theory that income-tax is payable. Our judgment will therefore be for the appellants (4).

Judgment for appellants.

Solicitors—Gregory, Rowcliffes & Co., agents for A. T. Squarey, Liverpool, for appellants; Solicitor to Inland Revenue, for respondent.

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(4) See *The Mayor of Worcester* v. *The Assessment Committee of the Droitwich Union*, 46 Law J. Rep. M.C. 241.

[IN THE QUEEN'S BENCH DIVISION AND THE COURT OF APPEAL.]

1881. March 4. May 5. } HAMILTON *v.* CHAINE. (MORGAN, *claimant.*)*

Bill of Sale—Statement of Consideration—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 8.

In a bill of sale the consideration was stated to be "700l., now in hand, paid." On the making of the bill of sale the grantee gave the grantor two cheques amounting to 700*l.*, *and, under a previous arrangement between them, the cheques were cashed, and out of the proceeds the sum of* 7*l.* 10*s. cash, together with a promissory note for* 10*l.*, *was paid to the grantee for "commission on the loan and expenses":*— Held (*affirming the judgment of the Queen's Bench Division*), *that the consideration was not truly stated so as to satisfy section* 8 *of the Bills of Sale Act*, 1878.

This was an appeal, by way of Case stated, from the decision of a County Court Judge on an interpleader issue, involving a question of the sufficiency of the statement of consideration in a Bill of Sale.

The facts, so far as they are material, are thus stated in the Special Case:—

Par. 2. On the 27th of January, 1880, Mrs. Chaine applied to the claimant to advance her money upon the security of certain household furniture and effects at certain houses—Nos. 19 and 20 Holland Road, Hove.

Par. 3. The said furniture and effects had some time previously been assigned by her to a third person, under a bill of sale then outstanding, to secure the sum of 271*l.*, which sum was then due, and Mrs. Chaine proposed to the claimant that out of a portion of the advance to be made by him to her he should pay off such bill of sale. The claimant assented, and there and then, at Mrs. Chaine's request, gave to the holder of that bill of sale a cheque for 271*l.*, which sum was paid on account of the total advance to be made to Mrs. Chaine.

Par. 4. The claimant subsequently offered to lend Mrs. Chaine 700*l.* in all, upon the security of the said furniture and effects, which offer Mrs. Chaine accepted. It was arranged that the parties should meet at the office of the claimant's solicitor to complete the transaction on the 31st of January, 1880.

Par. 5. The parties duly met as agreed on the said 31st of January, 1880. There were present, besides the claimant and Mrs. Chaine, Mr. Maynard, the solicitor, who attested the bill of sale, and a Mrs. Dawson, who attended with Mrs. Chaine, to whom Mrs. Chaine was at that time indebted in the sum of 350*l.*

Par. 6. At the said interview a bill of sale of the said furniture and effects from Mrs. Chaine to the claimant was produced and executed by Mrs. Chaine. The claimant then handed to Mrs. Chaine his cheque, payable to her order for 429*l.*, being the balance of the said sum of 700*l.* after deducting the 271*l.* previously paid to the holder of the prior bill of sale. Mrs. Chaine then handed the cheque to one of Mr. Maynard's clerks with instructions to cash it and bring back the proceeds, which was done.

The cheque was cashed and the money brought back to the office and applied as follows:—

There was paid, first, to Mrs. Dawson 350*l.*, being the amount due to her from Mrs. Chaine; second, to the said Mr. Maynard there was paid 21*l.* 5*s.* 6*d.*, being the amount of his charges in respect of the preparation of the bill of sale and incidental thereto; third, 7*l.* 10*s.* was paid to or retained by the claimant for commission on the said loan and expenses in connection therewith, in pursuance of a previous arrangement to that effect between the claimant and Mrs. Chaine; and Mrs. Chaine further gave the claimant her promissory note for 10*l.* also in respect of commission on the said loan and expenses in connection therewith. The balance of the said sum of 700*l.*, amounting to 50*l.* 4*s.* 6*d.*, was paid to Mrs. Chaine.

The said bill of sale was put in on behalf of the claimant and the due execution thereof by Mrs. Chaine proved. It comprised the furniture in question in the issue, and it was admitted to be in com-

* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

pliance with the provisions of the Bills of Sale Act, 1878, in all respects except as to the sufficiency of the statement of the consideration, which the plaintiff alleged did not comply with the provisions of section 8 of that Act. The Judge found as a fact that the handing over of the two cheques of 271*l.* and 429*l.* respectively were parts of the same transaction, but gave judgment for the defendant on the ground that, having regard to the payment to or retention by the claimant of the sum of 7*l.* 10*s.* on the settlement as before mentioned, the consideration for which the bill of sale was given was not set forth within the above-mentioned section of the Bills of Sale Act, 1878.

The claimant appealed.

Petheram and *Gore*, for the appellant, cited *Hamlyn* v. *Betteley* (1), *Ex parte The National and Mercantile Bank* (2), *Ex parte The Charing Cross, &c., Bank* (3) and *Ex parte Challoner* (4), as shewing that, where the consideration is stated, if it be proved that the grantor has had the benefit of the full sum, either in cash or partly in cash and partly in repayment of liabilities actually incurred, it is sufficiently stated. Here the grantor had had the benefit of the whole 700*l.*, partly in cash and partly in payment of liabilities already incurred.

R. T. Reid, for the respondent.—The words in the bill are "700*l.* now in hand, paid," as denoting the consideration, whereas it was not really "in hand, paid." The cases cited are not actually in point, but only to a certain extent analogous. True, it is enough if the lender has in fact paid the sum, either all to the borrower, or some part of it to others by his direction, and the rest to him, but there is no authority for holding that the lender has a right to deduct a sum for commission—see *per* Grove, J., in *Hamlyn* v. *Betteley* (1). In *Challoner's Case* the money which was paid was due to a solicitor. In this case the consideration was really 692*l.* 10*s.*, and not, as stated, 700*l.*

Gore, in reply.

GROVE, J.—The County Court Judge is right. The true sum given was smaller than that specified as the consideration for the bill of sale. The principle would be the same if it had happened to be a larger sum that was given, but in this case the Judge has found that a certain sum was deducted. In point of fact, a larger sum was deducted than that found by the County Court Judge to have been deducted, for not only was the amount stated really reduced by the 7*l.* 10*s.* charged for commission, but the amount of the promissory note for 10*l.* was also given in diminution of that amount. As I read the case, the 7*l.* 10*s.* was never in fact paid or advanced as real consideration. The agreement was that 700*l.* was to be advanced in consideration of certain furniture, &c., being transferred to the grantee of the bill of sale, and the mortgagor covenants with the mortgagee for interest at twelve per cent. per annum. It is not quite clear in the case of *Ex parte Challoner* (4) whether interest was to be paid on the whole sum named as the consideration, and the point was not taken in the argument; but in this case it is perfectly clear that it was intended to be paid on the full sum of 700*l.* The question is, Was the consideration truly stated? It would be if all the 700*l.* had been paid in hand. But, as a matter of fact, 700*l.* was not paid, because the sum of 7*l.* 10*s.* and, in addition, 10*l.* by a note of hand, were given to the grantee by the grantor, and therefore 17*l.* 10*s.* was really kept by or returned to the grantee at the time of the transaction. Can it be said that the consideration is truly stated, when 17*l.* 10*s.* is retained? What was legally the consideration? On the part of the grantee the consideration was the payment of money to the grantor; on the part of the grantor the transfer of the furniture to the grantee. The statute requires the real consideration to be set forth. This has not been done here. The real consideration paid by the grantee

(1) 49 Law J. Rep. C.P. 465; Law Rep. 5 C.P. D. 327.
(2) 50 Law J. Rep. Chanc. 231; Law Rep. 15 Ch. D. 42.
(3) 50 Law J. Rep. Chanc. 157; Law Rep. 16 Ch. D. 35.
(4) Law Rep. 16 Ch. D. 260.

was 682*l.* 10*s.*, while the sum of 17*l.* 10*s.* remained in his hands. It is said that the grantee may properly retain part of the money, and cases have been cited as shewing this. But that can only be where there is a true debt due from the grantor, such as the legitimate expenses of the bill of sale, but here the matter in dispute is as to a commission. If this commission had, in fact, been a pre-existing debt, as if there were evidence that the grantee had gone to London or incurred expenses, it might have been deducted; but it was a commission for the very transaction, the loan, the making over the money. Therefore the real consideration was not 700*l.*, but something less, and it is immaterial how much less. *The Charing Cross Bank* (3) is closely in point, the only difference being that the sum deducted was for interest and not for commission. It is said that the facts shew a prior arrangement, but I cannot read it as "commission earned," but merely when talking of the transaction, that it was agreed that the sum of 7*l.* 10*s.* was to be deducted. If we do not hold so, we should let in all those matters which it was the object of the statute to prevent—that is, we should be allowing it to be stated that the consideration was a sum never really advanced, but partly kept back as bonus. This the Act was intended to avoid.

The grantee was not entitled to interest on the whole amount of 700*l.*, because part of it was retained, yet in this case it was clearly and explicitly reserved on the whole amount, which distinguishes this case from *Ex parte Challoner* (4). The bargain is not fairly represented and the real transaction is not truly stated by the bill of sale. I am therefore of opinion that the consideration is not sufficiently set forth.

LINDLEY, J.—I am of the same opinion. The case is not free from difficulty, owing to the authorities cited, especially *Ex parte Challoner* (4). The Act requires the consideration to be set forth. Now what is the meaning of the consideration for which the bill of sale is given? It must mean the consideration moving to the borrower. In this case that is said to be 700*l.* Is that true? It turns entirely on the facts. This was how the 700*l.* was made up:—

	£	s.	d.
To the holder of prior bill of sale	271	0	0
Mrs. Dawson . . .	350	0	0
Money due to Mr. Maynard	21	5	6
Cash advanced . . .	50	4	6
Commission . . .	7	10	0
Total . . .	700	0	0

And then the borrower gave the lender a promissory note for 10*l.* The actual consideration for the advance was the bill of sale and the promissory note; the consideration from the lender was 692*l.* 10*s.*, or, if the promissory note be taken into account, 682*l.* 10*s.* I am rather disposed to consider the 10*l.* promissory note in the same way as the 7*l.* 10*s.* This consideration, so actually advanced, is not expressed in the deed. The interest is, moreover, payable on 700*l.* at twelve per cent. per annum. It is said this was the agreed price of an advance of 700*l.* But there never was an advance of 700*l.*; it may have been the agreed price of an advance of 692*l.* But this is less, therefore it is not what is stated in the bill of sale. Turn the figures how you will, this is not the price of an advance of 700*l.*, but of 692*l.* 10*s.* In the case of *The Charing Cross Bank* (3) there was a deduction for interest and expenses. But here it is not found that there was any previous arrangement. The case of *The Charing Cross Bank* (3) is most like this. If, however, the lender deduct anything, he must express it, and he cannot keep back part of the alleged advance as the price of that advance.

The claimant appealed.

Petheram and *Gore*, for the claimant. —The consideration is truly stated in the bill of sale so as to satisfy section 8 of the Bills of Sale Act, 1878 (5). Reading

(5) Section 8 of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31) enacts that "Every bill of sale to which this Act applies shall be duly attested, and shall be registered under this Act within seven days after the making or giving thereof, and shall set forth the consideration for which such bill of sale was given; otherwise such bill of sale, as against all trustees or assignees of the estate of the person whose chattels, or any of them, are

raphs 4 and 6 of the Special Case ner, it is clear that the 7*l.* 10*s.* to be ted from the sum advanced was a due to the grantee when the advance ade. If the grantor had refused to he advance, the grantee could have ered from her the 7*l.* 10*s.* as damages each of the agreement whereby the e lost the profit he would have if the 700*l.* had been advanced. ase therefore is governed by *Ex The National Mercantile Bank; in ynes* (2) and *Ex parte Challoner; Rogers* (4). The case of *The ng Cross Advance and Deposit Bank; Parker* (3) is distinguishable, be- there was no evidence of an agree- to lend the sum stated as the con- tion. The real agreement there o lend 90*l.* only, whilst 120*l.* was sed as the consideration in the deed. *F. Reid*, for the grantor of the bill e, was not heard.

MWELL, L.J.—I am of opinion that ppeal must be dismissed. In my the transaction was this: The e of the bill of sale says, "I will ou 700*l.*, but in truth you can only e 692*l.* 10*s.* The case therefore is apable of the ingenious argument has been addressed to us, that the ment was to lend 700*l.*—the 7*l.* 10*s.* a debt due to the lender at the time loan which he was entitled to . The substance of the transaction agreement that the deed shall re- t the grantee as having lent 700*l.*, at the grantor shall take 692*l.* 10*s.* the 7*l.* 10*s.* being called "com- n." The transaction therefore is thin the decision in *Ex parte The al Mercantile Bank; in re Haynes* I quite agree that it is not right to dly distinctions and refinements decisions on the construction of the Act of Parliament; but here I am of opinion that there has not been a sufficient statement of the consideration for the bill of sale to satisfy the Act.

BRETT, L.J.—I am of the same opinion. I think the agreement between the parties was that a sum should be stated in the bill of sale as the consideration, which was not the real sum but something else. It was part of the agreement for the loan that this should be done. It may be true that it was part of the arrangement that the cheques for the whole sum should, in the first instance, be handed over to the grantor, but it was also part of the arrangement that the whole of the proceeds of the two cheques was not to go to her, and that part of the proceeds should be paid back to or retained by the drawer of the cheques. It is absurd to call the 7*l.* 10*s.* commission. It is said that the case is like *Ex parte Challoner; in re Rogers* (4), in which the Court of Appeal held that the consideration was truly stated when part of it was deducted by the grantee in payment of the costs and expenses of preparing the deed. With regard to that decision I can only say that, if it was strictly in point in the present case, I should, of course, have followed it, but with reluctance. For the reasons already stated, however, I do not think it applies here. I may add that, had I been a party to the decision in *Ex parte The National Mercantile Bank; in re Haynes* (2), I should have shared the extreme doubt which Lord Justice Bramwell appears to have entertained in that case.

COTTON, L.J.—The question for our decision is, whether the consideration is truly stated in this bill of sale.

As I understand the arrangement, the 7*l.* 10*s.* was to be deducted from the 700*l.* —not returned after the consideration had been paid, because with respect to the other sum of 10*l.* which the lender was to receive for the same thing, a promissory note was given. It was simply an arrangement by which the lender was to retain, as his own profit, part of the consideration stated to be paid on the bill of sale. The case is entirely dis-

ed in such bill of sale, under the law to bankruptcy or liquidation, . . . shall ed fraudulent and void so far as regards perty in or right to the possession of any comprised in such bill of sale which, at the time of filing the petition for bank- r liquidation, . . . and after the expira- such seven days, are in the possession, or t possession, of the person making such ale."

tinguished from *Ex parte The National Mercantile Bank; in re Haynes* (2), where part of the consideration stated on the bill of sale was to be applied in payment of a debt due from the grantor to the grantee. It is said that *Ex parte Challoner; in re Rogers* (4) governs this case. There a sum was retained for costs due to the lender, who was a solicitor. The case is entirely distinguishable from this, for the solicitor's claim was for work done, in respect of which he could have recovered even if the money had not been advanced. I must say that I arrived at my decision in that case with hesitation, and only because I thought we were bound to follow *Ex parte The National and Mercantile Bank; in re Haynes* (2).

Judgment affirmed.

Solicitors—Venn & Woodcock, agents for Goodman, Brighton, for the appellant; Nash & Field, agents for Stuckey & Co., Brighton, for the respondent.

[IN THE COURT OF APPEAL.]

1881. March 21, 22. } MITCHELL AND ANOTHER *v.* HOMFRAY.*

Undue Influence—Confidential Relation—Patient and Medical Man—Revocable Gift.

At the trial of an action by the executors of G. to recover the amount of a gift of money made by G. to her medical man, it was admitted that, when the gift was made, the relation of patient and medical man existed between G. and the defendant, and that G. had no independent advice of any kind. In answer to questions left to them by the Judge, the jury found that there had been no undue influence in fact, or fraud, on the part of the defendant; and that, after the relation of patient and medical man had come to an end between G. and the defendant, and after any effect produced by it had been removed, she intentionally abode by what she had done. The Judge was not asked to leave, and did not leave, to the jury the question whether G., when she made the gift, or subsequently, knew that it was revocable, and he entered judgment for the defendant upon the findings:—Held, *that as the effect of the findings was that G., after the relation and influence had ceased, deliberately determined she would not revoke the gift, whether or not it was revocable, the judgment was rightly entered.*

* *Coram* Lord Selborne, L.C.; Baggallay, L.J.; and Bramwell, L.J.

Appeal from a judgment of Stephen, J., at the trial.

The action was brought by the executors of the will of Mrs. Geldard to recover a sum of 800*l.* from the defendant.

The case was first tried at Durham Summer Assizes, 1879, before Stephen, J., and a special jury. A verdict was then given for the defendant, and the Exchequer Division subsequently discharged a rule *nisi* for a new trial, obtained by the plaintiff. On appeal the Court of Appeal at Westminster set aside the verdict, and ordered a new trial, the Court suggesting the questions which might be left to the jury on the second trial. The three first questions set out (*post*) were among the questions so suggested; the other two questions became unnecessary through the admissions at the trial.

The case was tried a second time before Stephen, J., and a special jury at the Leeds Summer Assizes of 1880.

The following were the material facts:—

In the year 1871, Mrs. Geldard, as was alleged by the defendant, gave him two cheques, for 500*l.* and 300*l.* respectively, in order to enable him to buy a house. Mrs. Geldard was then living at Gainford, and the defendant was, and had for some time been, her medical man. The gift, according to the defendant's evidence, was made in accordance with the wish of Mrs. Geldard's husband, who had died some time previously, and whom the defendant had also attended for a long period as medical man. The defendant's evidence further was, that he volunteered to pay Mrs. Geldard a life annuity of 40*l.*, and that he did so from the time of the gift to himself until her decease, Mrs. Geldard, on several occasions, signing

chell v. *Homfray* (*App.*), *Exch.*

ts drawn up by the defendant in llowing form :—
eceived from Dr. Homfray the sum *l.*, for half-year's life annuity in eration of a free gift of 800*l.*"
1872 Mrs. Geldard left Gainford and to reside at Barnard Castle, about miles distant, and the defendant then to act as her medical man. She at Barnard Castle till her death, happened in July, 1876.
was admitted at the trial that Mrs. rd had no independent advice of ind when the gift was made, and t that time he was acting as her al adviser.
following were the questions left ephen, J., to the jury, and their rs :—
Was the advance of 800*l.* a loan or a gift?—*A.* A gift.
f there was a gift, was there undue ice in fact?—*A.* No.
Did the relation of patient and al man between Mrs. Geldard and Homfray come to an end when she to Barnard Castle in 1872, and did Geldard, after that relationship had nded, and after any effect produced had been removed, intentionally by what she had done?—*A.* Yes.
Was the signature of the receipts ed from Mrs. Geldard by fraud?—).
phen, J., entered judgment for the lant on the findings of the jury. laintiffs appealed.

by Seymour and *Chadwyck Healey* with them), for the plaintiffs.—nent should have been entered for aintiffs on the findings. The jury in effect found that the deceased never had any independent advice, hat she merely did not revoke her In all cases of confidential relation ns of shewing that the giver had ntent and independent advice is upon rson seeking to benefit by the gift. s v. *Bate* (1) is directly in point in aintiffs' favour, and the same prin-s to be found in many other autho-

15 Law J. Rep. Chanc. 267; Law Rep. c. App. 252.

rities—*Dent* v. *Bennett* (2), *Anderson* v. *Ebsworth* (3) and *Stump* v. *Gaby* (4).

There was no confirmation of the gift, and the jury were not asked, as they should have been, whether Mrs. Geldard knew that the gift was revocable.

A. Wills (*Candy* with him), for the defendant.—Judgment was rightly entered for the defendant upon the findings, and especially upon the third. There was strong evidence of confirmation of the gift by Mrs. Geldard, a considerable time having elapsed between the date when the relation of patient and medical man ceased between her and the defendant—*Gregory* v. *Gregory* (5). The receipts also are confirmation. It does not lie upon the defendant to shew affirmatively that the giver knew the gift was impeachable. There need be no positive acts of confirmation; mere acquiescence, after the confidential relation has ceased, is enough to render valid the gift—*Wright* v. *Vanderplank* (6). Knowledge on Mrs. Geldard's part is to be presumed, and the *onus probandi* is on the other side, who must shew that she was ignorant of her rights. In all cases of contracts made with infants, the infant is presumed to know that the transaction is voidable. The principle applies that everyone is presumed to act with knowledge of the law—1 *Taylor on Evidence* (7), and *In re The Constantinople and Alexandria Hotel Company* (8), where ratification by an infant was treated as implying a knowledge of the law. The strong expressions in *Rhodes* v. *Bate* (1) must be taken as referring to the particular facts of that case. The true principle to be found in the authorities is, that the question is one of fact, and there is a strong presumption against the gift where the confidential relation has existed between the parties; but the presumption may be rebutted, as

(2) 4 Myl. & Cr. 269; 5 Law J. Rep. Chanc. 58; 8 ibid. 125.
(3) 3 Giff. 154; 30 Law J. Rep. Chanc. 922.
(4) 2 De Gex, M. & G. 623; 22 Law J. Rep. Chanc. 352.
(5) Coop. Select Cases in Chancery (1792-1814), 201.
(6) 8 De Gex, M. & G. 133.
(7) 7th ed. p. 97.
(8) 39 Law J. Rep. Chanc. 679; Law Rep. 5 Chanc. App. 302.

it is here by the third finding—*Holman* v. *Loynes* (9), *Hatch* v. *Hatch* (10), *In re Holmes's Estate* (11), *Billage* v. *Southee* (12), *Archer* v. *Hudson* (13), *Pratt* v. *Barker* (14), *Gibson* v. *Russell* (15), *Cooke* v. *Lamotte* (16) and *Gibson* v. *Jeyes* (17).

The objection that the jury ought to have been asked whether Mrs. Geldard knew that the gift was impeachable comes too late. Both sides at the trial agreed upon the questions that were left to the jury.

Chadwyck Healey, in reply, referred to *Moxon* v. *Payne* (18) and *Strange* v. *Fooks* (19).

LORD SELBORNE, L.C.—The Court is placed in very great difficulty in this case. It is one which ought to come before us in such a form as to present the whole of the facts for our consideration and judgment. The case has been tried by two juries, and necessarily the facts come before us in the form of particular findings by the jury, without any right on our part to look behind those findings, or at the evidence upon which they proceed. The case having been twice tried, it would be, in our view, a misfortune if we should be obliged to send it again to a jury.

Before coming to a determination upon the effect of the findings, it seems to me extremely important to bear in mind the manner in which, and the circumstances under which, the case went to the jury. On the hearing in this Court a suggestion was thrown out by the Court that certain questions should be left to the jury on the new trial. Those questions were—[His Lordship read the questions].

At the trial that part of the series of questions which related to the matter of independent advice was covered by an admission by the defendant that there was no independent advice of any kind at any time. Dr. Homfray did not himself advise Mrs. Geldard, nor did anybody else give her advice on the matter. With regard to the other questions, the important one is the third. It is, "Did the relation of patient and medical man between Mrs. Geldard and Dr. Homfray come to an end when she went to Barnard Castle in 1872, and did Mrs. Geldard, after that relationship had ceased, and after any effect produced by it had been removed, intentionally abide by what she had done?" The jury answered the question in the terms suggested. Neither party asked or suggested that any other question should be left to the jury. But, in argument, we were pressed with the suggestion that a further one should have been put, whether the lady was or was not aware that the gift was impeachable in point of law. If it was intended to suggest that the findings of the jury were useless and insufficient, the answer is that the question should have been asked at the trial. It is our duty, I think, to deal, under the circumstances, with what was actually done by the parties upon the footing that both sides were willing to drop that question, and to treat the case as one to be disposed of on the other questions which were in fact left. I think the jury's answer to the question relating to the lady's mind and purpose with respect to the gift, when the influence had ceased, is of vital importance. No doubt it would have been preferable that they should also have found whether she knew or did not know that the gift was impeachable. But, if it be assumed that the defendant had no actual knowledge that the gift by her was impeachable, although it must be remembered that she is dead, and her want of knowledge could hardly be proved, the third finding must be construed as implying and importing all that ought fairly to be inferred in order to give effect to it in favour of the defendant.

I think the finding means that she determined the gift should take effect;

(9) 4 De Gex, M. & G. 270; 23 Law J. Rep. Chanc. 529.
(10) 9 Ves. 292.
(11) 3 Giff. 237.
(12) 9 Hare, 534; 21 Law J. Rep. Chanc. 472.
(13) 7 Beav. 551; 15 Law J. Rep. Chanc. 211.
(14) 1 Sim. 1; on appeal, 4 Russ. 507.
(15) 2 You. & C. N.C. 104.
(16) 15 Beav. 234; 21 Law J. Rep. Chanc. 371.
(17) 6 Ves. 266.
(18) 43 Law J. Rep. Chanc. 240; Law Rep. 8 Chanc. App. 88.
(19) 4 Giff. 408.

looking at the manner in which ase went to the jury, I think it t also that she intended it to take , whether or not she had the power tracting it. If it was impeachable, was determined not to impeach it. is no case of confirmation, nor is it e of acquiescence. She deliberately mined that if she could avoid the she would not avoid it. No autho- goes the length of saying that, under circumstances, those who represent fter her death should be at liberty to hat which she herself deliberately red not to do. *Rhodes* v. *Bate* (1) down the principle most strongly the burden of proof lies on the party ng to benefit by the gift, and it lays also, as an inflexible rule, that, the confidential relation continues, ust be shown that the person making ift had competent and independent e in making it. But such advice is ecessary when the influence has been ght to an end, and proof is given of onor's purpose to abide by the trans- n in the manner found by the ver- n this case.

ere is not much authority to assist deciding whether or not the verdict ld be disturbed; but there is some h looks in that direction. In *Dent mett* (2), which was a case of medi- an and patient, among the observa- made by the Court as to the circum- es of that case (all of which tended ie conclusion that the transaction d be set aside) there is (at p. 275) ollowing: "There is an absence of idence of the testator having at any recognised or in any manner given proof of approval of the agreement, any consciousness of its existence." aps that does not go far to shew would have been the effect if cir- tances of the kind suggested had d, but it shews, at all events, that view of the Lord Chancellor such mstances might have an effect on ecision of the Court. In *Wright* v. *erplank* (6) Lord Justice Turner language not exactly like that in es v. *Bate* (1), and he seems to have mplated the possibility of allowing from child to parent to stand if the parental influence had ceased, and there had been a deliberate and unbiassed intention on the part of the child to give to the parent, even though no independent advice had been given. There is no different principle to be applied in the cases of doctor and patient, parent and child, and solicitor and client. It is not disputed that the doctrine is the same in all. Lord Justice Turner, in *Wright* v. *Vanderplank* (6), said that it was difficult to say that the transaction could have been maintained, if the case had rested upon the mere circumstances which attended the original gift, and that "the transaction had its inception at a period when the minority had just terminated. It was completed while the parental influence and authority was in full force, and there was no independent advice given to the daughter. The transaction, therefore, was impeachable at and after its completion, and the only question is whether it has become unimpeachable by reason of what has subsequently occurred. It was argued at the bar that it was not, for that some positive act was required to make it so, and that here no such act has been done. I am not of opinion that a positive act is necessary to render the transaction unimpeachable. All that is required is proof of a fixed deliberate and unbiassed determination that the transaction should not be impeached. This may be proved either by the lapse of time during which the transaction has been allowed to stand, or by other circumstances." And in a sentence further on the Lord Justice says, "It is stated on the face of the bill that the daughter had been informed by some of her friends before her marriage that a fraud had been practised upon her by the defendant." That seems to shew some positive knowledge on the daughter's part that the transaction was impeachable, and we must take it there was enough to satisfy the Court of that knowledge. *Wright* v. *Vanderplank* (6), therefore, would be more distinctly in point if some positive knowledge that the transaction was impeachable had been proved, which it has not, in the present case. But that case comes very near to this if we are right in saying that the

jury found that Mrs. Geldard's mind and intention were such as to make it immaterial to her whether she had power to revoke the gift or not. In *In re Holmes's Estate* (11) the Vice-Chancellor, speaking with reference to a gift from client to solicitor, says, "The principle of influence vitiates the gift, but the presumption of influence may be rebutted by circumstances short of the total dissolution of the relation of solicitor and client. That relation is only looked at as creating the influence, and, as soon as circumstances of evidence are introduced which remove all effect of the influence, whether the relation subsists or not, if that influence is removed, there is no incapacity on the part of the solicitor to become the object of his client's bounty, and to be the recipient from his client of a gift which will be valid at law and in equity." In the present case both the influence and confidential relation had wholly ceased, so that the difficulty dealt with in *In re Holmes's Estate* (11) does not arise.

I think that these authorities support the conclusion at which we arrive—that the parties having gone to trial under the circumstances which have been mentioned, and the jury having found what they have found, we ought not to disturb their verdict.

Baggallay, L.J.—I am of the same opinion. The findings of the jury must be taken together with the admissions made by the defendant at the trial. The first principle enunciated in *Rhodes* v. *Bate* (1) by Lord Justice Turner is as follows: "I take it to be a well-established principle of this Court that persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can shew to the satisfaction of the Court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them." I think the case of a medical man and his patient comes within that proposition. In my view, therefore, the gift was originally void or voidable, having regard to the relation that existed between Mrs. Geldard and the defendant. Then comes the third finding of the jury that the relation ceased when the lady went to Barnard Castle, and that any effect produced by it had come to an end before her decease. That finding gets rid of the second principle in *Rhodes* v. *Bate* (1), that, when a relation of confidence is once established, the Court will presume it to continue unless the contrary is proved. In the present case the confidential relation ceased for a period of three years before Mrs. Geldard's death. The third finding goes on to say that after the relation and influence had ceased she intentionally abode by what she had done. We have to construe that part of the finding, and no doubt it must be taken with the admission that she had no independent advice. It is impossible, in my view, to avoid giving effect to the word "intentionally" — the jury, by their answer, having adopted that word. Without dealing at length with the words of the finding, it is enough for me to say that I think the jury meant, "She knew what she had done, and was determined to abide and did abide by it." None of the decided cases go so far as to compel us to say that was not a sufficient adoption of what she had done to take the case out of the principle laid down in the cases which have been cited to us. Three years having elapsed between the time the confidential relation ceased and her death, I do not think that the transaction ought to be set aside.

Bramwell, L.J., concurred.

Judgment affirmed.

Solicitors—A. Scott-Lawson, for plaintiffs; A. Burn, agent for Steavenson & Meek, Darlington, for defendant.

N THE COURT OF APPEAL.]
eal from the Exchequer Division.)
l. } BAINES *v.* BROMLEY AND
26. } ANOTHER.*

ctice—Costs—Claim and Counter-—Rules of Court, Order LV. rule 1.

an action for a liquidated money after trial with a jury, judgment was l for the plaintiff on his claim, but e defendants for a balance on a r-claim for goods sold, the amount ch exceeded that of the claim. The ent directed that the "plaintiff should · against the defendants his costs of nd that the defendants recover the of the counter-claim":—Held *(re- the judgment of the Exchequer m), that the plaintiff was entitled to eral costs of the cause.*

eal from the Exchequer Division.

case is reported *Ante*, p. 129.

plaintiff brought an action to re-commission alleged to be due under eement.

defendants denied the plaintiff's and by way of set-off and counter- they claimed 230*l.* 0*s.* 9*d.* for goods y them to the plaintiff. The plain- r his reply admitted that he was ed to the defendants in that amount. the trial the jury found a verdict e plaintiff on his claim for 114*l.* *l.*, and a verdict for the defendants ir counter-claim for 230*l.* 0*s.* 9*d.*

Judge directed that judgment l be entered for the plaintiff on the and judgment for the defendants e counter-claim for 115*l.* 3*s.* 3*d.*, the balance; the certificate of sociate was drawn up accordingly, ided with the following direction: ordered that the plaintiff recover t the defendants his costs of suit, at the defendants recover the costs counter-claim."

Master, on taxation, gave the lants the costs of the cause. The iff appealed, and Lopes, J., having d the matter to the Court, the quer Division dismissed the sum- to review the taxation.

plaintiff appealed.

ore Bramwell, L.J.; Brett, L.J.; and , L.J.

Pollard, for the plaintiff.
Forbes, for the defendants.

BRAMWELL, L.J.—I am of opinion that this appeal must be allowed, because of the terms in which the judgment was expressed; the plaintiff has not had "his costs of suit" taxed to him. No doubt the judgment of the Exchequer Division would be right if the old rule, that the party in whose favour the balance is on the whole is entitled to the costs of the cause, which still exists, applied to this case; but that is not the judgment which was here given. I may add that I think cases of set-off and counter-claim are susceptible of different considerations.

BRETT, L.J.—I also think that this appeal must be allowed. The judgment is entered, and the costs by it are dealt with as if the defendants had met the plaintiff's claim by a counter-claim in the nature of a cross action and not of a set-off, and such judgment stands unchallenged. The question is, How ought the costs to be taxed, when in such a case the plaintiff succeeds on his claim and the defendants on their counter-claim? If this had been treated as a pure set-off to the amount of the plaintiff's claim, as I think it might have been, and had so appeared on the judgment, then it seems to me that the defendants would have been entitled to the costs of the action, because then the defendants would have denied by way of defence that the plaintiff had any right to bring an action at all. There may be a case where the defence is partly by way of set-off and partly by way of counter-claim, as where the defendant asserts his right to recover the amount of balance due after satisfying the plaintiff's claim by his set-off. It is not necessary to say now how the costs in such a case are to be taxed, because here the judgment is in form, not that the defendants have a set-off, but a counter-claim only. It is as if the defendants chose to deny the whole of the plaintiff's claim and to rest on their cross action. The costs have been taxed, however, as if the plaintiff had not succeeded at all in his action, but only on certain issues, and I think that that was wrong. That alone

is sufficient to sustain the appeal. I have, however, a firm opinion that where there is a claim with issues taken on it and a counter-claim, not a set-off, but in the nature of a cross action with issues on it, and where the plaintiff succeeds on the claim and the defendant on the counter-claim, the proper principle of taxation, if not otherwise ordered, is to tax the costs of the counter-claim and its issues as if it were an action, and then to give the *allocatur* for costs for the balance in favour of the litigant in whose favour the balance turns. In such a case, where items are common to both actions, the Master would divide them. Where the so-called counter-claim is a set-off there is but one action.

COTTON, L.J.—The sole question is whether under this order and judgment the costs have been rightly taxed. The judgment was that the plaintiff "recover his costs of suit," and not merely the cost of issues found in his favour. It is clear that that judgment has not been followed, those costs have not been allowed to the plaintiff, and the taxation must be reviewed.

Appeal allowed.

Solicitors—Scott & Barham, for plaintiff; Bell, Brodrick & Gray, agents for Rodgers, Thomas & Co., Sheffield, for defendants.

[IN THE COURT OF APPEAL.]

1881. March 11, 12. April 13.

ALDERSON *v.* MADDISON.*

Contract—Parol Agreement to devise Realty — Part Performance — Statute of Frauds.

In an action by the plaintiff, as heir-at-law of A., to recover the title-deeds of a farm, the defendant counter-claimed for a declaration that she was entitled to a life estate in the farm. At the trial the jury found that the defendant was induced to serve A. as his housekeeper for many years, and to give up other prospects of establishment in life, by a promise made by him to her to make a will, leaving her a life interest in the farm. The promise was a verbal one, and A. died intestate:—Held (*reversing the judgment of* STEPHEN, J.), *that there had been no part performance necessarily referable to the agreement, so as to exclude the operation of the Statute of Frauds; and therefore that the plaintiff was entitled to succeed upon the claim and counter-claim.*

Appeal from a judgment of Stephen, J., reported 49 Law J. Rep. Exch. 801.

The facts of the case and the arguments on the appeal sufficiently appear from the judgment.

Bagshawe, *Gainsford Bruce* and *W. Barber*, for the plaintiff.

J. G. Wood and *J. Edge*, for the defendant.

The following authorities were referred to: *Loffus* v. *Maw* (1), *Lester* v. *Foxcroft* (2), *Pickard* v. *Sears* (3), *Hammersley* v. *De Biel* (4), *Caton* v. *Caton* (5), *Ungley* v. *Ungley* (6), *Nunn* v. *Fabian* (7), *Coles* v. *Pilkington* (8).

Cur. adv. vult.

The judgment of the Court was (on April 13) delivered by

BAGGALLAY, L.J.—The plaintiff in this action is the heir-at-law of one Thomas Alderson, who, at the time of his decease, was the owner in fee-simple of a farm in the North Riding of the county of York known as the Manor House Farm.

Thomas Alderson died on the 16th of December, 1877, intestate, and upon his decease the defendant, who had for some years been in his service as housekeeper,

* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Brett, L.J.

(1) 3 Giff. 592; 32 Law J. Rep. Chanc. 49.
(2) 1 White and Tudor's Leading Cases in Equity, 5th ed. 828.
(3) 6 Ad. & E. 469.
(4) 12 Cl. & F. 45.
(5) 36 Law J. Rep. Chanc. 886; Law Rep. 2 H.L. Cas. 127.
(6) 46 Law J. Rep. Chanc. 189; on appeal, 854; Law Rep. 4 Ch. D. 73.
(7) 35 Law J. Rep. Chanc. 140; Law Rep. 1 Chanc. App. 35.
(8) 44 Law J. Rep. Chanc. 381; Law Rep. 19 Eq. 175.

possession of the title-deeds relating farm, and refused to give them up plaintiff, who thereupon com- the present action to recover sion of the deeds. Those facts are isputed by the defendant, but it is d by her that she entered the service omas Alderson in the year 1845, she was sixteen years old, and that g remained in his service, first as l servant, and afterwards as house- r, until the year 1860, and her being then considerably in arrear, etermined to quit his employment, hat he, being an old man and anxious that she should continue him, promised her that if she would n with him and continue to serve or the rest of his life, and would r to press for her wages, he would, sfaction of the arrears of her wages n lieu of future wages, leave her a terest in the Manor House Farm, he expected his uncle to leave nd in any other property of which he be possessed, and would effectually such life interest to her, and that mutually agreed between them to ffect.

s further alleged by the defendant he said Thomas Alderson from time ne, and after he had succeeded to Manor House Farm, repeated the se he had so made to her in 1860, hat, relying upon his promises and the agreement so come to between she continued to serve him as his keeper until his death, and did not him for payment of any wages.

se allegations were made by the dant in her statement of defence, he thereby submitted that she was ed to an estate for life in the Manor e Farm and to the custody of the leeds which were sought to be re- ed from her in the action, and, by f counter-claim, she claimed a decree claration to the like effect. She r, and in the alternative, claimed entitled to retain the deeds until she een paid all wages due to her from aid Thomas Alderson, or a fair and nable remuneration for her services. dmitted by the defendant that the ises so alleged to have been made by the said Thomas Alderson, and the agreement so alleged to have been entered into between them were by parol only.

The plaintiff, by his reply, and by way of defence to the counter-claim, claimed the benefit of the Statute of Frauds.

The action was tried before Mr. Justice Stephen at the Durham Summer Assizes, in 1879. The defendant was examined at the trial, and verified, by her own testimony, the several allegations to which reference has been made. It was further proved that some time after Thomas Alderson became the owner of the Manor House Farm, he signed a document which purported to be a will, and by which he purported to leave the said farm to the defendant for life, subject to the payment of a small annuity; but that after his death it appeared that the document so signed by him was not duly attested so as to operate as a will.

At the request of counsel on both sides, Mr. Justice Stephen put the following question to the jury: "Was the defendant induced to serve Thomas Alderson as his housekeeper without wages for many years, and to give up other prospects of establishment in life, by a promise made by him to her to make a will leaving her a life interest in the Manor House Farm if and when it became his property?" The jury having answered this question in the affirmative, the learned Judge reserved the effect of the evidence and of the finding of the jury for further consideration, and eventually gave judgment for the defendant, making a declaration as claimed by the first alternative of the defendant's counter-claim.

The judgment of Mr. Justice Stephen appears to have been based upon the following considerations: That there was a contract between Thomas Alderson and the defendant to the effect alleged by her; that such contract, whether it could or could not have been enforced by him, was based upon a sufficient consideration to make it binding upon him, and upon his estate in the possession of the plaintiff, to whom it passed on his decease; that such contract was completely performed on the part of the defendant, and by reason thereof the provisions of the Statute of Frauds had no application.

From that judgment of Mr. Justice Stephen the present appeal is brought.

In support of the appeal it has been contended, first, that that which has been treated by Mr. Justice Stephen as a contract originally binding upon Thomas Alderson was at most a representation made by him of his intentions, by which possibly the defendant might have been influenced, but in respect of which she could not have enforced any demand against Thomas Alderson in his lifetime, or against his estate after his decease; second, that, assuming it to have been the intention of the parties to enter into a binding agreement, the terms of that alleged by the defendant to have been come to between them were so vague and uncertain in their scope and effect, that neither party, in the lifetime of Thomas Alderson, could have obtained a decree for specific performance, even though there had been a memorandum in writing of its terms signed by both of them; third, that, inasmuch as the alleged contract related to land, the circumstance that there was not any memorandum or note thereof in writing, within the intent and meaning of the 4th section of the Statute of Frauds, was a sufficient answer to the counterclaim of the defendant; and, fourth, that there had not been any part performance sufficient to take the case out of the operation of the statute.

We are of opinion that the third and fourth of the reasons so assigned by the plaintiff are well founded, and are sufficient to support his appeal. It is not disputed that the third must prevail unless the fourth is rejected. The question, then, which we have to determine is, whether there has been such a part performance of the alleged agreement as to exclude the operation of the Statute of Frauds. This is the question which has been chiefly discussed before us, though it would appear, from the judgment of Mr. Justice Stephen, that the question more particularly argued before him was, to use his own form of expression, whether the defendant made a bargain with Thomas Alderson, or took her chance of his keeping his word.

Now it is a well-recognised rule that if in any particular case the acts of part performance of a parol agreement as to an interest in land are to be held sufficient to exclude the operation of the Statute of Frauds, they must be such as are unequivocally referable to the agreement; in other words, there must be a necessary connection between the acts of part performance and the interest in the land which is the alleged subject-matter of the agreement. It is not sufficient that the acts are consistent with the existence of such an agreement, or that they suggest or indicate the existence of some agreement, unless such agreement has reference to the subject-matter. As was said by Lord Hardwick in the case of *Gunter* v. *Halsay* (9), they must be such as could have been done with no other view or design than to perform the agreement. Thus payment of part, or even of the whole, of the purchase-money, is not sufficient to exclude the operation of the statute, unless it is shewn that the payment was made in respect of the particular land and the particular interest in the land which is the subject of the parol agreement. On the other hand the admission into possession of a stranger is, speaking in general terms, a sufficient part performance, for it is not explicable upon any other supposition than that it has resulted from a contract in respect of the land of which possession has been given. Again, the continuance in possession of a tenant is not in itself a sufficient part performance of a parol agreement for the purchase from the landlord, for it is equally consistent with a right depending upon his tenancy.

Let us, then, apply this test to the acts of part performance relied upon by the defendant in the present case; they are limited to her continuance in the employment of Thomas Alderson until his death without being paid the wages due to her in 1860, and without receiving any remuneration for her subsequent services. It cannot, with any shew of reason, be contended that such continuance in his service was referable only to an agreement that he would leave her a life estate in his property, or indeed that it was referable to any agreement whatever. Other considerations for the continued

(9) Amb. 586.

of the defendant will readily sug-
emselves, and in particular that to
we have already referred as having
uggested by the plaintiff in argu-
that the defendant had been in-
to continue in the service of
s Alderson by an expectation,
d possibly upon a representation
by him, of his intentions of some
benefit to be derived under his will
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stance that Alderson subsequently
ed a document which he intended
rate as a will in the defendant's
carries the case no further; it is
sistent with a previous expression
ntion as it is with his having pre-
entered into an agreement; and
qually consistent with his never
done either the one or the other.
the reason, then, that there is not
present case any evidence of a
nt part performance of the parol
ent, upon which the defendant's
r-claim is based, to exclude the
ion of the Statute of Frauds, we
opinion that the plaintiff's appeal
be allowed.

cases of *Loffus* v. *Maw* (1) and
v. *Ungley* (6) were much pressed
s by the counsel for the defendant,
porting a conclusion different from
t which we have arrived; but it
e found upon an examination of
ases that they differ materially in
ircumstances from that under con-
ion. In *Loffus* v. *Maw* (1) a codicil
en executed, giving to the plaintiff,
of declaration of trust of property
l to trustees, the benefit previously
ed, and such codicil having been
ed and explained to the plaintiff,
on the faith of the provision ap-
ly so made for her, continued in the
r's service until his death. By a
uent codicil he made void the
in her favour declared by the pre-
odicil, and directed that it should
l as if her name had not been men-
. The Vice-Chancellor decreed that
usts declared in her favour by the
should be carried into effect by the
es in trust. The benefit of the
e of Frauds had been claimed by
fendant, but the Vice-Chancellor summarily disposed of the objection by saying that the Statute of Frauds had no application to such cases. The question of the operation of the statute being excluded by reason of part performance was in no way entertained by him. Whether this case was rightly decided it is not for us now to express an opinion, but it is no authority for the defendant's contention. In *Ungley* v. *Ungley* (6) a father, immediately after the marriage of his daughter, and in pursuance of a verbal promise before the marriage, put the daughter and her husband into possession of a leasehold house, of which he was the owner, but subject to a charge in favour of a building society, payable by instalments. The father paid the instalments which became payable during his life; and the balance, 110*l.*, became due shortly after his death. The Court of Appeal (affirming Vice-Chancellor Malins) held that the possession given by the father excluded the Statute of Frauds; that the agreement was to give the house free from incumbrances, and that consequently the 110*l.* was payable out of the father's estate. There is nothing in this decision inconsistent with the conclusions at which we have arrived in the present case, for, as we have already observed, admission into possession has been recognised as a part performance sufficient to exclude the operation of the statute.

Having arrived at this conclusion, it is perhaps unnecessary that we should express any opinion as to the other reasons which have been urged by the plaintiff in support of his appeal. Mr. Justice Stephen was of opinion that a contract had been concluded between Thomas Alderson and the defendant; we do not dissent from that view, but the case well illustrates the wisdom of the Legislature in enacting the Statute of Frauds, as well as the propriety of the conclusion at which Courts of equity, through whose jurisdiction the strictness of the law has been hitherto moderated, have in more recent times arrived, that the application of the principle of allowing acts of part performance to exclude the operation of the statute should not be extended. Without intending or desiring to suggest any doubt as to the perfect truthfulness of the defendant's

statement, it is impossible not to feel to how great an extent the determination of the terms of the parol agreement is dependent upon the testimony of an interested witness speaking of a transaction which took place many years ago, and after the death of the only other party to the transaction. We have only further to observe that, upon the assumption that such a contract as that alleged by the defendant was in fact come to between her and Thomas Alderson, it was a contract which in our opinion could not have been enforced by either party to it during the life of Thomas Alderson. As regards the obligation upon the defendant, it was a contract for personal service, for the specific performance of which a decree could not be obtained, though, in some cases, as in that of *Lumley* v. *Gye* (10), a Court of equity would by injunction restrain the doing of an act contrary to the terms of the agreement, and in that way obtain in substance a performance of it. Nor could a Court of equity, any more than a Court of law, compel a man to make a will in accordance with any promise or agreement previously given or entered into by him.

But there is a further objection to the claim of the defendant to have a declaration, as against the plaintiff, that she is entitled to a life interest in the Manor House Farm: she is claiming to have the same benefit as if Thomas Alderson had made a will in her favour. Mr. Justice Stephen pointed out in his judgment that, to contend that Alderson's heir-at-law was estopped by Alderson's conduct from disputing the validity of the unattested document, would be to repeal the Statute of Wills. It appears to us that to give the same effect to a man's promise or agreement to make a will as to a will made by him in pursuance of such promise or agreement, would be in direct contravention of the provisions of the statute.

The alternative claim of the defendant was hardly pressed upon us. If any wages or other remuneration were due to her at the decease of Alderson, her claim in respect thereof could not be enforced against his heir-at-law in this action, at any rate as the pleadings are at present framed. We should have been glad if some arrangement could have been come to under which the defendant might have received from the estate of Alderson a reasonable remuneration for the many, and those the best, years of her life spent in his service, and apparently without any adequate remuneration. That he intended to remunerate her is beyond doubt, and his intentions have been frustrated by an accident. The result we cannot but regret.

Judgment reversed.

(10) 2 E. & B. 216; 22 Law J. Rep. Q.B. 463.

Solicitors—Ridsdale, Craddock & Ridsdale, agents for W. W. & W. J. Watson, Barnard Castle, for plaintiff; Rogerson & Ford, agents for Proud, Bishop Auckland, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1881. April 26. WALKER *v.* ROOKE.

Practice — Attachment of Debts — Garnishee Order—Partnership Firm—Rules of Court, 1875, *Order XLV. rule* 2.

A garnishee order will not be granted on partners in the name of their firm.

Ex parte application on appeal from a Judge at chambers.

The plaintiff having recovered judgment against the defendant for 1,257*l.*, of which 600*l.* was unsatisfied, obtained a list of the defendant's creditors, and applied *ex parte* at chambers, under Order XLV. rule 2 (1), for garnishee orders

(1) Judicature Act, 1875; Order XLV. rule 2: "The Court or a Judge may, upon the *ex parte* application of such judgment creditor, either before or after such oral examination, and upon affidavit by himself or his solicitor stating that judgment has been recovered, and that it is still unsatisfied, and to what amount, and that any other person is indebted to the judgment debtor and is within the jurisdiction, order that all debts owing or accruing from such third person (hereinafter called the garnishee) to the judgment debtor shall be attached to answer the judgment debt; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the Court or a Judge or an officer of the Court, as such Court

ng, among others, a debt due "from Marshall & Snelgrove to the de-." The application came on before Dodgson, who refused to grant the on Messrs. Marshall & Snelgrove, ground that a garnishee order not be made on partners in the f their firm. The plaintiff appealed Judge at chambers (Bowen, J.), irmed the decision of the Master.

e Payne, for the plaintiff, now ap- to the Divisional Court.—Before nsolidation of the three common isions the practice in each division . The Exchequer Division granted nent orders on partners in the of their firm, while the Common nd Queen's Bench Divisions re- the names of the partners to be

LD, J.—If the Court were to grant er that the "persons forming the should appear and no one ap- ?]

presumed the order would be d, and in any case the plaintiff have the opportunity of enquiring ere the partners.

VEN, J.—No doubt the mode would cessful when applied to first-rate out shaky firms might well avoid ration of the order.]

service of the order would be made same way as service of a writ may made on a firm under Order IX.

D COLERIDGE, C.J.—Order XLV. is taken from section 61 of the on Law Procedure Act, 1854, and section the word "garnishee" is the singular number.]

submitted it was the intention of dicature Act to include "firms" the words "any other person," and w service of garnishee orders on ns in the same way as service of If a person was trading under a name, an order would be valid that name. This order ought to be l if the Court possesses the power, and it is submitted that the Court can make the order.

PER CURIAM (2).—The decision of the Master was right, and must be affirmed.

Application refused.

Solicitors—S. M. & J. B. Benson, for plaintiff.

[IN THE QUEEN'S BENCH DIVISION.]

1881. March 10. THE YORKSHIRE FIRE AND LIFE INSURANCE COMPANY (*appellants*) *v.* CLAYTON (*respondent*).

Inhabited House Duty—Business purposes, Tenements used for—Separate Tenements—Partial Occupation by Landlord— 41 *Vict. c.* 15. *s.* 13.

A building divided into different sets, but having one entrance and one staircase, was occupied as follows: The ground floor by the appellants and other firms for business purposes; the first floor entirely for business purposes; the second floor as a residence by the tenants and the caretaker and his wife, who acted as servants to the tenants of the residential and business premises. The appellants sought exemption from assessment in respect of the ground floor, first floor and part of the second floor, as being used solely for the purposes of trade or business, or of profession or calling, within the meaning of 41 *Vict. c.* 15. *s.* 13:—Held, *that the house was not divided into, and let in, different tenements within the meaning of the section; that there was a common user of the house by the landlords and the tenants for residential purposes, since the landlords occupied part of the house otherwise than by caretakers, and that the exemption did not apply to rooms in a house as distinguished from separate and distinct tenements.*

This was an appeal by a Special Case, stated under 37 Vict. c. 16, from an assessment of certain premises of the appellants to the inhabited house duty. The ground of the appeal was, that no de-

e shall appoint, to shew cause why he ot pay the judgment creditor the debt due m to the judgment debtor, or so much as may be sufficient to satisfy the judgbt."

(2) Lord Coleridge, C.J.; Field, J.; and Bowen, J.

duction had been made in the assessment on account of part of the premises in question being occupied for business purposes only. The building was let out in offices or rooms, partly for business purposes and partly for residential purposes. The ground floor was occupied as offices by the appellants, a banker, and a civil engineer; the first floor was let as offices to other tenants; and on the second floor the curates of St. Mary's Church, Hull, had rooms wherein they resided; the rest of the floor being occupied by the caretaker and his wife, who cleaned the offices of the appellants and acted as servants to the curates.

Each of the rooms, except one, opened on to a staircase common to all the tenants and leading from the one entrance to the house.

The case came on for hearing on the 9th of March, 1880, but was adjourned by the late Kelly, C.B., and Hawkins, J., to enable the appellants to furnish further particulars of the construction of the building.

Bigham, for the appellants.—Section 13 of 41 Vict. c. 15 (1) was expressly intended to meet such cases as this, which were not exempt under the old Act—*Rusby* v. *Newson* (2). The case finds that this house is, in fact, divided into separate tenements.

The Solicitor-General (*Sir F. Herschell*) (with him *Dicey*), for the respondent.—The case of *The Attorney-General* v. *The Mutual Tontine Westminster Chambers Association* (3) decided that to bring it within the exemption in section 13 a house must be divided into, as well as let in, separate tenements. "House" means the whole house and not one partly inhabited by the landlord.

Bigham, in reply.—The sets are not accessible one from another, and the house is therefore divided into separate tenements, and occupation by the landlord merely for trade purposes does not prevent the exemption applying.

GROVE, J.—I do not say that this section is free from difficulty, but on the whole I think there should be judgment for the Crown. The section was, I think, intended to apply to a house, parts of which are let out something as chambers are, so that the tenant of each part has exclusive control over that part, though there is a staircase common to all the sets. In that case taxation would not be assessed in respect of such of the distinct tenements as are used for business purposes. It is true that certain tenants of the house in question are traders, but I do not think that it is let in different tenements. I do not go so far as to say that the whole house must be let, so as to exclude the landlord from using part for business or residential purposes, but there must be independent tenements. Here the rooms on the different floors have separate doors opening on to the staircase, and are not separate and independent sets under the control of the several tenants. The tenants of the rooms on the second floor are waited on by two persons who also attend on the other occupiers. These servants are not mere caretakers, such as are persons left

(1) 41 Vict. c. 15. s. 13. sub-s. 1: "Where any house, being one property, shall be divided into, and let in, different tenements, and any of such tenements are occupied solely for the purposes of any trade or business, or of any profession or calling, by which the occupier seeks a livelihood or profit, or are unoccupied, the person chargeable as occupier of the house shall be at liberty to give notice in writing, at any time during the year of assessment, to the surveyor of taxes for the parish or place in which the house is situate, stating therein the facts; and after the receipt of such notice by the surveyor, the commissioners, acting in the execution of the Acts relating to the inhabited house duties, shall, upon proof of the facts to their satisfaction, grant relief from the amount of duty charged in the assessment, so as to confine the same to the duty on the value according to which the house should, in their opinion, have been assessed, if it had been a house comprising only the tenements other than such as are occupied as aforesaid or are unoccupied."

Sub-section 2: "Every house or tenement which is occupied solely for the purposes of any trade or business, or of any profession or calling, by which the occupier seeks a livelihood or profit shall be exempted from the duties by the said commissioners on proof of the facts to their satisfaction, and this exemption shall take effect although a servant or other person may dwell in such house or tenement for the protection thereof."

(2) 44 Law J. Rep. Exch. 143; Law Rep. 10 Exch. 322.

(3) 44 Law J. Rep. Exch. 146; 45 ibid. 886; Law Rep. 10 Exch. 309; ibid. 1 Ex. D. 469.

in charge of a gentleman's house or chambers. I cannot say that the fair meaning of the section would cover the present case and that this house is let in separate tenements, for there is nothing to shew a separate holding by tenants having absolute control over the chambers irrespective of the rest of the house. The words of the section are very difficult, but this is what I take them to convey—that the exemption is only to apply when a house is divided into separate and exclusive tenements. And in coming to this decision I rely much on that part of the case which relates to the servants, as indicating a common use of the house by the landlords and tenants for residential purposes.

LINDLEY, J.—I am of the same opinion. The appellants have to bring themselves within the exemption in the section contained, and I think they have failed. The clause is no doubt obscure. I do not think that sub-section 2 applies where the landlord occupies any part of a house for residential purposes, and not as caretaker only. That sub-section contemplates a house divided in tenements and let—that is, intended to be let—as a whole in tenements, except such part as is inhabited by a person in charge as caretaker only, and does not apply where the landlord partly occupies the house for residential purposes. Nor can I say that this house is let in "different tenements" within the meaning of the section. The case of *The Attorney-General* v. *The Mutual Tontine Westminster Chambers Association* (3) decided that "different tenements," under the section, were such as were complete in every particular—in fact, what are known as flats, and not only different sets of rooms with a common staircase. In this sense I do not think the house was let in different tenements. There must therefore be judgment for the Crown.

* *Judgment for the Crown.*

Solicitors—Bell, Brodrick & Gray, agents for W. & E. Gray, York, for appellants; solicitor to Inland Revenue, for the Crown.

[IN THE COURT OF APPEAL.]

(*Appeal from the Common Pleas Division.*)

1881. Jan. 14. } HEATH AND ANOTHER *v.* PUGH.*

Statutes of Limitation (3 *&* 4 *Will.* 4. *c.* 27. *ss.* 2, 3, 24, *and* 1 *Vict. c.* 28)—*Mortgage—Mortgagee out of Possession—Foreclosure—Decree for Foreclosure absolute, Effect of—Ejectment.*

S., in 1856, *mortgaged lands in fee to the plaintiffs, and in* 1859 *sold his equity of redemption to the defendant. In* 1877 *the plaintiffs obtained, in the usual course and form, a foreclosure decree absolute, and in* 1878 *brought an action of ejectment against the defendant. The plaintiffs had never been in possession, and there had been no payment at any time of any principal or interest due on the mortgage, nor any acknowledgment in writing of their title by the defendant:*—Held (*reversing the judgment of the Common Pleas Division*), *that the plaintiffs' right to bring the action was not barred by the Statute of Limitations* (3 *&* 4 *Will.* 4. *c.* 27).

Appeal from a judgment of the Common Pleas Division.

Action of ejectment brought on the 18th of October, 1878, and tried before Denman, J., in Middlesex, at the Trinity sittings, 1879, when the following facts were proved or admitted in evidence.

By an indenture of mortgage, dated the 24th of November, 1856, T. R. Stephens conveyed the lands in respect of which the action was brought in fee to Heath, one of the plaintiffs, and W. S. Crealock, to secure the repayment of 7,700*l.* and interest. The money was advanced to Stephens out of trust funds, of which Heath and Crealock were possessed as trustees of a marriage settlement, dated the 24th of February, 1816.

In 1859 Stephens, with the knowledge and connivance of Crealock, but without the knowledge of Heath, sold the lands in question to the defendant, without disclosing to him the existence of the mortgage. The conveyance to the defendant was dated the 14th of February, 1859,

* *Coram* Lord Selborne, L.C.; Baggallay, L.J.; and Brett, L.J.

and he thereupon paid the purchase-money and entered and took possession of the lands.

On the 2nd of September, 1870, Heath executed a reconveyance of the lands to Stephens, being induced so to do through the fraudulent representation of Crealock that Stephens, having sold to the defendant, wished to execute a conveyance to him, and that the purchase-money was to be paid by the defendant to Heath and Crealock as trustees of the marriage settlement. Crealock, to whom Heath had sent the deed of reconveyance, shortly afterwards absconded, having appropriated the whole of the purchase-money paid by the defendant.

In September, 1870, Heath filed a bill in Chancery against the defendant and Stephens for redemption or foreclosure.

On the 10th of December, 1873, Bacon, V.C., made a decree declaring that the deed of reconveyance was obtained from Heath by fraud, and ordering it to be delivered up to be cancelled; declaring also that the mortgage debt of 7,700*l.* remained a charge upon the lands; and ordering that an account of what was due for principal, interest and costs under the mortgage should be taken; that the amount should be paid by Stephens; that in default by him or the defendant to pay the amount, Heath should be entitled to realise his security; that the lands should be sold, and the defendant should deliver the title-deeds in his possession to the purchaser.

On appeal from the decree of Bacon, V.C., the Court of Appeal, on the 10th of November, 1874, varied the decree by ordering a foreclosure simply and not a sale of the lands, and by refusing to confirm the order for a delivery up of the title-deeds by the defendant.

The judgment of the Court of Appeal is reported in *Heath* v. *Crealock*, 44 Law J. Rep. Chanc. 157; Law Rep. 10 Chanc. 22.

The usual accounts of principal, interest and costs due under the mortgage were subsequently taken, and orders of foreclosure absolute, dated the 6th of March and the 6th of September, 1877, respectively, were made in the Chancery Division against Stephens and the defendant.

The present action of ejectment was commenced on the 18th of October, 1878.

At the hearing the Statute of Limitations was set up as a defence to the action. Evidence was given that Stephens was in possession of the lands subsequently to the mortgage deed of the 24th of November, 1856, and that the mortgagees had never been in possession. There was no evidence of any payment of principal or interest due on the mortgage by Stephens, nor of any acknowledgment in writing of the plaintiffs' title by him or the defendant within twenty years before the commencement of the action.

Denman, J., gave judgment for the plaintiffs on the ground that the foreclosure suit, and the orders for foreclosure absolute obtained therein, prevented the statute from running against the plaintiffs.

The defendant subsequently obtained a rule *nisi* for a new trial in the Common Pleas Division.

On cause being shewn,

Day and *Muir Mackenzie* appeared for the plaintiffs.

Cohen and *Trevelyan*, for the defendant.

The following judgments were given:—

Lord Coleridge, C.J. (after stating the facts).—The present state of things has been brought about by a curious misapprehension of the state of the law, going back for many years past, on the part of those who advised the plaintiffs; and it seems to me, if of two innocent persons one must suffer, to be reasonable at least that the persons whose advisers have advised them ill, who have misconstrued their remedy—that is, the plaintiffs—must suffer. It has been stated to us—and I am surprised to hear that anyone was unaware of it—that a foreclosure suit, according to the doctrines of equity, did not affect possession, and that the mortgagee had a right to pursue concurrent remedies, and if he pleased, before the statute had run, to issue a writ in ejectment which would have saved the operation of the statute. The foreclosure suit has no such operation in causing the statute to run afresh as has been suggested. The writ of ejectment might have been issued in plenty of time to save the operation of

the statute. The effect of the foreclosure suit was misconceived, and the writ in ejectment was forgotten or neglected, or deliberately abstained from by those who represented the plaintiffs, and this result has followed. If the plaintiffs have any legal rights under their foreclosure decree, which they can enforce by going to the Chancery Division, let them go there. We do not interfere with them in any way in taking that course, but we do not interfere to assist them in a state of things which has been brought about by the mistake of those who advised them in the manner I have described.

I think, therefore, upon these grounds that the judgment pronounced at the trial should be reversed, and judgment entered for the defendant.

LINDLEY, J.—I am of the same opinion. The first question is, What are the rights of a mortgagee as against a mortgagor in possession? Those rights are—first, to sue upon the covenant for payment of the money; secondly, to foreclose; and thirdly, to eject. If the mortgagee forecloses, that foreclosure merely prevents the mortgagor from redeeming after the time fixed for the exercise of his right; in that respect the decree for foreclosure does not in any way touch the possession; the decree for redemption does, because the legal estate is then in the defendant, and the mortgagor upon redeeming is entitled to have the property conveyed to him. A foreclosure decree does not affect possession, for the reason that the mortgagee having the legal estate can bring ejectment if he wants possession. The practical effect of the ordinary decree for foreclosure made by the Court of Appeal in this case was this, that if the defendant did not choose to exercise his right of redeeming within the time limited, he would be for ever prevented from redeeming; but it did not in any way touch the question of possession; it did not give the plaintiffs any greater right, in equity, to possession than they had before. The plaintiffs seem to have been under the impression that possession could be got for the mere asking, and that the foreclosure suit and proceedings in equity entitled them to it as a matter of course. That appears to me to have been an erroneous impression. If they had issued a writ of ejectment the moment the conveyance of 1870 was set aside, they would have saved the statute or they would have not, according to the facts. If they were late then, they are *a fortiori* too late now. They did bring their action in October, 1878, when they had been out of possession a little more than twenty years. The defendant did not plead the statute—he was not bound to do so under the new rule; he put in a defence in the general form, which by the rule he was entitled to do; but the plaintiffs must have perfectly well known that they had been out of possession all this time, and, unless they were under some misapprehension as to the effect of the foreclosure orders, that the statute would be relied on. I think there was no such surprise or accident as that, under the particular circumstances of this case, we ought to give the plaintiffs the opportunity of retrying this action. I am disposed to think that we ought not to order a new trial as against the *bona fide* purchaser for value, even upon the terms suggested of the plaintiffs paying the costs.

Upon these grounds, treating this as a special case in that respect, I am of opinion that the rule ought to be made absolute to enter judgment for the defendant.

The plaintiffs appealed.

A. Charles (*Muir Mackenzie* with him), for the plaintiffs.—First, the plaintiffs were taken by surprise by the defence set up at the trial, and a new trial ought to be granted in order to allow the evidence to be given of the payment of interest by Stephens to the plaintiffs up to 1859. The evidence would consist of declarations by Stephens made after he had conveyed his interest to the defendant—*Anderson* v. *Weston* (1). Secondly, if no payment of interest can be proved, the Statute of Limitations (3 & 4 Will. 4. c. 27) ceased to run against the plaintiffs when the decree absolute in the foreclosure suit was made. That suit was an action in the High Court of Justice to recover land within the meaning of section 2 of the statute.

(1) 6 Bing. N.C. 296.

The 7 Will. 4 and 1 Vict. c. 28 explain the earlier Act, and provide that the time within which an action at law or suit in equity may be brought shall be twenty years next after the last payment of interest. Lord St. Leonards, in *Wrixon* v. *Vize* (2), thought that a suit in equity would prevent time from running as well as an action at law. (See also *Board* v. *Board* (3).)

Cohen and *Trevelyan*, for the defendant. —Time under the statute begins to run against a mortgagee when there is a failure to pay the sum secured at the time named in the mortgage deed, and that is shortly after the execution of the deed—*Doe* v. *Lightfoot* (4). Nothing that happens after time has once begun to run can prevent it from continuing to run, except the occurrence of one of the contingencies provided for by the statute. A foreclosure decree operates *in personam* only, depriving the mortgagor of his right to redeem—*Paget* v. *Ede* (5). The form of the decree is no bar to the statute running. The effect of such a decree is stated by the Lord Chancellor (Lord Cranworth) in *Colyer* v. *Finch* (6). A foreclosure suit is no more than the exercise of the mortgagee's right to require the mortgagor, or a purchaser from him for value without notice, to redeem then, or not at all.

The plaintiffs have not shewn that they are prepared with any legal evidence of the payment of interest under the mortgage deed. There is therefore no ground for granting them a new trial.

A. Charles replied.

Cur. adv. vult.

Lord Selborne, L.C. (on Jan. 14), delivered the following judgment: This is an action of ejectment, commenced on the 19th of October, 1878, by the plaintiffs, who are trustees under a certain indenture of settlement. The only defence was the Statute of Limitations (3 & 4 Will. 4. c. 27). At the trial a verdict was found for the plaintiffs, under the direction of Mr. Justice Denman, on the ground that certain decrees and orders of the Court of Chancery, which I shall presently mention, were an answer to the statute. But the Common Pleas Division, on motion to set aside this verdict, differed from that view of the law, and ordered judgment to be entered for the defendant. The appeal is from that order. We disposed, during or at the close of the argument, of two points which were raised, the one by the appellants the other by the respondent. The appellants contended that they ought, if necessary, to have the opportunity of going before another jury for the purpose of proving the payment of interest by one Stephens, from whom the defendant derived his title, by means of declarations of Stephens made after he had parted with his estate in the land. These declarations we thought inadmissible against the defendant. On the other hand it was contended (but, as we thought, without sufficient ground) that an order of the Master of the Rolls vesting the land in one of the plaintiffs as a new trustee jointly with the other plaintiff, who was an original trustee, was void, and that the plaintiffs must therefore fail. There remains for determination the main question, whether, upon the evidence at the trial, the plaintiffs were entitled to judgment. (I shall speak throughout for convenience as if both the plaintiffs had been the original trustees.) The facts which we regard as material are these: first, a legal mortgage of land to the plaintiffs, dated the 24th of November, 1856, to secure 7,700*l.* and interest; secondly, a subsequent conveyance of the equity of redemption by the mortgagor (Stephens) to the defendant in 1859; thirdly, bill filed by the plaintiffs against Stephens and the defendant for redemption or foreclosure in 1870; fourthly, decree in 1874 against both defendants to the suit for the usual accounts, and for redemption or foreclosure; fifthly, subsequent proceedings according to the usual course of the Court of Chancery, ending in an order

(2) 3 Dr. & War. 104 (at p. 123).

(3) 43 Law J. Rep. Q.B. 4; Law Rep. 9 Q.B. 48. Judgment of Blackburn, J.

(4) 8 Mee. & W. 553; 11 Law J. Rep. Exch. 151.

(5) 43 Law J. Rep. Chanc. 571; Law Rep. 18 Eq. 118.

(6) 19 Beav. 500; 26 Law J. Rep. Chanc. 65.

ath v. *Pugh* (*App.*), *C.P.*

eclosure absolute against the present dant, on the 6th of September, 1877. was no proof of payment at any of any sum on account of principal terest upon the mortgage, nor of acknowledgment in writing of the tiffs' title by the defendant.

will be seen that we do not regard all material the fact that the defen- purchased from Stephens for valu- consideration without notice of the tiffs' mortgage. It was determined usively in the Chancery suit that he took by his conveyance from iens was only an equity of redemp- and that being the case, the right lemption and the liability to be fore- l were the necessary and correlative ents of his title—*Colyer* v *Finch* (6). e Court of Appeal, in the Chancery did indeed refuse, on the principle cable to a purchaser for valuable deration without notice, to take the defendant the title-deeds, or to against him any form of order de- ing upon the mere exercise of the etion which would interfere with the nuance (for such time as it might wise continue) of his possession. But Court made the common decree for ption or foreclosure, to be worked in the usual manner, with all the s and consequences which such a e would have had in the case of iens himself, or of any other person was not a purchaser for value without e. The present question is what effects and consequences are.

authority was quoted for the de- n of the Common Pleas Division; the authority of the Judges who ounced it (one of them especially iar with equity) is itself great. g unable to concur in it we are led, ir high respect for every opinion of learned Judges, to state our reasons reater length than we might other- have thought necessary. The law ortgage is a familiar and very im- nt branch of English jurisprudence, h, when the statute 3 & 4 Will. 4. c. as passed, was well understood on sides of Westminster Hall. Several ons of that statute, and the whole of ater Act—1 Vict. c. 28—expressly relate to it. By 7 Geo. 2. c. 21 the Courts of common law had been enabled and directed, in any action for recovery of a mortgage debt, or for the possession of mortgaged land (unless proceedings were at the same time going on in equity), to give effect, upon the defendant's application, to his right of redemption and reconveyance, much in the same way as a Court of equity would have done. The possession of the mortgaged land by the mortgagor, during the subsistence of the security, and while the mortgagee did not choose to take possession, was held (at law as well as in equity) to be "at the will" or by the "sufferance" or "permission" of the mortgagee, under a "tacit agreement," which the mortgagee might determine at his pleasure. It was of the nature of the transaction that the mortgagor should continue in possession. His possession was rightful and not by wrong. He was entitled to the rents and profits so long as he remained in possession; mesne profits, accrued due and received prior to action or demand, could not be recovered from him by the mortgagee. The former Statute of Limitations (21 Jac. 1. c. 16) did not, under the circumstances of such a possession by the mortgagor, run against the mortgagee—*Keech* v. *Hall* (7), *Moss* v. *Gullimore* (8), *Partridge* v. *Bere* (9), *Hall* v. *Surtees* (10), *Leman* v. *Newnham* (11), *Doe* v. *Williams* (12). It may be added that, by the Judicature Act of 1873 (section 25), "a mortgagor entitled for the time being to the possession of land, as to which no notice of his intention to take possession has been given by the mortgagee," is recognised as having a right in respect of which it was thought fit that he should be enabled to sue for possession, and for the recovery of rents and profits, in his own name.

In equity (where this branch of our jurisprudence originated) the conveyance of the legal estate to a mortgagee was regarded as nothing more than a security

(7) 1 Dougl. 21.
(8) Ibid. 283.
(9) 5 B. & Ald. 604.
(10) Ibid. 687.
(11) 1 Ves. sen. 51.
(12) 5 Ad. & E. 291.

for a debt. During the subsistence of the equity of redemption the debt, together with the benefit of the security, passed to executors by a will of personal estate, and the legal title to the land did not pass by a general devise of all the mortgagee's real estate in a will duly attested, because it was not regarded in equity as any part of that estate. As to the equity of redemption, it is sufficient to quote Lord Hardwicke's words in the leading case of *Casborne* v. *Scarfe* (13): "An equity of redemption has always been considered as an estate in the land; for it may be devised, granted or entailed with remainders, and such entail and remainders may be barred by fine and recovery; and therefore cannot be considered as a mere right only, but such an estate whereof there may be a seisin. The person, therefore, entitled to the equity of redemption is considered as the owner of the land, and a mortgage in fee is considered as personal assets. . . . The interest in the land must be somewhere, and cannot be in abeyance, but it is not in the mortgagee, and therefore must remain in the mortgagor. A devises his estate, and after makes a mortgage in fee; though this is a total revocation in law, yet, in this Court, it is a revocation *pro tanto* only." (And see *Blake* v. *Foster* (14).)

This being the position of the title, as long as the mortgage is redeemable, the effect of an order of foreclosure absolute is to vest the ownership of, and the beneficial title to, the land for the first time in the person who previously was a mere incumbrancer. The equitable estate of the mortgagor is then forfeited and transferred to the mortgagee. It is transferred as effectually as if it had been conveyed or released. "A foreclosure," said Lord Hardwicke, "is considered as a new purchase of the land." "The mortgage being foreclosed," said Sir William Grant, "the estate becomes absolutely his." "By the order made in the foreclosure suit," said Sir Lancelot Shadwell, "he became the absolute owner"—*Casborne* v. *Scarfe* (13), *Silberschildt* v. *Schott* (15), *Le Gros* v. *Cockerell* (16). The title obtained by such new purchase did not, before the Wills Act, 1838, pass by general words in a will duly attested to pass real estate, made before the foreclosure, and afterwards republished; it did pass if such will were republished after foreclosure, or if a new will, in like general terms, were then made.

It follows from this state of the law, that when the owner of land under an ordinary decree of foreclosure absolute takes proceedings to recover possession of that land, he seeks possession of that which, by a title newly accrued, has for the first time become his own property; and that it can make no difference whether the title which he previously had as a mere incumbrancer was or was not protected by a legal estate. The possession which he now claims, and the right by virtue of which he seeks to recover it, are essentially different from the possession which he might before have claimed, and from the right, by virtue of which he might have claimed it. "There can be no two things," said Lord Manners, in *Blake* v. *Foster* (14), "more distinct or opposite than the possession as mortgagee and possession as owner of the estate; nor can anything be more hazardous and inconvenient than the possession of a mortgagee. The manner in which he is called to account is most rigorous and severe." One consequence of a decision that a mortgagee who obtains a foreclosure absolute is not safe against the Statute of Limitations, under circumstances like those of the present case, would be to make it necessary for him (under such circumstances) to take possession while still mortgagee, or, if it were resisted, to bring ejectment for that purpose, on pain of forfeiting his title, and of becoming liable, if a trustee (as the present plaintiffs are), for a loss, by breach of trust, of the whole value of the estate. The present plaintiffs had, within thirteen months before the commencement of this action, obtained against the

(13) 1 Atk. 633; and 2 Tudor's Leading Cases in Equity (5th ed.), at p. 1055.
(14) 2 B. & B. 402 and 403.
(15) 2 Ves. & B. 49.
(16) 5 Sim. 384.

nt defendant an order of foreclosure
nte, having that effect in equity
h has been described. This action
brought upon the title so obtained.
statement of claim contains these
nents: first, that "by virtue of those
s of foreclosure made in the suit"
rhich the dates are stated), "and
rtue of the indenture of the 24th of
mber, 1856, the lands and premises
ioned in the writ became, and are
subject to the trusts of the indenture
:tlement of the 24th day of February,
;" and, second, that "by virtue of
premises, the plaintiffs are now
l in fee-simple, and entitled in pos-
n to the lands and premises men-
d in the writ." The plaintiffs re-
nt for the purposes of this action
whole equitable title and rights of
cestui que trust.

is not, in our opinion, necessary to
mine how far, and under what cir-
tances, before the Judicature Acts,
art of law would have taken notice
e effect of such orders of foreclosure,
sting for the first time the equitable
in the person who previously (as
gagee) had the legal estate. Under
ons 24 and 25 of the Judicature Act
873, the High Court of Justice is
d to do so, and to give full effect to
equitable right; so that (if there
d previously have been any conflict
his point) the rule of equity must
prevail. We may, however, state
greement with what was long before
by Lord St. Leonards (17), which is,
rink, fully applicable in principle to
resent case: "A suit in this Court"
; is, the Court of Chancery), "pro-
instituted, will prevent time from
ing; and a Court of law, now that
ame rule is prescribed by statute for
Courts, should, I conceive, act upon
principle. At all events, this Court
protect its own jurisdiction, and will
ermit the suitor to be evicted at law,
had an equitable right to sue for the
and had filed his bill within the limit
ed, and duly pursued his remedy."
is impossible, without disregarding
quitable title, to hold that the right
of the plaintiffs to the land in the present case was barred by the Statute of Limitations, when this action was brought. All the sections of the Statute of Limitations which expressly relate to mortgages, and also the later Act—1 Vict. c. 28—may be laid entirely out of the case. This action was not barred by any of them. The Act 1 Vict. c. 28 does not itself create a bar in any case in which it had not been already created by the Act which it explains; it only declares (in conformity, and with manifest reference, to the rule which had before prevailed in equity) that nothing in that Act shall bar the title of a mortgagee (continuing to be such) who has received any payment on account of principal or interest from the person entitled to the equity of redemption within twenty years before the commencement of any action or suit. The question, therefore, depends upon the 2nd and 3rd, when considered in connection with the 24th and 34th sections of 3 & 4 Will. 4. c. 27. Time (if it ever ran under the 2nd and 3rd sections) must have begun to run either from the date of the mortgage deed (November 24, 1856) or from the day fixed for redemption or payment of the principal money secured by that deed—not more, certainly, than a year afterwards. It is obvious that the time, having that commencement, could only run against the mortgage title, then vested in the plaintiffs. So far as that title was concerned, their proper remedy was equitable; and that remedy was duly pursued within the period limited by section 24. After the commencement of the suit which ended in the foreclosure, it was no longer possible that the statute should run against that title. The new title, by foreclosure, first accrued upon and "by reason of" the "forfeiture" of the defendant's equity of redemption, within the meaning of the last clause of the 3rd section of the statute—that is, at the date of the order for foreclosure absolute. Lord St. Leonards thought that this last clause was the only part of the 3rd section applicable to mortgages (18), and, if applicable (as he thought it) to the lapse, by non-payment *ad diem*,

(17) 3 Dr. & War. 123.

(18) 3 Dr. & War. 117.

of the first right of redemption, expressly reserved by the deed, it cannot be less applicable (when the party who forecloses has the legal estate) to the later and more conclusive forfeiture by which the equity of redemption is finally barred. The legal estate, under such circumstances, supports the beneficial title. A plaintiff who obtains a foreclosure cannot be in a worse position, because when he became in equity the owner of the land, he had already a legal estate down to that time unaccompanied by ownership.

If authority were needed, these conclusions appear to be supported by that of Lord St. Leonards in the case before him already referred to—*Wrixon* v. *Vize* (2). He thought, notwithstanding the doubts expressed by Mr. Justice Pattison in *Doe* v. *Williams* (12)—doubts which (speaking here for myself) I should have shared, if the point had been open—that, "although the conveyance was by way of mortgage, the right to bring an action or make an entry clearly fell within the 2nd section." But he also thought that a foreclosure suit was a suit "to recover the land," within the meaning of that statute and of 1 Vict. c. 28. "The right," he said, "to file a bill of foreclosure, whether the plaintiff's mortgage be a legal or an equitable one, falls within the 24th section of the statute 3 & 4 Will. 4, and the 1 Vict. c. 28; and the time is governed by the legal right of the party to bring an action, or, if he have not the legal estate, by the right which he would have had if his estate had been a legal instead of an equitable one." And "it cannot be said that the suit is not to recover the land as it is already vested in him; for this expression would be strictly accurate where the mortgage is of the equitable estate; and where the mortgage is a legal one, yet the suit is in effect to recover or obtain the equity of redemption, which is, in the view of equity, an actual estate" (19).

Lord St. Leonards therefore held that a mortgagee by filing a bill of foreclosure within the time limited by section 24 did all that was necessary to prevent the bar of the statute; and that when he obtained the usual order for foreclosure absolute, he "recovered the land" within the meaning of the statute. If so, how could the mortgagor be entitled a day or a year afterwards to refuse to give up possession on the ground that the right was barred by the statute? The 34th section says that at the determination of the period limited by the Act to any person for bringing any action or suit, "all right and title of such person to the land, for the recovery whereof such action or suit might have been brought within such period, shall be extinguished." If the period limited for bringing an action for the recovery of possession of land, under a legal conveyance by way of mortgage, could be held to have determined by the lapse of twenty years from the accruer of such right of action, during the pendency of a foreclosure suit commenced in due time, we see no escape from the conclusion that the right and title of the mortgagee to the land would be thenceforth extinguished; that, instead of the equitable right of the mortgagor being forfeited to the mortgagee, the whole right, title, estate and interest of the mortgagee would be transferred to the mortgagor; and that, instead of an order for foreclosure absolute being afterwards made, all further proceedings in the foreclosure suit ought immediately thereupon to be stayed. To state such a consequence (if it logically follows, as we think it does) is of course to disprove the premises. The defendant who is barred by the order absolute is estopped from denying that the right and title thereby adjudged to the plaintiffs became vested in them by virtue of that order, or that the plaintiffs thereupon became entitled, in a right distinct from that which they previously had, to that possession, which he (the defendant) had down to that time held, not by wrong, but under and by virtue of the same right and title which is so transferred. The plaintiffs are not barred by the statute, because, after the institution of the Chancery suit, it ceased to run against them; and by the present action they are seeking to enforce that right of possession which was for the first

(19) 3 Dr. & War. 119, 120.

time given to them indefeasibly by the decree absolute for foreclosure in that suit.

We are, for these reasons, of opinion that the appeal must be allowed, and that judgment must be entered for the plaintiffs in the action.

Judgment reversed.

Solicitors—Talbot & Tasker, agents for Budd, Son & Brodie, for plaintiffs; Combe & Wainwright, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1881. March 23. ROLFE (*surveyor of taxes*) (*appellant*) *v.* HYDE AND COMPANY (*respondents*).

Inhabited House Duty—Tenement occupied solely for Business—Caretaker—41 Vict. c. 15. s. 13. sub-s. 2—"Servant or other person" dwelling in House for Protection thereof.

Exemption from inhabited house duty was claimed under 41 Vict. c. 15. s. 13. sub-s. 2, in respect of a building which was used only for business purposes save that there resided in it, as caretaker, occupying a sitting-room and bedroom, a cashier receiving a salary of 200l. a year. The commissioners found as a fact that the cashier was a "servant or other person" within the meaning of the Act:—Held, *that the commissioners might so find.*

Yewens *v.* Noakes (*Ante*, Exch. 132) *discussed.*

CASE stated under 37 Vict. c. 16.

At a meeting of the Inhabited House Duty Commissioners for the city of Oxford, held on the 14th of July, 1879, R. P. Hookham, as trustee for Hyde & Co., wholesale clothiers, appealed against an assessment to the inhabited house duties for the year ending the 5th of April, 1879, of 300*l.* at 6*d.* in the pound, in respect of new warehouses, 31 and 32 Queen Street, Oxford, and claimed exemption under 41 Vict. c. 15. s. 13. sub-s. 2 (1).

He stated that the whole of the premises in question were used as warehouses and counting-houses, with the exception of a sitting-room and a bedroom on the top story, occupied by the cashier of the firm, who sleeps on the premises solely as caretaker, and for the protection thereof, that being considered as a part of his duty. He also stated that a woman attends to the cashier's domestic wants, as also to those of the other clerks and warehousemen during the day, but does not remain on the premises at night. The surveyor of taxes submitted that a person holding the responsible position of cashier, and in receipt of a salary of 200*l.* per annum, could not be deemed to be such a "servant or other person," within the meaning of the Act, as may dwell on the premises as caretaker, and for the protection thereof, and bring them within the exemption (1).

The commissioners discharged the assessment, being of opinion that the cashier was a servant or other person who dwelt only for the purpose of protection.

Upon the application of the surveyor the commissioners stated the above Case.

Dicey, for the appellant.—The cashier was not, within the meaning of 41 Vict. c. 15. s. 13. sub-s. 2 (1), "a servant or other person" dwelling in the house "for the protection thereof." The words "servant or other person" cannot, on principle, extend to such a person as this cashier. And *Yewens* v. *Noakes* (2), on the similar words in 32 & 33 Vict. c. 14. s. 11 (repealed by 41 Vict. c. 15. s. 13. sub-s. 3), is a conclusive authority to that effect. Bramwell, L.J., no doubt rested his decision on another ground, but Thesiger, L.J., as one ground of his decision, held that the term "servant" was used in its ordinary and popular sense, not in the sense in which a clerk

(1) 41 Vict. c. 15. s. 13. sub-s. 2 enacts: "Every house or tenement, which is occupied solely for the purposes of any trade or business, or of any profession or calling, by which the occupier seeks a livelihood or profit, shall be exempted from the duties by the said commissioners upon proof of the facts to their satisfaction, and this exemption shall take effect, although a servant or other person may dwell in such house or tenement for the protection thereof."

(2) *Ante*, Exch. 132; Law Rep. 6 Q.B. D. 530.

or manager may be called the servant of his employer, but in the sense of an ordinary menial or domestic servant, and that the words "other person" meant a person standing somewhat on the same footing as a domestic servant (say a policeman), and that consequently a clerk, with a salary of 150*l.* a year, was not within the description, "servant or other person." And Baggallay, L.J., rested his decision entirely on that ground, adopting the reasons given by Thesiger, L.J. There is good reason why the Legislature should have limited the exemption to the case of a servant, or person somewhat on the footing of a servant; for if the exemption were extended to the case of a person such as this cashier, the putting in of such a person to act as caretaker would generally take some other house out of the liability to duty, inasmuch as he would presumably have dwelt in a house liable to the duty, whereas a servant, or person on the footing of a servant, would presumably not have had a taxable dwelling. Further, the caretaker must be dwelling in the house "for the protection thereof," and this cashier clearly did not dwell in the house solely for the protection thereof; there must have been benefit to him from his dwelling there, beyond the benefit which a caretaker would necessarily get in having a dwelling allowed to him.

He also referred to 48 Geo. 3. c. 55. sched. B; 57 Geo. 3. c. 25. s. 1; 6 Geo. 4. c. 7; and 30 & 31 Vict. c. 90.

Bosanquet, for the respondents. — In *Yewens* v. *Noakes* (2) the caretaker had residing with him his wife, five children and a servant, occupying a considerable part of the building; and that state of facts was the ground of the decision of Bramwell, L.J., and one ground of the decision of Thesiger, L.J., while Baggallay, L.J., did not dissent as to that ground, but only doubted. Bramwell, L.J., on the other hand, dissented from the view taken by Thesiger, L.J., and Baggallay, L.J., as to the effect of the words "servant or other person," he evidently considering that the words "other person" contemplated any person who had agreed to take care of the premises. Consequently the real ground of the decision in *Yewens* v. *Noakes* (2) is not adverse to the respondents.

Further, according to the view taken by Thesiger, L.J., and Baggallay, L.J., in that case, the question whether the caretaker comes within the words "servant or other person" is a question of degree, and therefore a mere question of fact; and Thesiger, L.J., said that if the commissioners had found as a fact that the caretaker was a caretaker simply, and was a "servant or other person" within the enactment, the Court, although it might think their finding erroneous, ought not to interfere. On the true construction of the statute, apart from authority, the judgment of the Court should be in favour of the respondents.

Dicey, in reply.

LINDLEY, J.—I think we ought not to disturb that which I understand to be the finding of the commissioners. The enactment in question—41 Vict. c. 15. s. 13. sub-s. 2—says, "Every house or tenement which is occupied solely for the purposes of any trade or business .... shall be exempted from the duties by the .... commissioners upon proof of the facts, ... and this exemption shall take effect although a servant or other person may dwell in such house or tenement for the protection thereof." What meaning ought we to attach to the words "servant or other person"? According to the case, the cashier of the respondents sleeps on the premises solely as caretaker, and for the protection thereof, that being considered as a part of his duty; and the commissioners say they were "of opinion that the cashier was a servant or other person who dwelt only for the purpose of protection," thus, in effect, as I understand the case, finding that the cashier, although not for any other purpose a servant, was, for the purpose of the caretaking, a servant or a person such as a servant. Mr. Dicey contends that a cashier receiving a salary of 200*l.* a year cannot be a servant or other person such as a servant, and relies on the judgment of Lord Justice Thesiger in *Yewens* v. *Noakes* (2), whose judgment on that head was adopted by Lord Justice Baggallay. I cannot, however, go the length for

which Mr. Dicey contends, though I do not say whether, if the commissioners had not found as they have, I should have considered the exemption established. In *Yewens* v. *Noakes* (2) the caretaker had his wife, five children and a servant residing with him, occupying a considerable part of the building—a state of facts expressly adverted to in the judgment of Lord Justice Thesiger, as well as in that of Lord Justice Bramwell. No doubt Lord Justice Thesiger thought that the term "servant" was used in its ordinary and popular sense—that was to say, not in the sense in which a clerk or manager might be called the servant of his employer, but in the sense of an ordinary menial or domestic servant; and that by the words "other person" a person of the same kind and description as a domestic servant was meant. But he went on to speak of the difficulty of drawing the line, and to say that if the commissioners had found as a fact that the caretaker was a caretaker simply, and was a "servant or other person" within the enactment, he thought it would have been the duty of the Court, although it might consider their finding erroneous, not to interfere. In my opinion, though this may be perhaps a case somewhat near the line, the commissioners having found that it is within the line, we ought not to interfere.

WILLIAMS, J.—The only question of law in this case is, whether a cashier receiving 200*l.* a year can be a servant. I think he can be, and accordingly that the commissioners might find as they have done.

MATHEW, J., concurred.

Judgment for the respondents.

Solicitors—The Solicitor to the Inland Revenue, for appellant; Lovell, Son & Pitfield, agents for Dayman & Walsh, Oxford, for respondents.

[IN THE COURT OF APPEAL.]

(*Appeal from the Queen's Bench Division.*)

1881. May 12. THE GREAT WESTERN RAILWAY COMPANY *v.* THE RAILWAY COMMISSIONERS; *in re* BROWN.*

Railway Commissioners — Jurisdiction of—Charge by Railway in excess of Parliamentary Limit—Reasonable Facilities—Railway and Canal Traffic Act, 1854 (17 & 18 *Vict. c.* 31), *s.* 2—*Regulation of Railways Act* (36 & 37 *Vict. c.* 48).

A complaint having been made to the railway commissioners of fares demanded by a railway company which exceeded by a small amount the sum fixed for such fares by Act of Parliament,—Held (*affirming the judgment of the Queen's Bench Division*), *that the railway commissioners had no jurisdiction to entertain the application, and that a writ of prohibition ought to issue; for that, although the sums demanded for fares were in excess of the statutory limit, still there was no allegation that the sums were so fixed and so demanded with a view to prevent passengers from travelling or trains from running, nor was there any allegation or evidence that the fares so fixed and demanded did in fact have that effect.*

Appeal from the Queen's Bench Division.

James Brown presented a complaint to the railway commissioners, pursuant to the provisions of the Railway and Canal Traffic Act, 1854, and the Regulation of Railways Act, 1873, setting out instances in which the Great Western Railway Company were in the habit of charging fares slightly in excess of those allowed by their Act of Parliament. The complaint specified a number of cases in which the company had demanded, and the complainant had paid such fares to and from various stations between Paddington and Swindon, and also set forth in detail the fare allowed by statute, and the government duty which might be added to the fare, and then shewed that a sum beyond that amount varying from a fraction of a penny to 3*d.* on each fare was demanded by the Great Western Railway Company.

* *Coram* Field, J., and Manisty, J., in the Queen's Bench Division; and Bramwell, L.J.; Brett, L.J.; Cotton, L.J., in the Court of Appeal.

Great Western Rail. Co. v. *Railway Commissioners (App.)*, Q.B.

The Great Western Railway Company obtained in the Queen's Bench Division a rule *nisi* for a prohibition, which was afterwards made absolute, when the following judgments were delivered:—

FIELD, J.—This is an application by the Great Western Railway Company for a writ of prohibition prohibiting the railway commissioners from proceeding to make any order upon the application of James Brown against them, and it is with reference to the 17th and 18th Vict. c. 31, the sections of which have been so recently under discussion in *The South Eastern Railway Company* v. *The Railway Commissioners* (1). But James Brown's application is rather a remarkable one. I do not say that he has not a ground of complaint, although in some cases it comes to three-tenths of a penny. He says, "By your maximum you have a right to charge certain rates and fares," and then he proceeds to set out in a table a number of rates which have been charged to him by the railway company. To take an illustration—the first is 1·88*d.*, and then he goes through a series of altogether twenty-three cases, one I see as low as 1·78*d.* He prays for an order enjoining the railway company to desist from any further continuance of the whole or any portion of the charges enumerated in his application, as the railway commissioners shall in their judgment deem right and proper, and not to subject him to any further continuance of those illegal charges. Now he bases his application on the ground that this action of the railway company is in contravention of the 17th & 18th Vict. c. 31. By the 2nd section of that Act (2) it is well known, of course, that the duties and powers of the railway commissioners respecting a matter like this are limited to complaints in respect of contravention and violation which are referred to specially in that section. Now, I will take what the Lord Chancellor said in the case of *The South Eastern Railway Company* v. *The Railway Commissioners* (1), instead of reading the Act of Parliament itself, because it is a judicial exposition of that section and of the meaning to be put upon it; and what he says is this: "What then are the obligations imposed on railway companies by this statute?" They are contained in the 2nd section, and are substantially three in number: First, a positive obligation to afford, according to their respective powers, all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return, and so on. He, therefore, and the learned Judges in the Court below—one of them, at all events, Lord Justice Lush—agree in dividing the 2nd section into three distinct branches. It was a construction strongly contended against by the railway company, who urged in that case in vain that the real meaning of section 2 was to be found, as many things are, in the postscript, with the exception, at all events, of the undue preference, and that was, that branch 1 and branch 3 were, in truth, limited to receiving and forwarding traffic, either their own home traffic or foreign traffic.

They tried in fact to limit it to foreign traffic entirely, but the Court did not adopt their construction; they adopted the construction that the section ought to be divided into three branches. Then the Lord Chancellor goes on to say that traffic, according to the interpretation clause, includes passengers and their luggage. Then he says, "railway includes every station of or belonging to such railway company and used for the purposes of such traffic." Then he goes on to say that "the second obligation is to

(1) *Ante*, p. 201; Law Rep. 6 Q.B. D. 586.

(2) 17 & 18 Vict. c. 31. s. 2: "Every railway company, canal company and railway and canal company shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles; and no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic in any respect whatsoever. . . ."

36 & 37 Vict. c. 48. s. 6 transfers to the railway commissioners all the jurisdiction conferred by section 3 of the Railway and Canal Traffic Act, 1854, on the Court of Common Pleas.

o undue preference. The third whatever may be necessary to the company's own line, and any line connected with or having a us near it, to be used by the public tinuous lines of communication." present case no complaint what- made of undue preference. That first thing to start with. Mr. says that the railway company s everyone else a decimal of a and makes him pay that decimal, is a grievance which he has been ted to for years, and therefore it is id there is any partiality or undue nce, neither does the case come the third branch. The case there- nust *ex concessis* be found in the ranch, and it is claimed that the y commissioners are entitled to an order on the complaint, because ilway company has not afforded reasonable facilities for receiving rwarding him.

ras argued before us that this case within that word "facilities," and ve to consider what the meaning t word "facilities" there is, used as collocation with the other words section.

w, what is the general nature of rown's complaint? He says, "You incorporated on certain conditions. of those conditions was that you not charge more than 2*d.* a mile, atever the maximum fare is. You broken that condition, and I have obliged to pay three-tenths of a more than I ought to have paid." is his complaint, and it is a com- , no doubt, which any County had power to decide, and to make ilway company pay it back; or, if ifficult question were involved, in manner this Court would have to consider whether or not the se of the power was within the s of the railway company or not. ions of very considerable nicety and itude arise, and I am not aware there would be any difficulty what- in any of the ordinary divisions of ligh Court of Justice entertaining a complaint. Now there have been two cases of importance, if I re- member, in which this first branch of section 2 (2) has been under discussion in the Court—I had better say three, because I will deal presently with one which was brought to my attention for the first time during the argument of this case. There are also cases of undue preference. They range themselves under that head, and if I may be allowed the expression, they are personal remedies for the violation of persons' rights, and they are violations of personal rights under a branch of section 2 (2) expressly directed to personal rights, because that section says you shall give no undue preference to any other person, and shall expose no person to any improper partiality or injury by reason of partiality. But the portion of the section that we are now considering has nothing whatever to do, as it seems to me, with any personal rights of that description at all, and is not so framed as to bring such a case under the words which deal with railway stations and traffic and arrangements for all that; and accordingly only two cases which I know of, in which that portion of the section has been discussed, are the *Caterham Case* (3), and the case of *The South Eastern Railway Company* v. *The Railway Commissioners* (1). In the Hastings case the question was one purely of facilities with reference to those things. Nobody can entertain any doubt, I suppose, but that if a railway company has a station at a particular place, they are bound to give reasonable facilities by trains and by proper arrangements at proper hours to forward passengers as well as goods; and I can very well understand that there would be no difficulty at all in supposing that the railway commissioners had that power in them. But then that is not the complaint here. That was the complaint in the *South Eastern Case* (1), in which my brother Manisty and the late Lord Chief Justice issued the prohibition, and the Court of Appeal, while they were inclined to agree with them in some respects, thought that there was some portion of the claim which might come within the meaning of the Act of Parliament, and therefore declined to issue the prohibition.

(3) 1 Com. B. Rep. N.S. 410; 26 Law J. Rep. C.P. 16.

Now the present case is this: A man says, "You have charged me more than you ought to have charged me; therefore I ask for an injunction forbidding you from ever charging me more than you ought to." It was argued that if you are bound to find a man trains you are bound to find him a convenient station where he can get into his carriage, and you are bound to find him trains which shall be convenient to him; and it was said that if you are bound to do that which was conceded in the argument, then is not it a want of facility if you tell a man that you will not carry him unless he will give you 100,000*l.*? Now that is the larger and broader way of putting it. But I must confess I am unable to put upon the word "facilities" in this branch of the section the large meaning which would include that; "facility," I think, must be with reference to—I do not know how to express it—but I had better say with reference to those matters which were discussed in the *South Eastern Case* (1). There was not much in that case bearing upon the present point, except the language of Lord Justice Brett, and he seems to lay down this principle, which I find does exclude the present case, because he says, dealing with the meaning of the word "facilities," "Their jurisdiction"—that is, the railway commissioners' jurisdiction—"was further confined to this, that they could only properly deal with matters which might facilitate or impede the receiving, forwarding or delivering of passengers or goods upon or from the existing railways or stations; they had no jurisdiction to entertain or deal with matters otherwise affecting passengers and goods." Whether the Lord Justice meant it in that limited sense I do not know. I think he did. Therefore, so far as it goes, it is an authority against the jurisdiction of the railway commissioners in this respect. Then it is said there was a decided case on the point—the case of *The Aberdeen Commercial Company* v. *The Great North of Scotland Railway Company* (4). It was said that that was an authority, although not strictly binding on us, but yet a very high authority indeed, of the Court of Session, and one which, if in point, I should pay the greatest possible respect to, although we might not feel ourselves bound by it. Now, speaking roughly and generally, the question in that case arose in this way: some one complained that the railway company had formerly carried for him manure, and they had all at once stopped and said, "Now we have made up our minds that we will not be common carriers of manure any longer, and you must pay us a special rate," and that special rate was more than the maximum rate which they had the power to impose if they were acting as common carriers. Thereupon came the applicant to the railway commissioners and applied for relief in that respect, and the point of law was to be raised by a Special Case, and accordingly a Special Case is stated, and the question which was proposed by the company to be stated was this: The first question was, whether the railway commissioners had any jurisdiction to entertain the application simply on the ground that the respondents have charged higher rates and tolls than they have by their Acts of Parliament power to charge. It seems to me that if the question had stood in that shape, and if the Court of Session had decided that question or answered that question in the way that is proposed, the case would have been an authority in point on the present application, because that does seem to have raised the question now before the Court, which is, whether the mere charging more than the maximum rate authorised to be taken by a railway company gives the railway commissioners any jurisdiction to entertain that application; but the railway commissioners when they came to settle their case declined to have the first question stated in that way, because they altered the question into this shape: "In pursuance of the said application we have stated the foregoing case for the opinion of the Court of Session in Scotland upon the following questions: Whether our determination that a railway company does not afford, according to its powers, all reasonable facilities within the mean-

(4) Cases in Court of Session, 4th series, vol. vi. p. 67.

section 2 of the Railway and Canal
Act, 1854, if it makes illegal or
ive charges for the conveyance of
is or is not in accordance with
ne construction of that section."
fore in that question they put in,
irposely put in, the words "illegal"
lso "excessive." In one sense no
an excessive charge is illegal, but
are many charges which are not
ive which are also illegal. A rate
ed by way of undue preference is
. Therefore that question ceased
the simple question which the com-
wanted to raise for the opinion of
lourt of law, but it involved, or
be taken to involve, the discussion
question whether or not in other
ts than as being in excess the
e was an illegal one, as being an
preference. Accordingly the case
rgued, and then the case was put in
way before the Court of Session:
said, "This talk about ceasing to
ommon carrier is a blind; you are
on carriers really. You pretend to
are not, because you want them to
ore; but, in point of fact, all this
you are acting as common carriers
e Corporation of Aberdeen. You
rrying their manure, precisely the
traffic as we want you to carry, and
re doing that at common carriers'
" Therefore they said it was a
blind, and so it was; and I have
ubt that was what the Court of
n thought it was. When you come
the reasons of the judgment in the
of Session, particularly of Lord
l's, it seems to me, so far from
mining the proposition that the ex-
e charge is enough to give a juris-
n to the commissioners, they in-
d in their judgment the question of
preference and illegal charge in
espect; and, if so, there is no doubt
ver about the jurisdiction of the
y commissioners. Therefore under
circumstances it seems to me upon
est construction I can give to the
f Parliament, and upon principle,
Mr. Brown's complaint is not one
which the railway commissioners
jurisdiction, and the writ of pro-
on must therefore issue.

MANISTY, J.—I am of the same opinion. It is an application by Mr. James Brown, who seeks to put himself forward as if he were really the relator in an information by the Attorney-General. That is the sort of character of the application, because it is not merely as regards himself, but he goes into twenty-three cases in which he says that the company is in the habit of charging an excessive toll. Now it is a question which may involve extremely difficult points. It is a question which may even, as in the case which I will just mention very shortly, divide the opinion of Judges; and I will take an instance which the applicant puts forward as one of his grievances. It is not the strongest, but it illustrates what I mean. He begins by saying that by the Act of Parliament the company can charge for every passenger conveyed in a first-class carriage by any other train than an express train the sum of 2*d.* per mile, and his allegation is that, in contravention of the Act, they carried first-class passengers to Swindon, which, he says, is a distance of seventy miles, neither more nor less—twenty yards more or less may make all the difference; and in all the cases he mentions the distance is a precise mile—it is not a fraction of a mile, they are all cases of miles absolutely. Take this one: he says it is seventy-seven miles, and the company charge an excess of 1·88*d.* Now if it is a few yards over seventy-seven miles a nice question arises whether they have not the right to charge the whole 2*d.* for the distance over that seventy-seven miles. They are allowed 2*d.* per mile. There is nothing said there as to a portion of it. If it is, say, a mile and a-half, are they entitled to charge 3*d.*, or are they entitled to charge as at the rate of two miles? But it is not only that, but it goes into the minutest questions. Take, for instance, the journey to Reading: he says they charge three-tenths of a penny too much. Where it is over the mile, for the excess of three-tenths of a penny may they charge a penny for the excess, or may they charge the whole sum of 2*d.*? But if it is a penny, then his three-tenths of a penny is gone. And so I find before me seven-tenths of a penny. Well, there again the same

question arises: If it is over a mile, say over ten miles but under eleven, what is the right thing to charge? I could go through others. There is another three-tenths, and sometimes even less than that. I should think on nearly half these instances some of the finest questions might arise which can very well be conceived. I agree entirely, apart from these observations, that it would be straining the language of the 2nd section of the Railway and Canal Traffic Act beyond all ordinary meaning if we were to apply it to such a case as this, namely, that the company should, according to their powers, afford all reasonable facilities for receiving, forwarding and delivering passengers. Would it not be straining the language of the Act to say that that has reference to the rate of charge which the company is entitled to make for all passengers travelling on their line?

It appears to me it is unnecessary to go beyond that, but I will just call attention to the case in the House of Lords—*Pryce* v. *The Monmouthshire Railway and Canal Company* (5), where two questions were raised: By the special Act the company had a power to charge at the rate of so much a mile, and they also had a right to charge for a fraction of a mile beyond four miles. Then it was said, that that being so, they had no right to charge for the fraction of a mile within the four miles. That was one point. Another point was, that they were entitled to make a reasonable charge for stopping. Well, that also is a similar question. If the railway commissioners have the right to go into this, they have a right to go into a question of what would be a reasonable charge for stopping. Now that question first was raised in a case which occupied about fifteen days in hearing in order to arrive at a conclusion of what would be a reasonable charge. The case was carried to the House of Lords on two points, both on the point of the fraction of the mile and the point of stopping. In the Court of Appeal Lord Justice James and Lord Justice Baggallay were of opinion that the claim of the toll for the fraction of a mile for distances within four miles was legal, but Lord Justice Mellish differed on the point, and the question was carried to the House of Lords. There the Lords divided two and two upon it, and the result was that the decision of the Court of Appeal stood, but only because the Lords were equally divided. Now, that is a specimen of what nice questions arise on these charges for tolls for a mile or for fractions of a mile, and the question of stopping, and so on.

I cannot refer to anything that illustrates the difficulty and importance of this question more than that case. It seems to me that without it it would be contrary to all reason to construe these words in the 2nd section (2) in the way the railway commissioners seek to construe them, and when I add to that the difficulties of the case I think that we ought to decide that the commissioners have not jurisdiction.

Rule absolute.

The railway commissioners appealed.

The Attorney-General (*Sir H. James*) (with him *The Solicitor-General* (*Sir F. Herschell*), *A. L. Smith* and *Browne*), for the appellants.—The question raised by this appeal is, whether the commissioners have jurisdiction to hear any complaint as to overcharges made by railway companies. The amount of the overcharge does not affect the principle, as, if a railway company may overcharge a small sum it may also overcharge a large sum, and thus prevent passengers from travelling as effectually as if it put a barrier before the door of the station; so that the question is one as to the duty of a railway company to receive, forward and deliver traffic under section 2 of the Railway and Canal Traffic Act of 1854 (2). The case of *The South Eastern Railway Company* v. *The Railway Commissioners* (1) shews that the obligations imposed on railway commissioners by that section are clear and unqualified.

[COTTON, L.J.—Do "reasonable facilities" include those matters, such as fares, which are provided for by the special Act of each company?]

From the analogy of undue preference it would seem that they do, for the Rail-

(5) 49 Law J. Rep. H.L Cas. 130; Law Rep. 4 App. Cas. 197.

lauses Consolidated Act of 1845
d enactments against undue pre-
aad yet undue preference is spe-
mentioned in this section 2.
IWELL, L.J.—There is no allega-
t these overcharges are made for
ose of preventing traffic.]
charges in this complaint may
ut the principle is the same. The
nant can doubtless recover these
rges by action, but if the railway
ioners deal with the case the
rges are put an end to for ever.
ction was taken to the power of
missioners in *The Chatterley Iron*
y v. *The North Stafford Railway*
y (6).
IWELL, L.J.—I think we have held
ses before the railway commis-
must not be cited as authorities

e *Aberdeen Commercial Company*
reat North of Scotland Railway
y (4) it is evident that the Court
the railway commissioners had
deal with questions of rates for
nd that would imply that they
ver to deal with fares for pas-

Wright (with him *Webster*), for
way company.—If the judgment
ourt of Session in *The Aberdeen*
ial Company's Case (4) be read,
eing had to the case before that
t will be found that the decision
ourt proceeded on the question
e preference, and that the ques-
rice or rates was not essential to
gment. Section 2 (2) of the
1854 points to facilities in the
f physical facilities for traffic, not
acilities destined to result in an
ent of traffic or to assist the
nce of statutory or common law
the language of the section is
; the working of the line, regard
d to its stations and accommoda-
l not at questions for which there
r and simpler remedies, such as
r information. There was no
on of this nature, as far as can
red from reported cases, to the
Common Pleas during the time

(6) 3 Nev. & M. 238.

that Court exercised the jurisdiction created by the Act of 1854.

BRAMWELL, L.J.—I am of opinion that this judgment should be affirmed. I think that the case is not within the first words of section 2 of the Act of 1854 (2). The applicant alleges in his complaint that overcharges have been, and are being, made—that is, a charge beyond what the company is entitled to demand—and he desires an injunction, as it may be called, to put a stop to such overcharges. He does not allege that these overcharges are made with any intent to put a stop to traffic or to prevent passengers from coming to be carried on the railway; but he says that the charges in question are wrong. I think that one would not suppose that the Legislature intended to transfer to the jurisdiction of the railway commissioners matters over which the ordinary Courts of justice have full power, and with which they can as conveniently deal. But although I make this observation I do not say that there are no cases in which there is a concurrent remedy. I do not doubt but that the railway commissioners have full power to deal with cases of undue preference. The Attorney-General says that the complainant gets a fuller remedy from the application to the railway commissioners than he would get from a proceeding in the ordinary Courts, inasmuch as they can by a injunction, or order in the nature of an injunction, put a stop to the continuance of the undue charges; but practically a judgment of a Court of law against the company would have the same effect, as in such a case the undue charges would cease, because the railway company would know that an action would be successful if one were brought to recover the overcharges; so that I do not think that argument displaces the presumption which, as I have said, I think exists against the jurisdiction, over this complainant, of the commissioners. What are the words of the statute?—"Every railway company . . . . shall . . . . afford all reasonable facilities for the receiving and forwarding and delivering of traffic." I think that there is in these words, taken in their natural sense, no reference to

price at all; they are affirmative words, although at the same time they have also a negative meaning, and imply that a railway company shall not put impediments in the way of traffic; and I think that the negative words in the same section contain the same idea as these affirmative words as to receiving and forwarding traffic. The Attorney-General then suggested a case in which a railway company might fix such a price as the charge for carrying a passenger or his goods that he could not in fact, or as a matter of business, pay it. I agree that if such a charge were made it would be as though an actual physical barrier were placed which the passenger could not cross, or which prevented his goods from being carried, and it would be a fraudulent, or at least an improper, proceeding, which would be calculated to put impediments in the way of receiving and forwarding traffic. That, however, is not to be surmised here. With regard to *The Staffordshire Case* (6) I pass it by; and as to *The Aberdeen Commercial Company* v. *The Great North of Scotland Railway Company* (4) I may say that I concur with it. It is, I think, but right to consider what the questions were which were presented to the Court in that case. The railway company issued this notice: "Notice is hereby given that the Great North of Scotland Railway Company do not profess to act, and do not act, as carriers of the undermentioned articles;" the articles are then specified. "The company, however, at the request of parties, and upon certain conditions and at agreed rates, but not otherwise, will provide waggons," &c., for that purpose. I suppose in one sense that they had a right to say that they would not be common carriers of certain things; but then the special jurisdiction of the railway commissioners comes in, and the commissioners are empowered to order that reasonable facilities shall be given. What I think the railway commissioners did was to order that facilities should be given, and what I think the Scotch Court of Session held was, that the railway commissioners had jurisdiction to order the railway company to carry the class of goods specified. It is true the question of rates was raised, but I think that the question of rates was wholly incidental and was not the ground of the application or of the judgment. There is therefore nothing in that case which is inconsistent with what is the intention of section 2 of the Act (2) and with our judgment in the present case.

BRETT, L.J.—Assuming the facts in the complaint to be true, they do not, in my opinion, raise a matter which the commissioners can entertain. The complaint is founded on allegations of overcharges. There is in the complaint no statement that the overcharges were intended to prevent traffic or any passenger from coming to the line, or to hinder the progress of trains. There is no statement that the overcharges were, in fact, such as would prevent traffic from so coming or so hinder the progress of trains. I hold that on account of the absence of either of those allegations the complaint does not raise a question which the commissioners can entertain. If the complaint contained statements such as those I have mentioned, I think that then the commissioners would have jurisdiction over it, as then there would be an intent to interfere with and diminish the accommodation for passengers. If the complaint stated that the overcharges were so great as, in fact, to prevent passengers from travelling or trains from being despatched, then I think that fact would give the railway commissioners jurisdiction, and then they would determine the matter on the question, whether the intent was proved or the overcharge was so great as to prevent passengers from travelling. It is consistent with this complaint that precisely the same number of trains would go at the same time as if this overcharge had never been made. It does not interfere with traffic; there is therefore no jurisdiction in the railway commissioners to deal with this matter, and the appeal must be dismissed.

COTTON, L.J.—The complaint is, that the railway company makes charges which are in excess of its parliamentary powers. Is such a complaint as this within the words of section 2 of the Act of 1854

(2), putting a fair and reasonable interpretation and construction on the words of the statute? "Reasonable facilities" are the words used, and those words, in my opinion, provide for proper accommodation in the stations and the carriages and arrangements of the line, for the use of the stations, carriages and line by passengers. The mere fact that an overcharge is made, and that the limit fixed by the statute is exceeded, does not bring the matter within the words "reasonable facilities." If it be shewn that charges are made either in connection with particular trains or as regards particular stations which are calculated to prevent the use of those trains or those stations, that would be equivalent to the refusal of "reasonable facilities;" and if it were done with intent to prevent the use of the trains and stations, that would, I think, give the railway commissioners jurisdiction over the matter and to entertain the question of the *quantum*. With regard to the case of *The Aberdeen Commercial Company* v. *The Great North of Scotland Railway Company* (4), I would say that I think it is clear that in that case there was a complaint of undue preference and of favour shewn to one kind of traffic over other kinds of traffic, and that the question as to that preference was the question on which the judgment of the Court really proceeded. The judgment of the Queen's Bench Division must be affirmed.

Judgment affirmed with costs.

Solicitors—The Solicitor to the Board of Trade, for railway commissioners; Nelson, for Great Western Railway.

[IN THE QUEEN'S BENCH DIVISION AND THE COURT OF APPEAL.]

1880. Dec. 2. 1881. Feb. 15.

MORGAN *v.* REES.*

Practice—County Courts Act, 1875 (38 & 39 *Vict. c.* 50), *s.* 6—*General Request to County Court Judge to take Notes—Signature of Judge—County Court Rules*, 1875, *Order XXXVII. rule* 26—*Adjournment of Trial.*

In order to entitle a party to obtain signature of a County Court Judge's notes under section 6 *of the County Courts Act*, 1875, *there should be a request to make a note of the questions of law intended to be raised. A mere general request to the Judge upon a case coming on for hearing to take notes of the evidence is not sufficient.*

The parties to an action in a County Court cannot adjourn the trial by consent, under Order XXXVII. rule 26 *of the County Court Rules*, 1875, *without the leave of the Judge.*

This was a rule calling upon the County Court Judge of the Aberystwith County Court to shew cause why he should not re-enter a case on his list, and also sign certain notes taken by him in an action.

The action was commenced in the Exchequer Division, then transferred to the Chancery Division, and afterwards remitted to the County Court under 30 & 31 Vict. c. 142. s. 8. The trial was commenced on the 14th of May, was adjourned to a Court held in June and again to a Court held in July. The plaintiff's case was closed before the second adjournment. At the Court held in July the solicitors for the parties agreed to a further adjournment, and the Registrar's clerk entered the case in an adjourned list. The Judge, however, refused to allow this further adjournment, which had been agreed on without his consent, and directed the case to be called on. No one appeared, and the Judge, being of opinion that the plaintiff's case was not made out,

* *Coram* Lord Coleridge, C.J., and Field, J., in the Queen's Bench Division; and Bramwell, L.J., Baggallay, L.J., and Brett, L.J., in the Court of Appeal.

entered a nonsuit. The Judge made an affidavit in which he stated that great inconvenience was caused by this practice of adjourning cases without leave.

As regards the Judge's notes the facts were as follows: An application was made to him when the case came on for hearing to take notes of the evidence, "as it was an important case, and might be taken to appeal." The Judge took rough notes, but objected to produce them, inasmuch as they were not taken for the purpose of an appeal, but for his own use only, and such notes were consequently imperfect and would be misunderstood.

A. Cohen (*Tindal Atkinson* with him) shewed cause.—There is no power to compel a County Court Judge to re-enter a cause. As regards the signing of the notes, there is no duty on the part of the learned Judge to sign any notes except such as are specified in section 6 of the County Courts Act, 1875. The Judge was not asked at the trial to make a note in accordance with section 6 of the statute. In order to comply with the requirements of that section there must be a request to make a note of some question of law raised. A general request, such as was given here, would frequently entail upon a County Court Judge an enormous amount of unnecessary labour (1).

Holl (*Terrell* with him) supported the rule.—It is contended that a proper request was made to the County Court Judge under section 6; at all events such a request was, under the circumstances, unnecessary—*Seymour* v. *Coulson* (2). They also cited *Ex parte Furber* (3).

Lord Coleridge, C.J.—I am of opinion that this rule must be discharged. As regards the first branch of the rule I am clear that we have no such jurisdiction as we are asked to exercise, altogether apart from the facts as disclosed to us upon the affidavits. We do not sit here to correct judicial misconduct, even where it exists, and the remedy of a suitor in such a case is by appeal to the Lord Chancellor.

But then it has been argued that we may at all events compel the County Court Judge to sign the notes which he has taken. That we have the power to do so where the requirements of the statute have been duly complied with, I have no doubt at all. Here, however, in my judgment, the County Court Judge was not asked within the terms of the 6th section to take any notes at all. As a matter of fact he did, it appears, take some notes—whether complete or not is immaterial—and these we are now asked by the plaintiff to the action to compel him to sign. The County Court Judge has objected on principle to sign these notes—first, because he was not bound to sign them, as he was not properly asked to make them, and they were not made for the purposes of appeal; and, secondly, the notes were imperfect and would mislead—in a word, were not such notes as he would have taken had the demand been made upon him according to the statutory requirements. Mr. Holl has argued that the Judge is bound to sign these notes, and he has done so partly on the construction of the County Courts Act, and partly on the authority of *Seymour* v. *Coulson* (2).

Now, so far as Mr. Holl's argument has reference to the County Courts Act, 1875, it clearly, in my judgment, fails. That statute, after laying down certain rules, proceeds to state that at the trial or hearing "the Judge, at the request of either party, shall make a note of any

(1) By the County Courts Act, 1875 (38 & 39 Vict. c. 50), s. 6, at the trial or hearing of any cause in a County Court, on which there is a right of appeal, "the Judge, at the request of either party, shall make a note of any question of law raised at such trial or hearing, and of the facts in evidence in relation thereto, and of his decision thereon, . . . and he shall at the expense of any person or persons being party or parties in any such cause . . . . requiring the same for the purpose of appeal, furnish a copy of such note, . . . and he shall sign such copy, and the copy so signed shall be used and received on such motion and at the hearing of such appeal." By an Order of the 22nd of January, 1877, no motions "shall be made by way of appeal from any County Court unless a copy of the Judge's notes, signed by the Judge, shall have been handed to the proper officer in Court, *unless otherwise ordered*."

(2) 49 Law J. Rep. Q.B. 604; Law Rep. 5 Q.B. D. 359.

(3) 3 Hurl. & N. 521; 27 Law J. Rep. Exch. 453.

ion of law raised at such trial or ıg, and of the facts in evidence in on thereto, and of his decision on, and of his decision of the cause, r proceeding; and he shall at the se of any person or persons, being or parties in any such cause, suit oceeding, requiring the same for the se of appeal, furnish a copy of such . . . . and shall sign such copy." section only deals with notes taken e Judge with reference to a point of nd facts connected with it, and has plication to the present case. But s been urged that there is a decision e Court of Appeal which supports laintiff's contention, and if there had such a decision it would be binding is Court. But all that *Seymour* v. *on* (2) decided was this, that it is condition precedent to the right of ıl that the Judge should have been sted to make a note. I don't see how lecision in that case can help Mr. when the question is whether a tory duty limited by the express s of the statute can be enforced, ı, except for the statute, could not nforced. I think for the reasons I given that this portion of the rule d also be discharged; and I may add no harm will be done, for if upon earing of an appeal any injustice is r to be done by the absence of a ty Court Judge's notes, the Court ower to dispense with them.

ILD, J.—I am of the same opinion. gards the first point, I never enter- d the slightest doubt that we had no liction to call upon the County Court e to re-enter the cause on the list. reference to the other point I own e entertained some doubt, but upon deration I agree with my Lord, and : we ought not to compel the Judge n these notes. A mere request to a e to take notes of the evidence does ntimate to him that there will be a ; of law raised. The County Court e did in the present case take notes is own information, "but," he says, vas never asked to take notes with ence to any point of law, and I dingly object to produce them be- e they are not such as would have come into existence had I known of the point of law intended to be raised." The doubt which I entertained arose in consequence of the decision in the Court of Appeal. But my Lord's view of that decision is, I think, the correct one. At one time I thought the appellants might be unfairly prejudiced on the hearing of the appeal, but the Rules of Court sweep away a grievance of this kind.

The plaintiff appealed.

Terrell, for the appellant, the plaintiff in the action.—A sufficient request was made to the Judge to take a note, and he is bound, under the County Courts Act, 1875, s. 6 (1), to sign the note which he has taken. As he has taken a note, an appeal lies, even if the request should be held to be insufficient—*Seymour* v. *Coulson* (2). By the County Court Rules, 1875, Order XXXVII. rule 26 (4), the parties had power to adjourn by consent, and when they had done so, the Judge had no jurisdiction to nonsuit. He also referred to *Morgan* v. *Davies* (5).

Cohen (*H. Tindal Atkinson* with him), for the County Court Judge.—No sufficient request was made to the Judge to make a note, and the statutory conditions have not been complied with. There is no power to adjourn except "to such subsequent Court as the Judge shall direct;" therefore the Judge's consent is necessary.

Terrell, in reply.

BRAMWELL, L.J.—I think we must dismiss this appeal. It seems to me that the County Court Judge heard the case, and although he did not hear it in the most satisfactory manner, perhaps we ought not to find fault with what he has done in the face of his affidavit as to the inconvenience of frequent adjournments. I do not think that he had no jurisdiction to hear the case in consequence of the adjournment. On the construction of Order XXXVII. rule 26 of the Rules (4)

(4) "The parties to any action, at any time before the action is called on, may by consent, and without payment of any trial fee, postpone the trial to such subsequent Court as the Judge shall direct. . . ."

(5) Law Rep. 3 C.P. D. 260.

I think the adjournment must be with the sanction of the Judge, and therefore we cannot call on the Judge to rehear the case, for he has not declined jurisdiction. It is obvious that a point of law may arise in the course of a case, and after evidence has been given; if this happens what is the Judge to do? Is he to hear the evidence over again? But there is the rule, and I do not think that technically the plaintiff took the proceedings which the rule makes necessary. The Judge did not take such a note as the rule requires, and the point was not made by requesting him to take a note, as required by the Act. I wish to add one observation. It is not clear to me that an appeal does not lie now; I should think that, under the words at the end of the order of the 22nd of January, 1877 (1), "unless otherwise ordered," the Court might allow the appeal to be brought.

BAGGALLAY, L.J.—I agree that no sufficient request to take a note was made to the Judge under the Act, which contemplates that a specific point must be raised; and I think it is not enough to say to the Judge that it is an important case, and you wish him to take a note. Here the Judge did not take a note of the whole evidence, and therefore the note which he took was not a note under the statute, and he was not bound to sign it. I think the Judge had power to decline to allow a further adjournment. No application to be heard on the evidence was made to him, and he had jurisdiction to nonsuit.

I should regret having thus to decide the case on a technical ground, were it not that, as at present advised, I think the plaintiff is not deprived of his right of appeal. The want of notes may amount to such circumstances as may induce the Court to entertain the appeal.

BRETT, L.J.—I think that the parties cannot adjourn without the consent of the Judge, and that the County Court rule (4) does not apply to an adjournment of an adjournment. The words of the rule shew two things—first, that the adjournment must be before the action is called on; and secondly, that the parties cannot adjourn by consent generally, and therefore the Judge's consent becomes practically necessary by implication before there can be any adjournment. There has been a practice in that particular Court of adjourning by consent without applying to the Judge; this is clear, because the Registrar's clerk said he would enter the case as adjourned. Why the Judge did not adjourn the case I do not know, but he did go on, the parties were there, and he directed a nonsuit; therefore he did not decline jurisdiction, and we have no power to order the Judge to hear the cause. Then is there authority to order the Judge to sign his notes? After some hesitation I think the request was not sufficient. If the Judge had taken a full note, the decision in *Seymour* v. *Coulson* (2) would apply. Why the Judge refused to sign the note I cannot say, but I do not think the Court can order him to sign it.

I have a strong opinion that if the Court think they can hear the appeal on the materials before them it may go on.

Judgment affirmed.

Solicitors—J. B. Barrett, agent for Griffith Jones, Aberystwith, for plaintiff; Bolton, Robbins & Busk, agents for Howell & Evans, Machynlleth, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1881. March 28, 29. DYSON *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

Railway Company—By-law, divisibility of—Passenger travelling in a First-class Carriage with Second-class Ticket—Intention to Defraud—8 *Vict. c.* 20. *ss.* 103, 108, 109.

[For the report of the above case, see 50 Law J. Rep. M.C. 78.]

[IN THE QUEEN'S BENCH DIVISION.]

1881. March 15. } BOWYEAR *v.* PAWSON.

Pleading — Set-off — Joint and several Covenant—Debt due to Co-surety.

To an action on a covenant by the defendant to discharge certain liabilities incurred by the plaintiff, the defendant pleaded that he had entered into the covenant jointly and severally with one Wilson, that a debt exceeding the amount of the plaintiff's claim was owing by the plaintiff to Wilson, and that Wilson had assigned this debt to himself and the defendant in equal shares as tenants in common.

To one moiety of the plaintiff's claim the defendant claimed to set off his share of the plaintiff's debt to Wilson, and to the other moiety of the plaintiff's claim the defendant claimed to set off the other share of Wilson's debt on the ground that he was entitled to be exonerated by Wilson and to call on him to contribute in equal shares to the payment of the plaintiff's claim:—

Held, *that the defence shewed no right of set-off or counter-claim and was no answer to the plaintiff's claim.*

Demurrer to a statement of defence.

The statement of claim alleged that by a deed of covenant of the 6th of June, 1879, the defendant covenanted with the plaintiff to discharge all liabilities which the plaintiff might incur under a certain deed of arrangement, dated the 28th of August, 1878, and made between Messrs. Myers and the plaintiff; that the plaintiff had incurred liabilities under the deed of the 28th of August, 1878, but that the defendant had made default in paying the same.

In his statement of defence the defendant alleged that the deed of the 6th of June, 1879, was made between the plaintiff and the defendant, together with one Wilson and Vowler, and was for the purpose, amongst other matters, of releasing the plaintiff from certain liabilities incurred by him on behalf of a partnership then existing between him and Vowler, under the name of the Canning Town Ironworks Company, the consideration for the release being that the plaintiff had agreed to retire from business, leaving the same to be carried on by Vowler alone.

The defendant accordingly, with Wilson and Vowler, entered into a joint and several covenant to pay and discharge all the claims and liabilities of the plaintiff as mentioned in the statement of claim.

By way of set-off and counter-claim the defendant pleaded that before the commencement of the action the plaintiff was indebted to the said Wilson in the sum of 811*l.* paid by him for the plaintiff, at his request, in respect of a debt due from the plaintiff to the Royal Exchange Assurance Company, and by an indenture made on the 8th day of November, 1880, the said Wilson, in consideration of the payment to him by the defendant of the sum of 371*l.* 6*s.* 2*d.*, assigned the said sum of 811*l.*, with interest, to himself and the defendant in equal shares as tenants in common.

That in respect of a moiety of the plaintiff's claim, the share of the said sum of 811*l.* with interest so assigned to the defendant was in excess of a moiety of the plaintiff's claim. In respect of the other moiety of the plaintiff's claim, that the defendant was entitled to be exonerated by his co-surety, the said Wilson, and to call upon him to contribute in equal shares to the payment of the plaintiff's claim, and that the share of the sum of 811*l.* and interest remaining vested in the said Wilson was in excess of the other moiety of the plaintiff's claim.

The defendant claimed, therefore, to set-off the two moieties of the said sum of 811*l.*, with interest, against the two moieties of the plaintiff's claim (if any).

Demurrer, on the ground that the above facts shewed no right of set-off or of counter-claim against the plaintiff.

Gore, for the plaintiff.

Castle, for the defendant.

The following authorities were cited: *Cochrane* v. *Green* (1), *Bechervaise* v. *Lewis* (2), *In re The Moseley Green Coal and Coke Company (Limited)*. *Barrett's*

(1) 9 Com. B. Rep. N.S. 448; 30 Law J. Rep. C.P. 97.

(2) 41 Law J. Rep. C.P. 161; Law Rep. 7 C.P. 372.

Case (No. 2) (3), *Hardcastle* v. *Netherwood* (4) and *Pellas* v. *The Neptune Marine Insurance Company* (5).

Cur. adv. vult.

The judgment of the Court (6) was (on March 18) delivered by

MATHEW, J.—In this case the plaintiff by his statement of claim sought to recover from the defendant the sum of 684*l.* 14*s.* 5*d.*, with interest, under the covenant of the defendant contained in a deed of the 6th of June, 1879. The defendant by his statement of defence, which was amended by consent in the course of the argument, alleged as follows: [His Lordship here read the statement of defence and counter-claim as above set out.] It was argued for the defendant, with respect to the first moiety of the plaintiff's claim, that the defendant was entitled to set off a moiety of the sum of 811*l.*, in respect of which it was alleged that the defendant and Wilson were entitled to be paid by the plaintiff.

In other words, it was said that if A was entitled to be paid a sum of money by B, B could set off in equity his share of a debt, whether legal or equitable, which A owed to him and another or others. It was not contended that any provisions in the rules passed under the Judicature Acts applied to the case, but it was urged that it was reasonable and equitable to allow the set-off. It seems to us not to be either reasonable or equitable. For in such a case A might reasonably say that when B and the person or persons alleged to have a claim against him chose to sue him, he would be prepared with his defence, but that B had no right to mix up the separate transactions between him and A with other and independent transactions in which B had only a joint interest.

Then, as regards the other moiety, the defendant's contention is ingenious, but, it seems to us, hopeless. The defendant, admitting his liability to the plaintiff, alleges that if he paid the plaintiff he would be entitled to call on Wilson to contribute a moiety of the debt, and that Wilson has a set-off in respect of that moiety against the plaintiff. But the defendant does not shew that he had any right to call on Wilson to appropriate the debt due to him from the plaintiff to the exoneration of the defendant, nor any contract with the plaintiff to accept a set-off of Wilson's debt as a discharge of the defendant. The attempt on the part of the defendant to establish a set-off to the plaintiff's claim of this extraordinary kind was explained by what was stated in the course of the argument, namely, that after the commencement of the action the defendant had obtained an order at chambers that Wilson should be added as a co-defendant; and it would seem that with a view of meeting the plaintiff's claim against both defendants the assignment of the 8th of November, 1880, had been executed. The order to join Wilson as a defendant was subsequently set aside by the Court, and the pleadings in this action represent the effort of the defendant to avail himself of the assignment as if Wilson were still a party to the action. It would seem that the defendant has sought to treat his joint and several covenant with the plaintiff as if it were joint only. But this attempt must fail for the reason that the defendant's covenant is several as well as joint. We are of opinion that the demurrer to the statement of defence must be allowed.

Judgment for the plaintiff on the demurrer.

Solicitors—Harper, Broad & Battcock, for plaintiff; Capel A. Curwood, for defendant.

(3) 4 De Gex, J. & S. 756; 33 Law J. Rep. Chanc. 617.
(4) 5 B. & Ald. 93.
(5) 49 Law J. Rep. C.P. 153; Law Rep. 5 C.P. D. 34.
(6) Williams, J., and Mathew, J.

IN THE HOUSE OF LORDS.]

1. }
10, 11. } CASTRO *v.* THE QUEEN.

inal Law — Practice — Joinder of Misdemeanours in one Indictment— —Power to award Successive Terms il Servitude exceeding in the Aggre- Maximum Punishment for any one Offences charged—2 *Geo.* 2. *c.* 25.

n indictment for perjury, C. was in one count with committing the in an action in the Court of Common nd in another count with the like in a Chancery suit brought by him nt the setting up of certain defences. lictment did not contain the words t the form of the statute," &c. C. d at bar and the jury found him f the offences "charged in and by unts of the indictment," whereupon sentenced to the maximum term of ears' penal servitude on each count, nd term to commence at the expira- the first:—Held, *that the verdict ufficient finding of guilty on each that since the passing of the Act* 14 *Vict. c.* 100, *an indictment not con- with the words "against the form of ute," &c., was sufficient to warrant tory punishment for what was also non law offence; that the Act* 2 *Geo.* *does not necessarily require the in- of a sentence under the previous law as that authorised by the Act; that jury committed in the Chancery suit separate and distinct offence from mmitted in the action at common hat separate judgments might be d upon several counts in one indict- charging distinct misdemeanours; hat successive maximum terms of ervitude might be inflicted in respect count.*

plaintiff in error appealed against ision of the Court of Appeal, re- 49 Law J. Rep. Q.B. 747; Law Q.B. D. 490.

amin and *Atherley Jones* (*Hedder- d Spratt* with them), for the ap- , repeated the arguments used in urt below.

The Attorney-General (*Sir H. James*), *The Solicitor-General* (*Sir F. Herschell*), *Poland* and *A. L. Smith*, for the respondent, were not called upon.

THE LORD CHANCELLOR (LORD SELBORNE).—Notwithstanding that the case has been argued at the bar of the House with so much zeal in support of the appeal, I believe your Lordships are agreed that it is unnecessary to call upon the learned counsel for the Crown to answer the objections which have been raised to the judgment pronounced by the Court of Queen's Bench. No fewer than six objections have been taken to that judgment, and I will deal with them shortly, reserving to the last that which alone appeared to me to be seriously relied upon by the leading counsel for the appellant. The first objection to the judgment was that there was no finding of guilty upon each count, but that there was a general finding of guilty upon the charges which were contained in both counts. This objection was founded upon the language of the verdict, which was as follows: "And now at this day—that is to say, on the said Saturday, the 28th day of February, in the year of our Lord 1874—the jurors aforesaid so empanelled and sworn as aforesaid to try the issues so joined as aforesaid, upon their oath say that the said Thomas Castro, otherwise called Arthur Orton, otherwise called Sir Roger Charles Doughty Tichborne, Bart., is guilty of the premises on him above charged in and by both counts of the indictment aforesaid above specified in the manner and form as aforesaid, as by the indictment aforesaid is above supposed against him." I need not say more with regard to this objection than that it appears to be founded upon a perverse and an unreasonable construction of the language of the verdict, which clearly refers to each count. The second objection was that the indictment did not contain the words *contra formam statuti*. In reference to this objection, I may say that, before the passing of the 14 & 15 Vict. c. 100, it undoubtedly was the law —for, although it was a mere technicality, it was still settled law—that an indictment founded on a statute should contain

those words, in order to justify the infliction of a statutory punishment for what was also a common law offence. It was, however, for the very purpose of obviating the inconvenience and the unreasonable consequences of that and other similar technical rules relating to the form of pleading in criminal cases that the statute of the 14 & 15 Vict. c. 100 was passed, which said that no indictment should be held insufficient by reason of the omission of those forms. It was argued that the language of the statute merely meant that the indictment from which those words were omitted should not be held bad, but that it was not sufficient to warrant the assumption that the statutory penalty could be inflicted under an indictment from which those words were omitted. I am of opinion that to place such a narrow construction upon the words in a remedial statute intended to get rid of inconvenient technicalities would be a very great mistake on your Lordships' part. When the statute said that the indictment from which those words were omitted should not be held insufficient, I am of opinion that it was not intended that the indictment from which those words were omitted was to be held insufficient for any purpose for which it would have been sufficient if it had contained those words. That, therefore, disposes of the second point. The third objection to the judgment was founded upon the terms of the statute of 2 Geo. 2. c. 25, and it was contended that the sentence was bad because the punishment inflicted was not an addition to some other and further punishment which might have been inflicted if that statute had not been passed. This objection applied equally to both terms of penal servitude, and, in my opinion, there is no foundation whatever for it. It is based on these words, in section 2 of the statute: "And the more effectually to deter persons from committing wilful and corrupt perjury or subornation of perjury, be it further enacted by the authority aforesaid, that, besides the punishment already to be inflicted by law for so great crimes, it shall and may be lawful for the Court or Judge before whom any person shall be convicted of wilful and corrupt perjury, or subornation of perjury, according to the laws now in being, to order such person to be sent to some house of correction within the same county for a time not exceeding seven years, there to be kept to hard labour during all the said time, or otherwise to be transported"—I do not think we need pursue the alternative of transportation—"and thereupon judgment shall be given that the person convicted shall be committed or transported accordingly, over and beside such punishment as shall be adjudged to be inflicted on such person agreeable to the laws now in being." Even if the punishment which the laws in force for the time being permitted to be inflicted for perjury before that statute was passed had been *diversi generis* from that which would be suffered under this clause in all respects, I still greatly doubt whether it would be a reasonable construction of the clause to hold that it requires cumulative punishments under the common law, or the Elizabethan law, and also under this Act of Geo. 2 in all cases. I think it probable that this would be the reasonable construction—that it meant to leave the Judge such discretion as he had before at common law with regard to common law punishment, which he might or might not think it right to inflict in addition to this, and also the power to punish within the limits authorised by this statute. But I do not think, according to the view which I take of the matter, that even that question need be determined, because the substance of the provision is this: whereas before this offence was punishable by imprisonment simply, the additional power is given to commit to the house of correction for a time not exceeding seven years, there to be kept to hard labour, which certainly must necessarily include the addition of the period of hard labour in the house of correction over and above imprisonment. That there should be a distinct and separate term of imprisonment, besides the imprisonment in the house of correction to which hard labour is superadded, does not seem to me to be at all within the reasonable interpretation of the statute. That is no doubt an objection which a prisoner convicted and sentenced is perfectly at liberty

to urge, if he can make it good at law. It means not that he has received too severe punishment, but that he ought to have received more punishment still, and the interpretation which I propose to your Lordships to put upon the words of the statute is not against persons sentenced for criminal offences of this kind, but one of rather greater leniency, and more in their favour. The next objection is that, the perjury in question having been committed in one and the same proceeding, it could not be made the subject of two separate punishments. No authority, however, was cited to show that perjury committed in the Court of Chancery in 1868 and perjury committed before the Chief Justice of the Common Pleas in 1871 must be regarded as constituting one and the same offence, even although they had one common object—that of substantiating a claim to certain estates. I should have been of opinion that the offences were separate, even although the assignments of perjury in each count had been precisely the same, but in point of fact there are some which are different. There were two distinct offences committed at two distinct times in two distinct suits, and it is clear that the appellant was indictable in respect of each of them. It has further been very zealously argued at your Lordships' bar that, however many counts there might be, only one judgment could be properly passed upon one indictment for misdemeanour. No authority whatever has been cited in support of that contention, but the case of *O'Connell* v. *The Queen* (1), which has been so often referred to for other purposes, is a full authority against it. I do not think it necessary to refer to any other authority than to read two or three passages which are to be found in the opinions delivered in that case. In the first place Mr. Baron Parke says this: "If this point were to be considered independently of the understood rule upon the subject, and supposing that no such rule existed, I should say that where an indictment contains several counts, each ought to be brought to its proper legal termination by a proper judgment. The practice has grown up, and much increased in modern times, of introducing many counts into one indictment; and though we know practically that these are most frequently descriptions only in different words of the same offence, they are allowable only on the presumption that they are different offences, and every count so imports on the face of the record, as Mr. Justice Buller states in *Young* v. *The King* (2), though Mr. Justice Taunton intimated a different opinion, I think without sufficient ground, in *The King* v. *Powell* (3). The question then being how these counts are to be dealt with on the face of the record, I should have said, *a priori*, that it was the duty of the Court acting between the Crown and the accused, and the right of the accused, to have the charge of each offence, for as such I must treat it, properly and finally disposed of on the record, so that the accused as well as the Crown might know for what offence the punishment was inflicted, and for what not," and so on. I will now refer to what was said in this House by two noble and learned Lords who took part in the judgment which the House pronounced, namely, Lord Denman, then Lord Chief Justice, and Lord Campbell, afterwards Lord Chief Justice. Lord Denman said, "So with regard to several counts in criminal cases, the objection may be entirely avoided by the Court passing a separate judgment upon each count, and saying, 'We adjudge that upon this count on which the prisoner is found guilty he ought to suffer so much; that on the second count he ought, on being found guilty, to receive such a punishment. Whether the count turns out to be good or not we shall now pronounce no opinion.'" Lord Campbell adds: "It is an utter mistake to suppose that there is only one *corpus delicti* which is made the subject of several counts in one indictment. Even with respect to felony, the law supposes a separate offence to be charged in each count; and in misdemeanours there are not unfrequently in the different counts entirely different offences, of different sorts, committed at

(1) 11 Cl. & F. 155.

(2) 3 Term Rep. 98.

(3) 2 B. & Ad. 75.

different times." And I may add that the judgment in that case was that, if there were not a separate judgment on each count, then, if there were one count bad at law, the judgment, being incapable of being referred to the good counts, must be regarded as distributed among them all, and the whole proceeding would fail. I must say that I heard this point argued by the junior counsel for the appellant with some surprise, because I understood that it had been given up by his learned leader. This brings me to the remaining objection, and the only one of substance—if such it could be called—in the case, which is, that a separate and cumulative sentence of seven years' penal servitude was imposed upon the appellant in respect of each count of the indictment, whereas by 2 Geo. 2. c. 25. s. 2, and the Acts of Parliament amending the same, the maximum term of penal servitude that could be inflicted in respect of the offence charged in the indictment was seven years only, and no greater penalty could be imposed for any offence or offences charged in one and the same indictment greater than the maximum penalty imposed by the law for such offence or offences. If it were not possible consistently with the law to inflict cumulative punishments, one to take effect after the expiration of the other, this argument might have had some weight. It has, however, been settled in this House as long ago as 1769, in the case of *The King* v. *Wilkes* (4), that the proper course, when more than one sentence has to be pronounced, is that the second term of punishment should commence at the expiration of the first. To the reasons given for that by Chief Justice Wilmot, and apparently adopted by this House, I will shortly refer. I will first, however, state the question which was raised and put to the Judges, which was this—"Whether a judgment of imprisonment against a defendant to commence from and after the determination of an imprisonment to which he was before sentenced for another offence is good in law;" to which the learned Judges returned an affirmative answer in the terms of the question; and thereupon this House affirmed the judgment which had been in fact so pronounced. That was a case of misdemeanours, and the material passages which I think it worth while to refer to in the opinion delivered by Chief Justice Wilmot, and reported in 19 *Howell's State Trials*, 1133, are these: "In treasons and felonies a certain known judgment which cannot be departed from, namely, in the present tense of the subjunctive passive; but in misdemeanours, where punishment is discretionary, the limitation as to time seems only to be that the punishment shall take place before a total dismission of the party; a punishment shall not hang over a man's head when he has been once discharged; that is properly a punishment *in futuro*. But whilst he remains under a state of punishment, whilst he is suffering one part of his punishment, he is very properly the object of a different kind of punishment to take place during the continuance of the former, or immediately after the end of it." And a little further on he says that if the punishment had been inflicted by imprisonment for twelve months, then, as he was already sentenced to ten months, it would have been only an imprisonment for two; in other words, that the power which the Court thought fit, having discretion, to exercise, of awarding a period of twelve months' imprisonment for the second offence, could not have been exercised unless it were by placing it after the expiration of the first. Now I will observe that in a case like the present, where the statutory power is to imprison for a term not exceeding seven years, if you were to pass two simultaneous sentences commencing at the same time, it would be manifest that for the second offence there would be no punishment at all suffered, even though it were given for the maximum period. Then later Chief Justice Wilmot says this: "We cannot explore any mode of sentencing a man to imprisonment who is imprisoned already but by tacking one imprisonment to the other, as is done in the present case." So far, therefore, as relates to misdemeanours, and subject therefore to the question whether this authority would apply when the aggregate of the two

(4) 4 Burr. 2527; 4 Bro. P.C. 360; 19 How. St. Tr. 1075.

uments exceeds in point of time that there would have been power to for either offence alone—subject to he case of *The King* v. *Wilkes* (4) s House is a clear and distinct ity in favour of the proposition hen a man is found guilty of two t misdemeanours, being distinct parate offences, and not the same prehend that it makes no kind of nce whether it be by two indict- simultaneously tried and found t him, or upon two counts in one e same indictment), there, not only petent, but the proper course, inde- it of any statutory legislation, was to pronounce the second sentence risonment, within the power of the as to duration, to begin after the tion of the first. If that be so, I hat difference can it make that a has said that for a single offence, l of having a discretionary power prison for any term that may be it fit, the Court shall have power to on for a term not exceeding seven The only difference it makes is hat for each offence the Court can far as seven years, and cannot go r; but the moment that it is ascer- that it is proper for the Court to a second sentence for a distinct commence after the expiration of prisonment to be suffered for the then the sentence so commencing, for seven years only, is not within nse of the statutory limit; and it is e fallacy, the moment that you stand the point of the case of *The* v. *Wilkes* (4), to mix up the two er as if they were one offence, and that because only one seven years inflicted for a single offence, there- nly seven years in the aggregate can icted for two offences. The statute ot said so, and having regard to the House decided in the case of *ing* v. *Wilkes* (4), it would be per- nugatory, and would be absolutely ring the Court of the power of post- the commencement of the sentence, that it ought to be so. Because, argument were good for anything, uld be good not only to cut off the years, but to cut off any part of the seven years. If the first sentence was for the full period of seven years, the result would be that it would be impossible, according to that argument, to sentence a man for a second offence for a period to commence after the end of the first. It does not stop there, because since 1769 the Legislature has thought fit to extend this principle even to cases of felony. By the Act 7 & 8 Geo. 4. c. 28 it was so provided, there being added—*ex cautela*, as I conceive—to the end of section 10 of that Act which dealt with the matter and expressly said that when a person was "already imprisoned under sentence for another crime, it shall be lawful for the Court to award imprisonment for the subsequent offence to commence at the expiration of the imprisonment to which such person shall have been previously sentenced," these words, "although the aggregate term of imprisonment may exceed the term for which the punishment could be otherwise awarded." I have left out the alternative of transportation for shortness only. I apprehend that if those last words had not been there the effect would have been practically the same; but those words at all events show that as far as those cases are concerned the intention of the Legislature when expressly dealing with them was the same as I conceive would have resulted in law from the rule which was settled in this House in the case of *The King* v. *Wilkes* (4) as to cases of misdemeanour. That was followed up by the case of *The King* v. *Robinson* (5), in which thirteen learned Judges were of opinion that there being two distinct misdemeanours charged in the same indictment in different counts, and one sentence for two years' imprisonment passed, that was bad, because by statute one year was the maximum term which the Court had the power to inflict for that offence; but all the thirteen Judges (all but Mr. Baron Parke and Mr. Justice Patteson being present) are stated to have been unanimously of opinion that the sentence was incorrect, and that there should have been consecutive judgments of one year's imprisonment each. The conviction was

(5) 1 Moo. C.C. 413.

therefore held to be bad. Now that was a case of misdemeanour—it was not a case of felony; it is, therefore, as far as the opinion of the thirteen Judges goes, expressly in point on this occasion. After that another Act of Parliament was passed, giving Justices, in the exercise of summary jurisdiction in criminal cases, a similar power to that which had been given to the Courts by the Act of the 7 & 8 Geo. 4. That Act was the 11 & 12 Vict. c. 43. It said (s. 25) that where Justices upon information should adjudge a defendant to be imprisoned, and the defendant should "then be in prison undergoing imprisonment upon a conviction for any other offence, the warrant of commitment for such subsequent offence shall in every such case be forthwith delivered to the gaoler to whom the same shall be directed," and it should be lawful for the Justices issuing it, if they thought fit, to award imprisonment for such subsequent offence which should commence at the expiration of the imprisonment to which such defendant should have been previously adjudged or sentenced. The Legislature did not add in that statute the words, "although the aggregate term of imprisonment should exceed the term for which the punishment might otherwise be awarded." A question under that statute came before the Court of Queen's Bench in the case *The Queen* v. *Outbush* (6) in 1867, and the only difficulty that was felt there by the learned Judges, if any difficulty was seriously felt, was this, that the language of the one statute was, "whenever sentence shall be passed for felony upon a person already imprisoned under sentence for another crime;" and the words of the latter statute were, "such defendant shall then be in prison undergoing imprisonment;" and the later statute, being thus expressed, seemed to justify the argument that if he had not actually got into prison, although a sentence of imprisonment had been pronounced upon him, the clauses did not apply. But that was held to be an untenable argument. Chief Justice Cockburn stated, after communing with the other Judges, that it was ascertained that the practice of the Judges, as far as living judicial memory went, under the Act of Geo. 4, had been to act upon that statute, whenever more than one case of felony was established against a man, and he was convicted of them at one and the same time, to make the sentence of imprisonment for the second or third offence, as the case might be, commence at the expiration of the sentence previously awarded. The learned Chief Justice, although admitting that there was some technical difficulty, not in any other part of the matter, but in the particular words I have read, which seemed to contemplate that the man should be actually in prison, yet thought the reason and substance of the case to be so clear, in addition to the authority to be derived from the exposition based upon the earlier statute by the uniform practice, as to make it right to hold that cumulative sentences might be awarded under those statutes even though the man had not already found his way to prison; and in point of fact one sentence was passed practically at the same time as the other. The practice, therefore, as far as can be ascertained from any of the authorities, or from any of the books, has been uniform in favour of consecutive cumulative sentences of this kind; and if it were not so it would be difficult to see how it would be possible that any punishment at all could be inflicted for more than one offence, if the convictions took place at the same time. I believe I have now said everything that occurs to me as important to say to your Lordships with regard to this case, because, upon the decision in the State of New York in the case of *Tweed* v. *Lipscombe* (7), it is sufficient for me to say that it appears to me to proceed upon New York law and not upon English law; and the cardinal proposition upon which it all depends is one of those which, if the view I have submitted to your Lordships is correct, we must reject as erroneous, namely, that only a single judgment can be pronounced upon a single indictment. For all these reasons, and also bearing in mind that the Courts before whom this question has already come have unani-

(6) 36 Law J. Rep. M.C. 70; Law Rep. 2 Q.B. 379.

(7) 15 Sickel's N.Y. Cas. 559.

greed in their determination that no error in this record, I must ur Lordships to affirm the judg- l to dismiss the appeal.

BLACKBURN.—I have never been m the beginning to the end, ain the least doubt that the t in this case should be affirmed. t point which has been made f of the plaintiff in error I think uires to be stated to answer it- has been said that, when there ie Court of Chancery a proceed- ing to set aside some outstanding rder to permit a trial at law in of ejectment, and in the course the plaintiff, who is now the being sworn, committed wilful upt perjury, for the purpose of ig the Court of Chancery in that t was not a different offence, or, hat the two offences were sub- r the same as the offence he d afterwards, at the trial of the t, in swearing falsely, and com- wilful perjury, with the intent to the Court that was trying the of ejectment. It is said that they stantially the same offence, be- th perjuries were committed in which the ultimate object was to certain estates situate in Hamp- l Dorsetshire. Taking that to be t, and stating it in that way, it m to me, upon the face of it, to ult to state anything which would more obviously wrong than the tement of the case does. We thing whatever to do with the object of the suit. The crime ry was complete as soon as the fully and falsely swore a matter intention to mislead the Court ery. The crime of perjury was when, at a subsequent time, the n wilfully and intentionally made tatement on oath with intent to the Court of Common Pleas. No is object in each case was to the same estates. In like man- he case which was put by way of ion, the object of a man who pen a house in the country with ntion to steal a jewel-case, and, finding that the lady has carried it off to London, goes off to London, and breaks into a house in London, and gets the jewel-case, his object in each case is to get the jewels, but no one will dispute that they are two crimes. It would have been quite possible, if the Legislature had been so wilfully absurd, to have so worded the Act of Geo. 2 as to say that, when a man has, with one object, committed per- jury, and commits afterwards any number of other perjuries for the same purpose, the aggregate punishment shall never, under any circumstances, exceed the seven years. Such a thing, if properly said by the Legislature, and sufficiently expressed, would of course be valid, but it is not pretended that there is a word in the statute of Geo. 2 which can by any torturing in argument afford a basis for that proposition. The next point, I think, namely, that the words *contra formam statuti* were not inserted here, rests upon one of those technical rules which have been most properly abolished by the Act 14 & 15 Vict. c. 100, and I think I need say no more upon that than that the Act clearly said in effect, that where any indictment would have required *contra formam statuti* before that Act was passed, it shall hereafter be just as good and sufficient for all purposes as if it had con- tained those words. The next point is this: it is attempted to say that the statute of Geo. 2 requires that before you can pass a sentence of penal servitude you shall first pass a sentence such as would have been capable of being passed before that Act was passed. I can only say that I cannot construe the words as meaning that. The words of the statute seem to me to express very plainly that the Court may give this punishment, and then the Act proceeds to give the form of judg- ment, and says that the prisoner may be sent for transportation, for which penal servitude is substituted, and that may be done in addition to any punishment which shall be awarded at common law. That means, I think, any punishment which is given, if there be a punishment in addi- tion. It does not mean that such a punishment shall necessarily be given in order to be a foundation for the other. If it did so, the only effect would be that

the sentence before the House should be amended by adding a fine of 1*s*., or an hour's imprisonment, or anything else they might please. But I think it is quite unnecessary to do that, for I feel clear (agreeing there with the Court below) that the construction of the Act is not that which is contended for by the plaintiff in error. Then we come to what is more nearly approaching to something of substance, if it is really well founded. I must say at once that I totally disagree with what has been repeatedly asserted by both the learned counsel at the bar, that the pleadings at common law in a criminal case and a civil case were in the slightest degree different. I am speaking, of course, of the time before the Judicature Acts were passed, which swept them all away. Many enactments had from time to time been passed relieving the strictness of pleadings in civil cases which did not relieve them in criminal cases, but the rules of pleading at common law were exactly the same in each case. The course taken with regard to an indictment which was found was this: the Queen having sent her commission to the grand jury, or any other commission, to a proper tribunal, that indictment presented all the offences charged against the person—then if it was brought before the Court sufficiently that a man had committed ten murders, fifty burglaries, and a score of larcenies, they would find, not one finding as to them all, but they would find that he had committed each of those charged offences; and if there were many other persons, as generally there are, it would be also found that those other persons had committed the offences charged against them also. Upon that a process could be issued against a man so charged to bring him upon his trial before a petty jury to try whether he was guilty of those offences so charged or not. Now at common law there was no objection whatever in point of law to bringing a man who was charged with several offences, whether those charges were felonies or misdemeanours, before one petty jury, and making him answer for the whole at one time. The contrary was asserted by the learned counsel, but, although repeatedly challenged to do so, he did not cite any authority in support of his contention. There was no legal objection to doing this; it was frequently not fair to do it, because it embarrassed the man on the trial if he was accused of several things, and frequently the mere fact of accusing him of several things was supposed to tend to increase the probability of his being found guilty, as it amounted to giving evidence of bad character against him. For these mixed motives it was well established that whenever it would be unfair to a man to bring him to trial for several things at once an application might be made to the discretion of the presiding Judge to say, "Try me only for one offence, or try me only for two offences; if one was the real thing let me be tried for one and one only;" and wherever it was right that that should be done the Judge would permit it; and it is further established by a long series of decisions (I confess I doubt whether they were right at first, but certainly they have been well established now, and sometimes by statute, that is quite clear) that where the several charges were of the nature of felony, the joining of two felonies in one count was so necessarily, I may say, unfair to the prisoner, that the Judge ought, upon an application being made to him, to put the prosecution to their election, and send them to two trials. It never was decided, indeed the contrary was often maintained, that if that application for the election was not made, even in felony, the joining of several felonies—that is to say, the taking several felonies which had been found upon the finding of the indictment together, and trying those several felonies before one jury—was wrong in point of law; on the contrary, it was repeatedly held that it was right enough, although, if the proper application had been made at the proper time in a case of felony, the party prosecuting would have been put to his election, or made to take one trial only, and not both at the same time. And in cases of misdemeanour it was by no means a matter of course that it should be done. I rather think that in point of practice, if the Judge upon an application had been satisfied that to try the prisoner for several misdemeanours together would

worked injustice to him, he had a
t right to say, "I will not work
njustice by trying them together;
diminish them in number, and try
onable number and no more." I
t know whether that was ever done
ase of misdemeanour, but I think it
y possible. I feel very little doubt
t may have been. I think that in
a case as the American case which
ited, where a man in one indictment
called upon to answer for 200
es, the man might not unreasonably
said, "That is too much to put a
upon his trial for; select five or six,
ie on those, and let the rest stand
' I do not see that that would be
an unreasonable application. And
present case, if an application had
made to the Court of Queen's Bench
the party to his election, and if it had
said, "I cannot be fairly tried for one
e of perjury committed in Middlesex,
the same time I am to be tried for
y committed in London, therefore
must be two separate trials." If
an application had been made, the
of Queen's Bench would doubt-
ave said, "We will listen to the
ents that may be urged in its
r." What they could possibly have
I do not know; but no such appli-
was made. The prisoner was tried
two indictments, the two counts
taken both together, and then the
was that he was found guilty upon
An attempt was made to argue
hing upon the wording here, namely,
he was found "guilty of the pre-
" to the effect that it did not mean
remises charged in each of the
s, but meant only, if I under-
the argument rightly, such pre-
as were charged, not only in the
nt also in the other. In the first
that is not the meaning of the
; and secondly, it would be utterly
d, because the one count related
ly to things which happened in
on three years before, and the other
ngs which happened in Middlesex;
fore there could be nothing identical
two. But he was found guilty, and
came the question, what was the
nce to be? It is clear that, if the
Court had pleased to grant the application, these two counts might have been tried—the one in London before a London jury, and the other in Middlesex before a Middlesex jury; and, but for the Act relating to the Central Criminal Court, which gives that Court jurisdiction over both, they must have been so tried. But, even now, they might have been so tried, and, if they had been so tried, and if each jury had found a verdict of guilty on the counts brought before it separately, *The King* v. *Wilkes* (4) would have been an authority absolutely in point as to the sentence, and there would not have been a pretext for saying there was the least difference. But then it is put in the argument in this way, that when they are both tried before one jury, and when the party has not been put to his election, but the trial for both offences has taken place together, the consequence must be that he is not to be punished in the same way as he would have been if he had been tried for each before a separate jury, and he is therefore entitled to get off with less punishment. Why, I am sure I cannot conceive; nor can I see that any authority has been cited for that—at any rate, in English law; nor does it proceed on any reason. In regard to the American case which was cited, it might be enough to say that I observe that it proceeds upon the express ground that the Court was acting upon New York decisions, subsequent to the Declaration of Independence, and upon New York statutes, and not upon English rules or English law. I daresay that decision may be right according to those New York decisions and statutes, but their decision is this: They say that, according to their view of the New York decisions, where there is but one trial before one jury, it must be for one offence, and one only, and upon that they all rest. They logically enough say that, if that is granted, where there are sentences passed for more than one offence, all but one must be *extra vires*; accordingly, they held that the power of passing a sentence was exhausted. I leave it to the American Judges to say whether that was right or not according to American law. I do not pretend to express an opinion on that, but I am quite clear that it is not English

law. I think that the English decisions are all the other way; and the reason of the case is, to my mind, quite clearly the other way. I will mention but one or two cases which prove it. The first is *Young* v. *The King* (2), where the law is laid down in the way I have stated, that it is not a matter of right and law that two indictments shall not be tried together, but only a matter of election. Then comes *The King* v. *Jones* (8), where Lord Ellenborough both laid down the law as I have stated it and acted upon it. Then *The King* v. *Kingston* (9), where Lord Ellenborough again repeats the doctrine; and lastly, *The Queen* v. *Robinson* (5), which has been already cited, where it was said that the doctrine of *The King* v. *Wilkes* (4) ought to have been applied to a case where there were two misdemeanours in separate counts tried together before one Judge. Taking all these cases together, I myself can feel no doubt at all that by the English law, and going by that alone, there is not a pretence for this writ of error.

Lord Watson.—After hearing the very ingenious arguments on the part of the appellant, I have come to the same conclusion as your Lordships, that there has been no reason whatever shewn for reversing the judgment now under the review of the House; and the view which I take of the various objections which have been urged against the validity of the verdict and sentence has been so well expressed already that I do not feel justified in adding more than a few words to what has already fallen from your Lordships. The question as to what constitutes a separate offence where there has been a repetition of acts of the same character may at times involve questions of extreme nicety. It is unnecessary to deal with any of the cases such as have been suggested in the course of the argument, as to whether statements differing in their character, made by a person under oath upon the same occasion, will constitute separate acts of perjury when falsely made. It is quite unnecessary to consider that in the present case. I have no hesitation in holding with your Lordship upon the woolsack, who, I think, indicated that opinion, that where at two different times, at different places, in different suits and under the sanction of two different oaths, the same man repeats the same false statement, he thereby commits two separate acts of perjury—two different crimes; and I do not think it possible to bind these up together as one transaction, as was suggested in the able argument of the leading counsel for the appellant. You cannot make them *pars ejusdem negotii*, when so separated in time and place otherwise, by the mere fact that the person who committed the perjury on each of these occasions was actuated in both by the same motive, and had the same improper object in view. I think the criticism upon the terms of the verdict is quite unfounded, and that it must be taken that these words import, as according to their natural signification they do in my opinion, that the jury thereby found the accused guilty of each of the separate charges of perjury in this indictment preferred against him. I shall not refer to the argument founded on the absence of the words *contra formam statuti*, or to that founded on the statute of 2 Geo. 2, or to the argument which we have heard from the learned junior counsel to-day, because these have been entirely disposed of, as the other points in the case have been, by the observations which have already fallen from your Lordships. The last, and what appeared to be the most important consideration which the counsel for the appellant had to urge on his behalf was, that where upon one indictment there are two separate charges *ejusdem generis*, and the prisoner is convicted of both, if there be a statutory limit to the punishment which may be inflicted for one of these offences, that is to be the measure of all the punishment that can be inflicted upon him for more than one offence. So far as I could follow the argument, the learned counsel failed to assign any good reason for that contention. I think he did not dispute that separate cumulative punishments may be awarded, the second to take effect from the date of the expiring of the first sentence. But then it was said, although

(8) 2 Campb. 131.
(9) 8 East, 41.

s competent, there is an important f qualification which you must ob- and that rule is this: If for each e the statute says that you shall in- sentence of not more than seven penal servitude, you cannot for the ffences exceed that limit. For that sition, which seems at first sight a startling one, and does not in my lose that character upon a closer in- on, no authority whatever was cited. ıgth, at the close of his argument, an l was made by the learned counsel American case, not as an authority— se I take it that the judgment of a in New York is not an authority ase of this kind arising in England, regard to English rules of procedure ninal cases—but as shewing an argu- that ought to convince the House t ought to come to the same con- n in the present case as the Court ıerica arrived at in the case of *Tweed* *ecombe* (7). That case, even if it receivable, does not appear to me to the least degree an authority for the sition in support of which it was d. What was decided there, as I stand the case, was, that the law of ica differs from the law of England; ne of the Judges expressly puts it ecause of that difference the English rities were of no authority in ica; and I should have thought the converse of that proposition l be equally true, namely, that the ons in America, such being the dif- e between the laws of the two ries, would be of no authority here. ssuming the case of *Tweed* v. *Lips-* (7) to be an authority, what does ne to? It comes to this, that in cutions for misdemeanour in America an only proceed for one offence upon indictment, and if you desire to have lative punishment extending to more one statutory punishment, you must more than one separate indictment. inference which I draw from the s used by the two learned Judges decided that case is this, that you t have more than one penalty of the nount tacked together, if you brought ate proceedings for that purpose. hen in England it is not necessary to bring these two separate proceedings in order to try one criminal for a misdemeanour, and I see no reason whatever, even if I accept that decision as law, for holding that if you can tack together two periods of the full amount, one for each offence, when you try by separate indictments, the same may not be done when two offences are tried upon the same indictment. And still further, it appears to me among the cases cited at the bar there is to be found, not only sufficient authority, but ample authority for the proposition that such a sentence is sustainable, and is good according to the law of England. Had there been any serious doubt or difficulty attending these questions of criminal law which have been raised at the bar, I should have given my opinion with very great hesitation and diffidence; but looking to the very unsubstantial character of the objections which have been stated to this conviction and sentence, I cannot say that I feel the least hesitation in giving my concurrence to the views which have been expressed by your Lordships.

Judgment appealed from affirmed, and appeal dismissed.

Solicitors—E. Kimber, for appellant; The Solicitor to the Treasury, for respondent.

[IN THE QUEEN'S BENCH DIVISION].

1881. March 15. CAIGER AND OTHERS (*appellants*) *v.* THE VESTRY OF ST. MARY, ISLINGTON (*respondents*).

Metropolitan Management Acts (18 & 19 *Vict. c.* 120; 25 & 26 *Vict. c.* 102)—*Contribution towards new Street*—"*House and Land*"—*Dissenting Chapel.*

[For the report of the above case, see 50 Law J. Rep. M.C. 59.]

[IN THE COURT OF APPEAL.]

(*Appeal from the Common Pleas Division.*)

1880. Nov. 26. 1881. April 1.

THE MAYOR AND FREE BURGESSES OF THE BOROUGH OF SALTASH *v.* GOODMAN AND ANOTHER.*

Trespass — Several Oyster Fishery — Navigable River—Grant subject to Exception in Favour of Free Inhabitants of Ancient Tenements.

The plaintiffs, a corporation by royal charter of a borough, claimed to be possessed of a several fishery in a tidal navigable river. The defendants claimed as subjects of the realm a general right to dredge for and to dispose of oysters in the river in question, and they also claimed a right as free inhabitants of ancient tenements in the borough to dredge for oysters in the same river, from the 2nd of February to Easter Eve in each year:—Held (*by the Court of Appeal—dissentiente* BAGGALLAY, L.J.—*affirming the judgment of the Common Pleas Division*), *that the defendants were liable in an action of trespass, brought by the corporation, for that there was evidence from charters of re-grant, from leases, and from immemorial user, of a grant to the predecessors of the plaintiffs of a several fishery as early as Henry* 2, *and that there was no evidence of any exception out of that grant in favour of the defendants.*

Appeal from a judgment of the Common Pleas Division, in favour of the plaintiffs, on a Special Case stated in an action brought to determine a claim by the defendants, as inhabitants of the borough of Saltash, to dredge for oysters in the river Thamer within the liberties of the borough of Saltash.

The case is reported 49 Law J. Rep. C.P. 565, where the Special Case is set out.

The plaintiffs brought an action of trespass against two free inhabitants of ancient tenements of the borough of Saltash, for trespass on an oyster fishery of which the plaintiffs claimed to be possessed in the navigable part of the river Thamer, and for conversion of certain of the oysters therein.

The defendants admitted the commission of the acts complained of, but alleged that they were done on the 2nd of February, 1876, and they claimed a right to do these and similar acts from the 2nd of February to Easter Eve in each year. The plaintiffs are a corporation incorporated by divers royal charters, granted by Elizabeth, Charles 2 and George 3, and by virtue of such charters and by prescription the plaintiffs claimed to be possessed of the soil and of a several oyster fishery in certain parts of the Thamer.

Paragraphs 9, 10, 11, 17 of the Special Case were as follows:—

Par. 9. "The free inhabitants of ancient tenements in the borough of Saltash have from time immemorial, without interruption, and claiming as of right, exercised the privilege of dredging for oysters in the *locus in quo* mentioned from the 2nd of February in each year to Easter Eve in each year, both inclusive, and of catching and carrying away the same without stint for sale and otherwise. The acts complained of were done in the exercise of the privilege."

Par. 10. "The river Thamer was, at the time mentioned, and at the *locus in quo* mentioned, a navigable river or arm or creek of the sea where the tide flows and reflows."

Par. 11. "The defendants contend that the soil of the Thamer of the *locus in quo*, and the several oyster fishery (if any) are vested in the Crown or Duchy of Cornwall. The plaintiffs contend that the soil and several fishery are vested in them."

Par. 17. "The questions for the opinion of the Court (who are to be at liberty to draw inferences of fact) are—

1. Whether the defendants, as subjects of the realm, are entitled to dredge for oysters, and to carry away the same without stint for sale or otherwise, between the 2nd of February and Easter Eve in each year, both inclusive.

2. Whether the defendants are entitled to the same rights as free inhabitants of ancient tenements in the said borough.

* *Coram* Baggallay, L.J.; Brett, L.J.; and Cotton, L.J.

or, &c., of Saltash v. *Goodman* (*App.*), *C.P.*

Whether the defendants are entitled same rights as free inhabitants said borough.

ıe Court be of opinion that the de- ts are not so entitled, judgment is entered for the plaintiffs for 40*s.* r an injunction restraining the de- ts from any repetition of the acts ained of, with costs of suit.

ıe Court should be of the contrary ı, judgment is to be entered for the ants with costs.

Special Case also referred to a r of Elizabeth, confirming charters rles 2; a charter of George 3, to s in certain actions, to which the ation had been parties, and which lecided in favour of the corporation, nection with the river Thamer and ıes by them of oysterage in that

Common Pleas Division gave judg- or the plaintiffs.

defendants appealed.

kenzie (with him *Bullen*), for the ants.—The contention of the de- ts, the appellants, is that the right ıhery in a navigable river is *prima* a the Crown for the benefit of the t; that the *onus* of shewing that ıave a several fishery in this navi- river lies on the plaintiffs; that w this the plaintiffs must shew either tual grant as early as Hen. 2, or ə evidence from which the Court ıfer such a grant; that there is in ıse no evidence of an actual grant; ł ever there was such a grant, still is evidence that it was surrendered, hat it never was regranted; that s no evidence from which the Court e led to infer a grant, and that as a of these contentions it is manifest the defendants, as subjects of the ı, have a right to a several fishery. the evidence be not held to support onclusion, then it is submitted that ridence before the Court raises an nce of a grant to the corporation of h of a several fishery for all the save the time between the 2nd of ary and Easter Eve, or that it raises erence of a grant to the corporation ustees, as regards the named period, for the inhabitants of Saltash, so that the corporation are bound to allow such inhabitants to dredge without stint for oysters during the named period in each year.

The *onus* of proof is, it is submitted, on the plaintiffs, for the presumption is in favour of the defendants, inasmuch as in a navigable river the right of fishery is *prima facie* in the public—*Malcolmson* v. *O'Dea* (1); so that the plaintiffs must shew a grant or produce evidence that one existed and has been lost—*Carter* v. *Murcot* (2).

[BRETT, L.J.—Does not that lead to this conclusion, that every subject of the Crown may fish at all times?]

At all times not forbidden by the general law.

[*Charles*, for the plaintiffs, intimated that he did not dispute that the *onus* of proof was on the plaintiffs.]

There is no distinction between oyster and other fisheries—*The Mayor of Orford* v. *Richardson* (3); and the statutes which regulate other fisheries apply also to oyster fisheries—*The Mayor of Maldon* v. *Woolvet* (4).

It cannot, perhaps, be contended that the inhabitants of the borough can prescribe as for a *que* estate, for they are too fluctuating a body, but still the free inhabitants of ancient tenements can claim the right by user. The charters under which the plaintiffs claim do not confer on them a several fishery. The charter of Elizabeth which confirmed an earlier grant by Reginald de Vantort granted "the town and borough aforesaid, with all and singular its suburbs, members and appurtenances," and with "the like lands, tenements, waters, water-courses." There is, therefore, no actual grant of a fishery, and general words such as those cited will not pass a right of several fishery, for a grant by the Crown of rights in a navigable river must, unlike other grants, be construed strictly against the grantee. In the case of *The Royal Fishery of the Banne* (5), the king granted, *inter alia*, *piscarias*

(1) 10 H.L. Cas. 593.
(2) 4 Burr. 2162.
(3) 4 Term Rep. 437.
(4) 12 Ad. & E. 13; 9 Law J. Rep. Q.B. 370.
(5) Davy's Rep. *temp.* Jac. 1. 55.

piscationes aquas aquarum cursus, and it was held that the fishery passed, not by the grant of the land, but by the special words cited; and to the same effect is the decision in *The Duke of Somerset* v. *Fogwell* (6).

In the case of *Swans* (7) the plea alleged a grant of *omnia messuag'*, *aquas piscat' et cætera hæreditam'*, so that there is a clear distinction between those grants and that relied on by the plaintiffs in the present case. If it be said that this is a charter of confirmation and should therefore receive a large interpretation, still it appears from the *The Mayor of Colchester* v. *Brooke* (8) that in a similar charter the much larger words were used — there the king did "ratify, confirm and restore."

[BRETT, L.J.—In the charter of Charles 2 we find the word "regrant."]

But only of what the plaintiffs had before and that was a limited grant; the regrant cannot be more extensive than the original grant. There is evidence of leases by the plaintiffs of the oysters, but those are chiefly of modern date, and do not, it is submitted, tell substantially against the right of the defendants. The inquisition of 20 Hen. 6 finds that the plaintiffs were "seised of the water Thamer," but this does not shew that they were seised of the oysters, and the contrary is the conclusion which should be drawn from such facts, regard being had to the authorities already cited.

If, however, the Court infers the grant of a several fishery to the plaintiffs, then the defendants claim to have a right to fish during the time specified, which is commonly called forty days. They claim that the grant, if inferred, shall be a grant in accordance with the user, which it is found has been in fact enjoyed. Although the inhabitants may be unable to prescribe in their own names, yet they may be capable of the benefit of such a prescription and may acquire it by user— *White* v. *Coleman* (9), and then the plaintiffs must be considered to hold the fishery in trust for the defendants— *Wright* v. *Hobart* (10).

It is true that the right claimed is larger than a common of piscary; but it is submitted that it is not unreasonable and is not inconsistent with the decision in *Rivers* v. *Adams* (11), where the right claimed was not a common law right, but must have originated in a grant.

Charles (with him *C. Hall* and *Austin*), for the plaintiffs.—There is ample evidence of a grant before Magna Charta of a several fishery to the plaintiffs. All the subsequent charters are confirmatory, and the user by the plaintiffs and their dealings with the subject-matter of the suit are inconsistent with the theory that any right in this fishery existed in the subjects of the realm. *The Duke of Beaufort* v. *The Mayor of Swansea* (12) shews that "*terra*" includes the seashore, and it is equally reasonable that "waters" should include fish. In *Malcolmson* v. *O'Dea* (1) it was held that the fact of executing a lease was some evidence that the lessor had a right to grant the lease, and if that test be applied here, there will be found to be evidence of repeated leases, frequent licences and constant receipt of tolls and rents. In *Mannall* v. *Fisher* (13) the right of dredging for oysters was held to be evidence of a several fishery. The *Mayor of Orford's Case* (3) only decides what is not disputed, that a subject may have a right to a several fishery in an arm of the sea, and to the same effect is *Hale De Portibus Maris* (14), where also it is stated that anchorage, which the plaintiffs have here, imports property in the soil (15). It is now admitted by the defendants that they cannot claim the right alleged affirmatively, and the grant which they allow to have been made to the plaintiffs they seek to limit by a reservation or exception, the effect of allowing which would be to destroy the property entirely, so that that which is to

(6) 5 B. & C. 875.
(7) Coke Rep. vol. iv. part 7, p. 82.
(8) 7 Q.B. Rep. 339; 15 Law J. Rep. Q.B. 173.
(9) Freeman's Rep. 134, c. 157.
(10) 9 Mod. 5th ed. case 32, p. 65.
(11) 48 Law J. Rep. Exch. 47; Law Rep. 3 Ex. D. 361.
(12) 3 Exch. Rep. 413; 19 Law J. Rep. Exch. 97.
(13) 5 Com. B. Rep. N.S. 856.
(14) At p. 18.
(15) Ibid. at p. 74.

is alleged, held in trust for the ants in order that they may exer- certain limited user must perish by ercise of that user, and so the trust at out of which it arises be both yed.

kenzie, in reply.

Cur. adv. vult.

following judgments were de- l on April 1, 1881 :—

GALLAY, L.J.—The plaintiffs in this were incorporated by divers royal rs granted in the reigns of Queen eth, King Charles 2 and King e 3, and they claim to be pos- by virtue of such charters and by iption of the soil of certain portions River Thamer and of a several fishery therein. The defendants e inhabitants of ancient tenements borough of Saltash, and the action ommenced in respect of a trespass d to have been committed by them 2nd of February, 1876, by breaking ntering the alleged fishery of the iffs, and by catching and carrying and converting to their own use of the oysters therein. By their ient of claim they claimed damages e alleged trespass and an injunction train the defendants and their ser- and workmen from repeating the omplained of. The action having so commenced, a Special Case was nsent stated for the opinion of the ion Pleas Division.

ere is no question as to the limits of veral fishery claimed by the plain- they are set forth and described in st part of the schedule of the Special

It is also admitted that the por- of the river Thamer in which the y is claimed is a navigable river or r creek of the sea in which the tide and reflows.

e defendants admit the commission, t, of the several acts complained of e plaintiffs, but they claim a right, bjects of the realm, to dredge for catch oysters within the aforesaid at all seasonable times of the year, o carry away and dispose of for their benefit by sale or otherwise, and ut stint, the oysters which they may so catch; and in the alternative they claim a right, as free inhabitants of ancient tenements in the borough of Saltash, to dredge for and catch oysters within the aforesaid limits from Candlemas to Easter Eve in each year, and to dispose of the oysters which they may so catch.

By their statement of defence the defendants made another alternative claim as free inhabitants of the borough, but this claim was not pressed either in the Common Pleas Division or before us, and what we have now to determine is whether they are entitled in either of the two first-mentioned characters; if they are entitled in either of such characters the defendants are entitled to judgment.

Mr. Justice Grove and Mr. Justice Denman gave judgment in the Common Pleas Division in favour of the plaintiffs, and granted an injunction as asked for by them; from that decision the present appeal is brought. I am of opinion that the appeal should be allowed, and though my colleagues think differently, and my opinion can consequently have no effect upon the decision of the question now under consideration, I am desirous of stating my reasons for the conclusion at which I have arrived. It being admitted that the portion of the river Thamer in which the several fishery is claimed by the plaintiffs is a navigable tidal river, their claim must be established either by proof of an actual grant by the Crown not later than the reign of King Henry 2, or by evidence from which such a grant ought to be inferred; in the absence of such proof or evidence every subject of the realm must be deemed entitled to fish within the aforesaid limits. No restrictions were empowered by Magna Charta upon the right of the Crown to grant the soil of a navigable tidal river, and it left untouched all fisheries which have been made several by Acts of the Crown not later than the reign of Henry 2; but it provided that the right of the public to fish in such rivers should not be barred by any Act of the Crown later in date than the reign of that monarch. This was concisely but clearly stated by Mr. Justice Willes in answering the questions submitted to the Judges by the House of

Lords in the case of *Malcolmson* v. *O'Dea* (1). He there said, "The soil of a navigable tidal river is *prima facie* in the Crown, and the right of fishing therein is *prima facie* in the public. But for Magna Charta the Crown could by its prerogative exclude the public from such *prima facie* right, and grant the exclusive right of fishing to a private individual either together with or distinct from the soil." There is no suggestion in the present case of any actual grant of the several fishery which is now claimed by the plaintiffs; but it is contended on their behalf that, having regard to the terms of the before-mentioned charters, and to the evidence of modern usage by which the language of such charters may be explained, it may and ought to be inferred that a valid and sufficient grant of the several fishery was made to the free burgesses of Essa, by which name the town of Saltash was anciently known.

Now, so far as can be gathered from the recitals in the charter of Queen Elizabeth, the charters of her royal predecessors amounted only to confirmations of the franchises and privileges granted by the earliest recited charter, that of Reginald de Vantort, by which, as recited in the charter of Queen Elizabeth, certain specified privileges were granted to the burgesses of Essa, but the privileges so recited to have been granted by Reginald de Vantort did not include a fishery of any kind or any similar franchise or privilege. The charter of Queen Elizabeth is, however, much wider in its terms, for, after reciting and confirming the several earlier charters and the privileges thereunder enjoyed, it further recites that the burgesses of Essa, from the time whereof the memory of man ran not to the contrary, had held and enjoyed divers other customs, liberties, immunities, exemptions and jurisdictions, as well by prescription as by reason and pretext of the aforesaid charters, and after incorporating the burgesses under the name of the mayor and free burgesses of the borough of Saltash, the queen granted to the said mayor and free burgesses that they henceforth for ever might hold, use and enjoy all the customs, liberties, privileges, franchises and jurisdictions before recited or specified, and "also all other customs, liberties, privileges, immunities, acquittances, exemptions, profits, commodities, emoluments and jurisdictions which the free burgesses of Essa, otherwise Saltash, had theretofore lawfully held, used or enjoyed, or ought to have held, used or enjoyed, by reason or pretext of any charter or letters patent by her, the said queen, or any of her progenitors, kings of England, or by any other person soever theretofore in any wise made, granted or confirmed, or by any other lawful means, right, custom, use, prescription or title theretofore had and accustomed." The terms in which the customs, franchises and privileges which had been previously enjoyed by the burgesses of Essa were thus confirmed to the mayor and free burgesses of Saltash are very wide, and had the burgesses of Essa been previously lawfully possessed of a several oyster fishery in the river Thamer the charter of the queen would, in my opinion, have been sufficient to confirm the right to the new corporation; but wide as is the language used, it is in no way suggestive that any such right had been previously enjoyed.

Our attention has been directed to the circumstance that, by the same charter, the queen granted to the new corporation divers lands, waters, privileges and emoluments, including the passage or ferry of Saltash, tolls of oysters, tolls of the market, anchorage, and the customs to be taken for barges, boats and seines of the sea; but such grant, unless operating by way of confirmation of some grant previous in date to Magna Charta, could not have had the effect of conferring upon the corporation a several oyster fishery in the navigable and tidal portion of the river Thamer.

The language, then, of the charter of Queen Elizabeth being sufficient to confirm to the new corporation a several oyster fishery in the river Thamer, if such fishery had been previously enjoyed by the free burgesses of Essa, though such language is in no way suggestive of any such fishery having been so previously enjoyed, we have to consider the nature of the evidence of modern usage by which the generality and uncertainty of the

nage of the charter may be explained
pplied.
ie case of the *Duke of Beaufort* v. *Mayor of Swansea* (12) well illus-
s the class of cases in which, and purposes for which, such evidence missible. A grant in the time of John being of "Terra de Gower," nce of modern usage was admitted to in of what "Terra de Gower" con-
l at the date of the grant. So in present case evidence of acts done ie plaintiffs, and of profits derived hem as apparent owners of the al fishery which they now claim, is ssible for the purpose of shewing such several fishery was lawfully ised and enjoyed by the burgesses 'ssa previously to the charter of n Elizabeth and was confirmed to laintiffs by such charter.

the terms of the 6th and 7th para-
is of the Special Case, the documents ioned in the 2nd schedule thereto, the minutes of the corporation set in the 3rd schedule are to be taken rming part of the case, and though of these documents and minutes are ecessarily inconsistent with the rights ted by the defendants, there are s which strongly support the claim by the plaintiffs.

do not propose to examine these nents and minutes in detail. I con-myself with observing that amongst most favourable to the plaintiffs lease by the corporation, dated as ack as the year 1680, of the sole ege of dredging oysters, other of subsequent dates down to a t period of a general right to dredge, gh not expressed to be exclusive and al minutes of the receipt of money ay of rent for oysters, one of such tes being dated in 1750 and others 94 and subsequent years.

ring a fair and reasonable effect to vidence relied upon by the plaintiffs, uld be disposed to hold that it was ient to support their claim, were it or the admissions contained in the aragraph of the Special Case. That graph is in the following terms: free inhabitants of ancient tene-s in the borough of Saltash have from time immemorial, without interruption, and claiming as of right, exercised the privilege of dredging for oysters in the *locus in quo* mentioned, from the 2nd of February in each year to Easter Eve in each year, both inclusive, and of catching and carrying away the same without stint, for sale and otherwise. The acts complained of were done in the exercise of the privilege."

Now I fully agree to the proposition pressed upon us by the counsel for the plaintiffs, that the defendants could not, as free inhabitants of ancient tenements in the borough of Saltash, support a claim based upon the immemorial but limited enjoyment described in the 9th paragraph of the Special Case. The soil of the river within the limits under consideration must, upon the admitted facts, be treated as vested in the corporation; and any such claim on the part of the defendants, if set up upon custom, must necessarily fail, being for a profit in *alieno solo*, and any attempt to support it by prescription must prove unsuccessful by reason of the fluctuating character of the parties asserting it.

But though such a claim, if made by the defendants, could not be supported in law, the immemorial enjoyment upon which it is based is, in my opinion, sufficient to defeat the claim of the corporation to a several fishery. The exercise by the free inhabitants of ancient tenements from time immemorial, and without interruption by those who it is now asserted had at all times a right to interrupt them, of the privilege described in the 9th paragraph of the Special Case is, in my opinion, inconsistent with any such exclusive right of fishery as it is alleged by the plaintiffs is evidenced by modern usage, and which it is essential for them to prove in order to establish their alleged claim by prescription. Whether such an exercise by the free inhabitants of ancient tenements can be treated as consistent with a modified right in the plaintiffs is a question which I will presently consider, but unless such modified right can be supported it would follow that upon the rejection of the plaintiffs' claim by reason of it not being supported by evidence from which a valid grant of a several

fishery can be inferred, the claim of the defendants in their character of subjects of the realm, which is a claim based not upon custom or prescription, but upon the right secured to them by Magna Charta, must prevail.

It has been suggested rather than contended before us, though the argument was pressed in the Common Pleas Division, that the right of the subject to fish in a navigable river is confined to floating fish, and does not extend to oysters, which, it is alleged, are part of the soil, or, at any rate, are so far attached to it that they cannot be removed without, to some extent, disturbing the soil, and that the soil of the Thamer being vested in the plaintiffs, the dredging by the defendants was a trespass in respect of the plaintiffs' ownership of the soil. But this argument is, in my opinion, untenable, having regard to the decision in *Bagot* v. *Orr* (16), in which it was in substance held that fishing for shell-fish in a navigable river was within the rights of the subjects of the realm, though there might be a question as to the removal of shells only. It has also been urged upon us that a usage to dredge oysters without stint is unreasonable and destructive of the fishery itself, and that this circumstance alone is sufficient to defeat the defendants' claim. It would doubtless be a very serious obstacle in their way if they were claiming by custom or prescription, but I do not regard it as of any force in respect of their claim as subjects of the realm.

Magna Charta imposes no restriction upon the extent to which the public may exercise the right of fishing in a navigable river, nor am I aware that any of the statutes passed for the protection of oyster fisheries imposed any other restrictions than with reference to the periods of the year during which the fishery may be carried on, and the size of the oysters which may be taken. These regulations must of course be observed. If they are not sufficient to protect what may be deemed a necessary supply, it is open to the Legislature to make adequate general or local provision for the purpose.

(16) 2 Bos. & P. 472.

On the other hand, it has been contended on behalf of the defendants that all the privileges of the corporation were surrendered into the hands of the sovereign in the reign of Charles 2, and were never regranted; but I am unable to take this view of the second charter of that sovereign. It is not disputed that if a grant of a several fishery had been made in, or previously to, the reign of Henry 2, and if such several fishery had been surrendered it could have been regranted. And when we turn to the charter we find a recital of the intentions of the king to regrant whatever had been surrendered, the surrender having been made for the purpose only of removing certain doubts which had arisen as to the election of mayors and the officers of the corporation. The surrender and regrant were contemporaneous acts, and the language of the operative part of the charter is, in my opinion, sufficient to regrant all such franchises and privileges as had been previously enjoyed and had been surrendered for the recited purpose.

Upon the question whether a modified right in the plaintiffs to the oyster fishery in the river Thamer could be supported, we had an ingenious and able argument addressed to us by Mr. Mackenzie. He contended that the evidence adduced on the part of the plaintiffs, taken in connection with the admissions in paragraph 9 of the Special Case, raised an inference of a grant of a several fishery to the plaintiffs throughout the whole year, with the exception of the interval from Candlemas to Easter Eve, or else with an obligation imposed upon them, if grantees for the whole year, to permit the inhabitants of ancient tenements within the borough to dredge for oysters during such period. In support of this contention, Mr. Mackenzie referred to the cases of *White* v. *Coleman* (9) and *Wright* v. *Hobart* (10). In the former case, which was an action of trespass for taking two mares in B., the defendant pleaded that the king was seized of B., and that he (the defendant) took them damaged feasant as bailiff to the king. The plaintiff replied that he was an inhabitant of C., and that the mayor and burgesses of C. had common of estover

rves for them and for every inhabi- to burn in *quibuslibet messuagiis* To this the defendant demurred, he effect of the decision of the Court ırs to have been that though inhabi- could not prescribe for common in own names, they might be capable e benefit of such a prescription, and :he mayor and burgesses might pre-) for themselves and the inhabitants. was also held that by virtue of such ription the inhabitants of new as as those of ancient buildings should estovers.

Wright v. *Hobart* (10) a piece of containing forty acres was formerly inheritance of two persons, who, al hundred years before the reign of ge 1, conveyed the same to the use of elves and the survivor for life, and the decease of the survivor to the ıd intent that as many of the inhabi- as were able to buy three cows t put them there to grass in the day- from the first Monday in May to the f August for ever, and from that o be in common for all the inhabi- there until Lady Day following, and to be enclosed for raising the grass the first Monday in May for ever. decree was made by Lord Maccles- in accordance with the terms of the , which, though at first supposed to it, was subsequently found. giving judgment, Lord Macclesfield hat if this had been by prescription ırson but the inhabitants of ancient ıages would be entitled to it. o not propose to express any assent dissent from the argument so ad- d by Mr. Mackenzie, as the plead- in the present action are not so d as to admit of the determination ıat would be in effect a question en Her Majesty's subjects at large particular class of them, whether ɔsed of all the free inhabitants of orough of Saltash or of the free itants of ancient tenements only. ıave already said that if the views ssed by him cannot be adopted, every ɔt in the realm has, in my opinion, ht to do such acts as those com- ɔd of in the present action. If they lopted the free inhabitants of ancient tenements are alone so entitled. In either view the defendants would be entitled to judgment.

BRETT, L.J.—This case is as stated, in my opinion, one of considerable difficulty. The Special Case states certain questions for the consideration of the Court, and upon these questions the burden of proof is on the defendants, and unless they make out their right our judgment must be for the plaintiffs. Then it is said that unless the plaintiffs can shew a grant to themselves, and thus oust the claim of the defendants, the defendants are entitled as subjects of the realm; and this is, I think, true.

The counsel for the defendants put forward several propositions. It is urged that the right of fishery in a navigable river is *prima facie* in the Crown for the benefit of the subject, and that in order to oust this the plaintiffs must shew an actual grant as early as Henry 2, or circumstances from which a grant may be inferred. I agree. It was denied that the plaintiffs did shew such a grant, and it was said that if there ever was a grant it had been surrendered.

Now to me it appears that we have to consider whether there is any evidence of an actual grant of a fishery to the plaintiffs, and whether, if there is some evidence of such a grant, there is evidence from which a particular kind of grant can properly be inferred. Then, if a grant can be inferred, what was its nature?—was there a grant with an exception in favour of the defendants, with a privilege for them to dredge for oysters for the period between Candlemas and Easter Eve? I agree that the documents to which reference has been made do not contain an actual grant; but I think that they refer to an earlier grant, and that they import a grant in the reign of Henry 2 from the Crown to the predecessors in title of the plaintiffs. This would shew that there cannot be a right in the subjects of the realm generally to fish in this place.

Although an argument urged in the Common Pleas Division was not urged here, still it was said that though the defendants could not maintain their right

by custom or by prescription as inhabitants of the borough, nor as subjects generally, yet that as there was no evidence as to the nature and extent of the grant it is permissible, and, indeed, necessary, to infer the nature of that grant from the nature and extent of the user. Then we must consider what that user has been. The plaintiffs produce a series of documents, and these documents appear to my mind to be a very satisfactory form of evidence. They include a number of leases by the corporation of an absolute right of fishery; but if the contention of the defendants is sound, the corporation had no right to make these leases, and the lessees might have brought an action against them for doing so. There is no evidence or suggestion that anything of this sort ever occurred, and the effect of these leases in successive years without dispute seems to me to afford evidence for our consideration of a right in the corporation to make leases of the right granted to them without any exceptions, and therefore evidence of a general grant to the predecessors of the plaintiffs of a several fishery.

But it is then said that the statements contained in paragraph 9 of the Special Case must be treated as statements of facts. It is said that we ought to draw the inference that there was a grant to the corporation of a several fishery with an exception for the period named in favour of the inhabitants of ancient tenements in the borough. This claim seems to me to be inconsistent with the right of the corporation; it is inconsistent with the user by the corporation. Such an alternative user by the predecessor of the defendants cannot be consistent with the user proved by the plaintiffs, the corporation of Saltash. How then ought we to deal with that paragraph? One way is to deal with it as consistent with the user by the plaintiffs, then it does not contradict the user. Another way is for the Court to say which of two inconsistent statements is the right statement, if two inconsistent statements are found in a case. These two statements do not, however, seem to me inconsistent, for, although the case states that the acts mentioned in paragraph 9 were done in exercise of a privilege, they were not, I think, done in such a way as to challenge the right of the corporation so as to call on them to interfere. I do not think that the case of *Wright* v. *Hobart* (10) applies to this case. I think that the evidence shews a grant of a right of several fishery to the plaintiffs, that they are entitled to our judgment, and that this appeal must be dismissed.

COTTON, L.J.—I also am of opinion that the judgment must be affirmed. The question is whether the plaintiffs have shewn a right to a right of several fishery in the river Thamer. Then there is the question whether the 9th paragraph of the Special Case states facts which prevent them from establishing such a right.

Is there evidence of a grant to the plaintiffs of such a right? There is no evidence of an actual grant, but there is evidence which, when taken with the user proved, raises a presumption of a grant. The corporation have for many years granted leases of dredging for oysters, and these leases have extended over the whole year; and on referring to their books, we find entries which shew that rent was paid for the whole year, and on such evidence I think we ought to come to the conclusion that there was a grant to the corporation of a several fishery in the river Thamer. The acts of the defendants are the acts of a limited portion of the public during a limited period, and do not appear to me to prevent us from holding that there was an exclusive grant to the corporation; they do not appear to me to be consistent with a right existing in the subjects of the realm generally, and that would be the right which would naturally exist in the absence of any exclusive grant to the corporation.

Have the defendants, however, established a right to something which limits the right of the plaintiffs? They cannot, as is admitted, claim any right by custom, nor can they prescribe for such a right as subjects of the realm; but it is said that we ought to be led by the evidence to hold that there was an exception in the grant to the plaintiffs, and that in respect of that exception the plaintiffs must be considered as trustees

half of the defendants. But that rs to me to be inconsistent with the of the defendants. They contend he soil of the Thamer, of the *locus o*, and of the oyster fishery is l in the Crown or the Duchy of rall; but is it possible for the de- nts to make out any such exception he grant to the corporation; and if lo attempt to prove such an excep- s not the grant destroyed for the l named?

public generally have not exercised t of dredging during the suggested l. Certain inhabitants of certain ents have, it is said, done so, and t is said, would be so limited for the of preserving the subject-matter of rant. Can it be presumed that has been a grant to anyone as a e for such inhabitants? I do not so. It would be an extraordinary of grant, and I do not think it has nade out. The claim of the defen- is, in my opinion, inconsistent with ser by the corporation, and if the ration had been but trustees I do ink leases would have been granted form in which they always were d. Lord Justice Baggallay has re- to two cases which were cited in ent; and I would say that in t v. *Hobart* (10) there was an ex- trust for the inhabitants of a par- r place, while in *White* v. *Coleman* ere was a corporation which had ed by prescription a right of com- and they were held to be trustees inhabitants of the borough. That the case here. But it is suggested re can infer some implied trust from cts of the defendants. I do not so. The case appears to me to be t from those cases, and this appeal be dismissed.

Judgment affirmed.

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rs—N. Bennett, agent for Cleverton & Plymouth, for plaintiffs; Wedlake & , agents for Edmonds & Son, Plymouth, efendants.

[IN THE QUEEN'S BENCH DIVISION.]

1881. March 16. THE BRITISH INDIA STEAM NAVIGATION COMPANY *v.* THE COMMISSIONERS OF INLAND REVENUE.

Stamp Act, 1870 (33 & 34 *Vict. c.* 97), *s.* 49—*Denomination of Instrument—Debenture or Promissory Note.*

Instruments were issued by a company, not under seal, and headed "debentures," by which the company undertook to pay at a specified date "one hundred pounds, the amount of this debenture," to A, or order, and interest in the meantime at a given rate "to the holder of this debenture," upon presentation and delivery of the coupons which were annexed to the instrument:—Held, *that such instruments were liable to be stamped as debentures under* 33 & 34 *Vict. c.* 97, *and not as promissory notes.*

CASE stated by the Commissioners of Inland Revenue, hereinafter called "the commissioners," pursuant to the 19th section of the Stamp Act, 1870, the same being required by, or on behalf of, the British India Steam Navigation Company (Limited), named in the hereinafter instrument, and hereinafter called "the company," in order that the company may appeal against the assessment made by the commissioners of the stamp duty with which the said instrument is in their opinion chargeable.

1. A copy of the instrument in question is annexed to and is to be taken as part of this Case. It ran as follows:—

"The British India Steam Navigation Company (Limited).

"Incorporated September, 1856, under the Joint-Stock Companies Act, 1856, as the Calcutta and Burmah Steam Navigation Company (Limited), and on change of name as the British India Steam Navigation Company (Limited), December, 1862, under the Companies Act, 1862.

	£
Capital subscribed and issued	950,000
Amount called and paid up .	566,200
Leaving amount to call at this date	383,800

3116. December 6th, 1880.

No. 50. Debenture. 100*l.* sterling.

"The British India Steam Navigation Company (Limited) will, on the thirtieth day of November, 1882, pay one hundred pounds, the amount of this debenture, to Mr. P. W. Armour, or order, at the City Bank, London, or at the registered office of the company.

"And the said company will also pay to the holders of this debenture interest at the rate of five pounds per cent. per annum on the said sum of 100*l.* sterling, by equal half-yearly payments, on the thirtieth day of May and the thirtieth day of November in each year, upon presentation and delivery of the coupons hereto annexed, the first of such half-yearly payments to be made on the thirtieth day of May, 1881.

"In witness whereof the company hath caused two of its directors to set their hands hereto this thirtieth day of November, 1880.

"W. Mackinnon, } Directors.
"W. P. Andrew, }
"P. Macnaughten, Secretary."

There were five coupons attached to the above instrument, in the following form:—

"British India Steam Navigation Company (Limited).
"Debenture No. 50, for 100*l.* sterling.
"Half-yearly interest, 2*l.* 10*s.*
"Payable on the 30th day of May, 1881.
"At the City Bank, London.
"P. Macnaughten, Secretary."

2. The said instrument having been stamped as a promissory note before it was executed with the duty of one shilling, which was denoted thereon by a stamp appropriated by words on the face of it to bills or notes, and is the proper duty with which a promissory note for 100*l.* is chargeable under the provisions of the Stamp Act, 1870, was, on the 2nd of December, 1880, presented on behalf of the company to the commissioners under the provisions of the 18th section of the Stamp Act, 1870, for their opinion as to the stamp duty with which it was chargeable. And it was, and is, contended by the company that the said instrument is chargeable with stamp duty as a promissory note and not otherwise.

3. The commissioners being of opinion that the said instrument is not chargeable under the provisions of the Stamp Act, 1870, with stamp duty as a promissory note, but is chargeable under the provisions of that Act with *ad valorem* stamp duty as a debenture for 100*l.*, have assessed the stamp duty on the said instrument at the sum of two shillings and sixpence, accordingly, and in conformity with the said assessment the said instrument has been stamped with a further duty of two shillings and sixpence which is denoted thereon by an ordinary unappropriated stamp.

4. The commissioners are not of opinion that the instrument is chargeable with stamp duty as a debenture and also as a promissory note, and in the event of the assessment made by them as aforesaid being upheld by the Court the one shilling stamp upon which the instrument was originally written will be allowed for as a spoiled stamp; and subject to such allowance the said instrument has, in conformity with the 18th section of the said Act, been stamped with a particular stamp denoting that it is duly stamped.

The question for the Court was whether the said instrument is chargeable with the stamp duty of two shillings and sixpence as a debenture for 100*l.* or with the same duty of one shilling as a promissory note for 100*l.* (1).

A. Wills and *Percy Gye*, for the appellants.—This instrument is not under seal and comes expressly within the definition of a "promissory note," as given in 33 & 34 Vict. c. 97. s. 49. The fact that the company themselves styled it a debenture cannot avail to alter the character of the instrument. As Martin, B., observed, in

(1) By the Stamp Act, 1870 (33 & 34 Vict. c. 97), s. 49. sub-s. 1, "The term 'promissory note' means and includes any document or writing (except a bank note) containing a promise to pay any sum of money." The stamp duty upon such a note is 1*s.* for every 100*l.* (See 33 & 34 Vict. c. 97. sched. sub-title, "Bill of exchange and promissory note.")

Under the schedule of the same Act, a "debenture for securing the payment or repayment of money" is liable to a 2*s.* 6*d.* stamp for every 100*l.*

Freeman v. *The Commissioners of Inland Revenue* (2), "For the purpose of ascertaining with what stamp a document ought to be impressed, the document ought to be looked at as what, upon the face of it, it is—that is, according to its true and proper effect, not according to the technical words that may be used in it." In *In re The Imperial Land Company of Marseilles; ex parte Colborne* (3) and *Ex parte The City Bank* (4) instruments very similar to the present were held to be promissory notes although headed "debentures."

The Attorney-General, *The Solicitor-General* and *Dicey*, for the commissioners.—The proper stamp for an instrument of this kind is a debenture stamp. There is no authority for saying that a debenture must be under seal; it simply means an acknowledgment of indebtedness. If the contention on the other side is correct there never could be a "debenture" under the Stamp Act. It may be that this document is both a promissory note and also a debenture; but if that be so the appellants cannot escape from the higher duty, particularly when they themselves have chosen to call this instrument a "debenture." (See the remarks of Jessel, M.R., in *Norton* v. *The Florence Land and Public Works Company* (5).) In *Ex parte Colborne* (3) the question did not arise under the Stamp Act, but the only point for decision was the negotiability of the instrument.

Wills replied.

GROVE, J.—This is a Case stated by the Commissioners of the Inland Revenue, and the question, apparently a simple one and certainly easy to state, is not free from difficulty, owing to the curious fact that the word "debenture" does not appear to admit of any accurate definition. A very general definition is given in the dictionaries, and neither the counsel in the case nor any information that we have been able to obtain defines exactly what "debenture" means. The difficulty arises from the fact that in the Act of Parliament (33 & 34 Vict. c. 97) the word "debenture" is mentioned in the schedule of duties in two senses, namely, "Debenture for securing the payment or repayment of money, or the transfer or retransfer of stock," and "Debenture or certificate for entitling any person to receive any drawback," &c.; and—in another portion of the schedule, where mortgages are spoken of—"Mortgage, bond debenture, covenant, warrant of attorney, and foreign security of any kind." In the Act there is no definition of "debenture"; as I have already said, no definition can be found.

Now, the argument on behalf of the appellants in this case was that this really was in fact a promissory note, that it had all the *indiciæ* of a promissory note, and that the mere use of the word "debenture," which occurs twice in the document itself, and also in each of the coupons attached to it, means nothing.

In the two cases cited, which do not touch the question at all of stamp, but bear on the question whether a "debenture" might be regarded as a "promissory note," two learned equity Judges held that the calling an instrument a debenture did not alter its attribute in that respect, but that it might be taken as a promissory note.

Now, if a debenture is a promissory note and nothing else, these words in the statute become almost inoperative, because there is another provision in the statute which defines "promissory notes" and which attaches certain duties to them and if a debenture were a promissory note then the same duties would be attached to a debenture, and the mention of it in the statute under the name "debenture" would really have no meaning at all.

My opinion is that a "debenture," being recognised in the statute and different duties affixed to it, is by the statute and by the law recognised as something different from a promissory note.

It may be a promissory note joined to something else, and I am of opinion that this so-called debenture, although it is in one sense no doubt ambiguous enough to make it a promissory note,

(2) 40 Law J. Rep. Exch. 85; Law Rep. 6 Exch. 104.
(3) 40 Law J. Rep. Chanc. 93; Law Rep. 11 Eq. 478.
(4) Law Rep. 3 Chanc. App. 758.
(5) Ibid. 7 Ch. D. 332.

yet contains matters other than those that are usually contained in a promissory note.

The company is headed "The British India Steam Navigation Company (Limited)," and it states the date of the incorporation, the change of name, the capital subscribed and issued, the amount called and paid up, leaving the amount to call so and so. All that, I presume, is stated in this document for the information of persons who lend money, which, I presume, the company had power to borrow. Then opposite the word "debenture" in the corner is put "100*l.* sterling," which would not be usual in the form of a promissory note. Then it goes on to say, "The British India Steam Navigation Company (Limited), will, on the 30th of November, 1882, pay 100*l.*, the amount of this debenture, to Mr. P. W. Armour, or order, at the City Bank, London, or at the registered office of the company." There again the terms are somewhat different from a promissory note; it is not they "promise to pay," but "will pay." The difference may be wholly unsubstantial, because if persons say they will pay it may be interpreted into they promise to pay; but we have to look at the instrument as it is. Then it goes on to say, "And the said company will also pay to the holder of this debenture interest at the rate of five pounds per cent. per annum on the said sum of 100*l.* sterling, by equal half-yearly payments on the 30th day of May and the 30th day of November in each year, upon presentation and delivery of the coupons hereto annexed, the first of such half-yearly payments to be made on the 30th day of May, 1881." Now then there does become something like a real distinction between a promissory note used in the normal sense of the word and this document, because, first of all, there is a double promise to pay—not a promise to pay as in a promissory note upon which promise to pay interest may be legally inferred—not as a promissory note and interest thereon, but it is a special mode of paying the interest, and a mode which has limitations, with the object, I suppose, of giving security both to the debtor and creditor; it is to be paid only to the holder of this debenture. I presume the holder of this debenture is the person to whom it would be indorsed by order of Mr. Armour, or under the general indorsement anybody who is a *bona fide* holder of the document—not a person who picks it up in the street, but an owner who traces, or who is capable of being able to trace, his title from the original person.

It is not merely that the interest is to be paid in a different way—it is not to be paid merely when it becomes due by an application verbal or in writing—but the interest is to be paid, it is stated in the document, upon presentation and delivery of the coupons hereto annexed. Now there is nothing of that in a promissory note. There are coupons running over the whole time for which the loan is granted. This one before me had apparently six, two of which have been cut off and four remain attached. I suppose it is for three years, they being half-yearly payments. Therefore there are coupons the object of which is that the company shall have a document, or a voucher which they attach themselves to the debenture when issued, and nobody but the person holding that voucher can be paid. Whether it is a condition precedent or not it is unnecessary to enquire, for I am merely enquiring into the difference of the two documents and not the legal effect of these coupons; and what would be the effect of a person presenting the documents without the coupons we need not concern ourselves with on the present occasion. All we have to see is if there is any distinction between these documents and the promissory note which is mentioned in the Stamp Act. These coupons are apparently for identifying the claims, because it is a debenture No. 50. The amount is stated, the interest is stated, the place at which it is paid is stated, and the day is stated; and those coupons are to be delivered from the person who claims the interest to the company when the interest is required.

Now it seems to me these do make a real difference between what the company here themselves call a debenture and promissory note. The statute contemplates in debentures something different from a

issory note, because it imposes a r duty—not that it is not a promis- note in one sense of the word, but a promissory note and something It is a promissory note with other rs attached, having a purpose in ; although a person might attach to a promissory note and make it the less a promissory note; and this ffords a reason why the Legislature have thought fit to impose a greater on these documents than it does on nissory note. Therefore, on the best on I can come to, though there is little to make one feel certain in opinion turning upon a word which o definite signification in the present of the English language, I come to pinion this is within the meaning e Stamp Act a debenture, and re- s the higher duty.

IDLEY, J.—I am of the same opinion. e question were whether this in- ent was to bear a stamp applicable omissory notes as defined in the Act stamp at all, I should say unques- bly this was a promissory note. It within the statutory definition of a issory note, and that definition is ed in ordinary course to impose on everything which answers the iption. But when you look at the tory definition of a promissory note so wide as to include all sorts of s which are taxable under other .

w the definition of a promissory note ction 49 is this: it means and in- s any document in writing (except k note) containing a promise to pay um of money, and that is applicable mortgage or a bond, or any other ument whatever which contains a ise. If therefore the question were ier it was to be stamped or no, I see swer to the argument that this in- ent would be a promissory note. re have not to determine that; we to determine whether it is a promis- ote as distinguished from something Take the common case of a mort- It falls within the statutory de- n; yet nobody can say that it ought stamped as a promissory note because lls within the statutory definition. The answer is—it is very true, but it falls under something else; it is a mortgage as distinguished from a promissory note. The question we have to decide is not whether this instrument is a promissory note, but whether it is not something else contrasted with a promissory note and something else under the Stamp Act.

Now, looking at the matter from that point of view, let us look at the instrument itself, which would strike any business man, or any commercial man, as something very different from a promissory note. It does not look like a promissory note. It is not framed like a promissory note. It contains all sorts of stipulations and conditions which would induce any commercial or business man to laugh at the idea of its being termed a promissory note. It purports to be something else; it is called a "debenture." I do not think that description is conclusive, but it is important when you bear in mind that the question we have to consider is whether that which a commercial man would repudiate as a promissory note is to be regarded for the purpose of taxation as a promissory note, or something which it purports to be and is called, namely, a "debenture."

Now what the exact meaning of "debenture" is I do not know. I do not find any particular definition of it, and we know that there are various classes of instruments called "debentures." You may have mortgage debentures, which are charges of some kind on property; you may have debentures which are bonds, and if this were under seal it would be a debenture of this kind. You may have a debenture which is nothing more than an acknowledgment of debt. You may have an instrument like this which is something more—it is a statement by two directors that a company will pay. I think any instruments of that sort may be debentures.

Now with reference to the cases referred to by Mr. Wills, the question was whether the instrument was assignable and negotiable like a promissory note—that is to say, so as to enable the holder to prove against the estate of a company without being affected by a right of set-off. That was the question in

dispute there; and, having regard to the form of the instrument, it was held that it was a promissory note for such a purpose as that, namely, to enable the holder to prove and to make a title, as the holder of a promissory note cannot be subject to the equities between the company and his assignor. They do not touch the question of stamp, and it appears to me when we have to consider, not whether it is a promissory note, or stampable as such, and not to be stamped as something else, but when we have to find out which of the two it is, I think it is that which it purports to be, and there are commercial advantages which accrue to the company in our so holding. Some people fancy there is magic in debentures, that they are wonderful things to have, but there are other advantages by holding that this is a debenture. It takes it out of the prohibition that you cannot stamp a promissory note after it is signed; if it is a debenture you can; and therefore there are advantages not only commercial, but legal, which the company seek to obtain when they call it a debenture; and my opinion is, as between the two, that this is a debenture rather than a promissory note, although I quite agree it is a promissory note if nothing else. But it strikes me it is something else, namely, a debenture; therefore I agree with the judgment given by my Lord.

Judgment for the Crown.

Solicitors—J. P. Sweetland, for appellants; the Solicitor to the Inland Revenue, for the Crown.

1881. May 12. THE QUEEN *v.* DUNCAN.

Practice—Indictment for Obstruction of Highway—New Trial—Acquittal of Defendant—Misdirection on Criminal Trial.

[For the report of the above case, see 50 Law J. Rep. M.C. 95.]

[IN THE QUEEN'S BENCH DIVISION.]

1881. June 22. LAWRENCE *v.* THE ACCIDENT INSURANCE COMPANY (LIMITED).

Insurance—Death by Accident—Epileptic Fit—"Death arising from fits or any disease arising before, or at the time, or following accidental injury"—Construction of Policy.

L., holder of a policy granted by the defendant company, insuring him against accidental injury, whilst standing on the platform at a railway station was seized with an epileptic fit, fell forward on to the rails and was killed by an engine passing over his neck and body. The policy contained a proviso that it did "not insure in case of death or disability arising from fits or rheumatism, gout, hernia, erysipelas or any disease whatsoever, arising before, at the time, or following such accidental injury (whether consequent upon such accidental injury or not, and whether causing such death or disability directly or jointly with such accidental injury)":—Held, in an action brought on the policy by the administrator of L., that the company was liable to pay the amount insured by the policy.

This was a Special Case stating the facts, the material parts of which are as follows:—

The plaintiff is the administrator of the estate of James Lawrence, deceased, late of 105 Regent Street, in the county of Middlesex.

The defendants are an insurance company, whose chief place of business is at No. 7 Bank Buildings, Lothbury, in the city of London.

On or about the 10th of February, 1873, the said James Lawrence effected with the defendants a policy of insurance for 1,000*l.* for one year, renewable from year to year, paying a premium of 4*l.*

In the said policy it was witnessed that "the said Accidental Insurance Company (Lim.), doth hereby agree that if at any time before the expiration of one year from the date of this policy, or if at any time hereafter during his life while the insured shall, at the expiration of each year from the date when this policy is renewable, pay the premium

specified, or any increased or de-
d premium agreed to be received
e directors in consequence of change
upation or otherwise, the said in-
shall sustain any personal injury
d by accidental and external violence
n the meaning of this policy, and
onditions hereto, and the direct
s of the said injuries shall occasion
eath within three calendar months
the happening thereof, then the
and property of the company shall
bject to pay the full sum hereby
d (being the sum of 1,000*l.*) to
gal representatives of the insured
n three calendar months after proof
h death satisfactorily to the directors
said company shall be furnished."
s said policy also (amongst other
s) contained the following pro-
—

rovided always that this policy in-
payment only in case of injuries
ntally occurring from material and
al cause, operating upon the per-
the insured, where such accidental
is the direct and sole cause of
to the insured, or disability to fol-
is avocations, but it does not insure
e of death or disability arising from
r rheumatism, gout, hernia, ery-
s, or any disease whatsoever arising
, or at the time, or following such
ntal injury (whether consequent
such accidental injury or not, and
er causing such death or disability
ly or jointly with such accidental
)."

sequently to the effecting of the
olicy, and while the same was still
ce, and during the continuance of
surance effected by it, namely, on
3th of February, 1879, the insured,
at the Waterloo Junction station
South Eastern Railway Company,
aken suddenly ill and fell forward
fit) off the said platform, across,
n to the railway there. A locomo-
ngine with empty carriages was at
oment passing through the station
e railway, and such engine and
ges passed over the neck and body
e said James Lawrence, and he
ed divers mortal injuries of which
on and there instantly died. The falling forward of the assured off the said platform as aforesaid was in consequence of his being seized with a fit or sudden illness, and but for such fit or illness he would not have suffered injury or death as before mentioned.

The question for the opinion of the Court was, whether the death of the insured happening under the circumstances stated in this case was caused in such a manner as to entitle the plaintiff, as the administrator of the insured, to payment of the sum assured by the policy.

Holl, for the plaintiff, cited *Winspear* v. *The Accident Insurance Company* (1), and contended that the principle therein laid down governed this case.

G. Bruce, for the defendants.—The question is, whether the whole transaction is not one accident—the having the fit, falling on the rails and the injury caused by the locomotive. Had there been no fit there would have been no death, for there would have been no fall. In *Smith* v. *The Accident Insurance Company* (2) the defendants were held not to be liable in the case of a death from erysipelas, when the insured died of erysipelas, though brought on from an accidental cause. So also in *Fitton* v. *The Accidental Insurance Company* (3), the Court looked to the real and not to the proximate cause of death. *Reynolds* v. *The Accidental Insurance Company* (4) differs from this, in that the terms of the policy are different. In *Winspear* v. *The Accident Insurance Company* (1) the words of the policy differ from those of the policy in this case.

Holl, in reply.—The real question is, What was the cause of the death? The sole cause was the engine passing over the neck and body of the deceased. If, however, there be any ambiguity in the wording of the policy, it should be construed rather in favour of the plaintiff than the company.

(1) *Ante*, 292; Law Rep. 6 Q.B. D. 42.
(2) 39 Law J. Rep. Exch. 211; Law Rep. 5 Exch. 302.
(3) 17 Com. B. Rep. N.S. 122; 34 Law J. Rep. C.P. 38.
(4) 22 Law Times, 820.

All the cases cited are really authorities for the plaintiff's contention. In *Smith* v. *The Accident Insurance Company* (2) the words of the policy are in effect the same, and shew the kind or class of accidents intended by the proviso.

It is impossible to deny that in *Smith* v. *The Accident Insurance Company* (2) the death resulted from erysipelas "following on the injury"—that is, within the very letter of the proviso. In *Fitton* v. *The Accidental Insurance Company* (3), also, the facts brought the case within the words of the proviso. In *Winspear* v. *The Accident Insurance Company* (1) the words of the policy are even stronger than here, and yet it was decided that they did not protect the defendants from liability.

DENMAN, J.—I must say that during the argument I felt some considerable doubt with respect to the case, and I am not sure now that but for the case of *Winspear* v. *The Accident Insurance Company* (1) I should not be of opinion that the defendants are protected by the clause and proviso in the policy. But the legitimate effect of the decision in that case is to make it plain that if that decision be correct the facts in this do not constitute a defence to this action. The facts are, that the deceased while standing near the edge of a platform in a railway station was suddenly seized with a fit, fell forward on to the rails and was instantaneously killed by a locomotive engine that happened to be passing at the moment. There is no doubt that but for the fit the insured would not have been on the rails, and in that sense it may be said that the fit led to the death. But the question is, whether the death is one of a series of events that cannot be dissociated, and the fit can be said to have caused the death directly or, in the words of the proviso, jointly with the accidental injury. In *Winspear* v. *The Accident Insurance Company* (1) it was decided that when a man seized with a fit fell into a river and was drowned, the death could not be said to arise from disease within the meaning of the terms of a policy very like the policy in this case, though not absolutely identical.

The policy here provides that it insures payment only in case of injuries accidentally occurring from material and external cause operating upon the person of the insured, where such accidental injury is the direct and sole cause of death to the insured, or disability to follow his avocations, but it does not insure in case of death or disability arising from fits or rheumatism, gout, hernia, erysipelas or any disease whatsoever arising before or at the time, or following such accidental injury (whether consequent upon such accidental injury or not, and whether causing such death or disability directly or jointly with such accidental injury). The words "Causing such death jointly with such accidental injury" appear at first sight strongly in favour of the defendants. If the words were simply, "Death caused by an accident jointly with a fit," and they stood by themselves, the defendants, I think, would have a defence to this action; but the words actually used are in a parenthesis, evidently put in only by way of explanation of the kind of cases to which the three preceding lines will apply—that is, they will apply whether the disease arising before, or at the time of, or following such accidental injury, and from which the death arises, be "consequent upon such accidental injury, or not, or causes such death or disability directly or jointly with such accidental injury" or not. The words "Arising from fits or any disease" have received judicial construction — *Winspear* v. *The Accident Insurance Company* (1). And there it was held that the death did not arise from the fit, but from the drowning. So here I am of opinion that we are bound to hold that the death was caused by the engine and carriages passing over the neck and body of the insured and not by the fit; and on that point we are bound to hold that *Winspear* v. *The Accidental Insurance Company* (1), decided in the Court of Appeal, does apply, and that this case is not within the proviso of the policy.

WILLIAMS, J.—I am clearly of opinion that the plaintiff should recover on this claim, and am desirous of being understood to decide this question on the broad ground of principle, and without

special reference to any decided case, and I think that, according to the true meaning of the terms of the policy, the company are liable. The whole case depends on the construction of the direct words and proviso of the policy. By the policy it is agreed that, "if at any time" during the continuance of the policy "the said insured shall sustain any personal injury caused by accidental and external violence," . . . and the direct effects of the said injuries shall occasion his death "within a certain time," the company shall be subject to pay the amount of the policy. Then there is a proviso that the policy does not insure in case of "death or disability arising from fits or rheumatism, gout, hernia, erysipelas or any diseases whatsoever arising before, or at the time, or following such accidental injury (whether consequent upon such accidental injury or not, and whether causing such death or disability, directly or jointly with such accidental injury)." The insured having accidentally fallen in a fit from the platform on to the rails, a passing engine ran over him. The question is, whether or not this is a case of death arising from a fit, or, if not, whether it is a case of death caused by disease jointly with accident.

Now, I am of opinion that it is right in a case such as this to apply the general principle enunciated in Lord Bacon's *Tracts on Legal Maxims* (under the heading *In jure non remota causa sed proxima spectatur*), where he says, "It were infinite for the law to judge the causes of causes and their impulsions one of another; therefore it contenteth itself with the immediate cause and judgeth of acts by that, without looking to any further degree."

Construing the words in this policy in accordance with this principle, it is necessary only to find what was the immediate and proximate cause of death, not to examine everyone of an infinite series of causes and effects. In order, therefore, to relieve the company from liability the construction must be that death arose from the fit immediately and proximately causing it. In this case that is not so, and therefore on the broad ground that the death was the result not of the fit, but of what afterwards happened, I think the judgment of this Court should be for the plaintiff.

Judgment for the plaintiff.

Solicitors—Charles Allen, for plaintiff; Wynne, Baxter & Co., for defendants.

[IN THE COURT OF APPEAL.]

(*Appeal from the Queen's Bench Division.*)

1881. May 19, 30. SCHNEIDER *v.* BATT AND COMPANY. PANWELS (*third party*).*

Practice—Bringing in Third Party—Position of Third Party when the Whole Matter cannot be disposed of by one Trial—Judicature Act, 1873, *s.* 24. *sub-s.* 3—*Rules of Court, Order XVI. rules* 17 *and* 18.

In an action against the defendants for breach of contract they served P., as third party, with a notice under rule 18 *of Order XVI. The defendants then applied to the Court to give directions as to mode of trial; but the Court held that the matters could not all be decided at one trial, and declined to give any directions. Pleadings having been, by direction of the Queen's Bench Division, delivered between the defendants and the third party, the defendants then gave the third party notice of trial, the action between the plaintiff and the defendants having been already tried:*—Held (*affirming the judgment of the Queen's Bench Division*), *that as the Court had decided that all the questions could not be determined in one trial, the third party ought to be dismissed from the action, and that the notice of trial should therefore be set aside.*

Appeal by the defendants from the judgment of the Queen's Bench Division setting aside notice of trial given by them to the third party. In an action against the defendants for the non-delivery of certain goods, the defendants brought in

* *Coram* Bramwell, L.J.; Brett, L.J.; Cotton, L.J.

Panwels as a third party under the provisions of the Rules of Court, Order XVI. rule 18 (1). The defendants then applied for directions as to the mode of trial. The Queen's Bench Division refused to give any, and on appeal the Court of Appeal affirmed that judgment and refused to order the whole matter to be tried at one trial (2).

The defendants, pursuant to the judgment of the Queen's Bench Division, delivered pleadings to the third party, and the third party also delivered pleadings (3). After delivery of reply the defendants gave notice of trial, when the third party, the action between the plaintiffs and the defendants having been tried, took out a summons to set aside the reply and notice of trial. The Master made an order accordingly and the Queen's Bench Division affirmed his order.

The defendants appealed.

The Solicitor-General (*Sir F. Herschell*) and *Crump*, for the appellants.

Grantham and *Bray*, for the third party.

Cur. adv. vult.

BRAMWELL, L.J. (on May 30), delivered the judgment of the Court.—We are of opinion that this judgment must be affirmed. The notice which was given by the defendants was in terms a notice which brought the case within rule 18 of Order XVI. (1). Speaking for myself, I think that when a case is not within that rule, but is within rule 17 (1) of the same order, the third party so served should be dismissed. I do not think that a third party should be brought in on one ground and then retained and dealt with on another ground—that appears to me rather like an obtaining of the third party on false pretences; but that is not the ground on which we decide this case, and I may observe that although the order was obtained under rule 18, the notice shewed that the case was really one to which rule 17 (1) applied. However, assume that the case is properly brought under rule 17 (1), then we think the object of the rule is that, where the same question may arise between two parties, where a plaintiff may say to a defendant, "You complain that the goods sold to you are not according to contract," and the defendant replies, "If that is true, and if they are not, then there is a third party who has broken a contract with me with respect to the same goods," that same question should be tried once for all. But when, as in this case, a Court has decided that the same question shall not be tried once for all between all the parties, then the reason for retaining the third party is at an end. There is no reason why the provisions of rule 17 (1) should be applied to the third party, and we think that the third party should then be dismissed from the action. It must not, however, be supposed that we are reflecting on what this Court then did, for this case was not before them.

(1) Judicature Act, 1873, s. 24. sub-s. 3: "The said Courts respectively and every Judge thereof shall also have power to grant . . . . all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other person, whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of such claim, pursuant to any rule of Court or any order of the Court as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose; and every person served with any such notice shall thenceforth be deemed a party to such cause or matter. . . ."

Rules of Court, Order XVI. rule 17: "Where a defendant is or claims to be entitled to contribution or indemnity, or any other remedy or relief over against any other person, or where from any other cause it appears to the Court or a Judge that a question in the action should be determined, not only as between the plaintiff and the defendant, but as between the plaintiff, defendant and any other person, or between any or either of them, the Court may, on notice being given to such last-mentioned person, make such order as may be proper for having the question so determined."

Rule 18: "Where a defendant claims to be entitled to contribution, indemnity or other remedy or relief over against any person not a party to the action, he may by leave of the Court or a Judge issue a notice to that effect stamped with the seal with which writs of summons are sealed. . . . The notice shall state the nature and grounds of the claim. . . ."

(2) *Ante*, p. 389.

(3) It was urged on behalf of the third party that these pleadings were never formally delivered but were mere outlines drawn up to assist the Court.

possible that there might be a new ation to the Court in respect of when one party desired some order costs. When this Court decided here should not be one trial only, ason of the third party's being re- l was at an end, and he was entitled s dismissed, and there should be rther proceedings against him, and opinion agrees with the views of who framed these rules. The Soli- General has said that the rules not limit the operation of sub-sec- 3 of section 24 of the Judicature 1873 (1); but the rules have re- d a sanction which renders them alent to an Act of Parliament, and, ing for myself, I think that, although ules ought to be interpreted accord- o the Act, still this view in effect so. It may be observed that the n of the statute is permissive, not atory or compulsory. If, then, this natter of discretion, and if we have ver to use discretion in the matter, is ground also we will not order the edings to be continued.

vould add one word as to the state- of claim which it is said the defen- delivered to the third party, and tatement of defence which the third delivered. I attach no value to as it is clear that those statements aim and defence were delivered *pro* , so that we ought to treat the case ough nothing of that sort had passed; f otherwise, what then? This Court not at that time determined that should not be one trial of all the ers in dispute, so the ground did not exist on which we now decide that ppeal must be dismissed.

Appeal dismissed.

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ors—W. A. Crump & Son, for appellants; ks, Son & Rickards, for the third party.

[IN THE COURT OF APPEAL.]

(*Appeal from the Queen's Bench Division.*)

1881. May 6. } BARTER AND COMPANY *v.* DUBEUX AND COMPANY.*

Practice—Parties—Bankruptcy of Defendant—Trustee in Bankruptcy—Order L. rule 2.

In an action upon a bill of exchange against a sole defendant, after issue joined, the defendant filed his petition for liquidation, and a trustee was appointed:—Held (*affirming the judgment of the Queen's Bench Division*), *that the trustee ought not to be made a defendant under Order L. rule* 2.

Appeal from a judgment of the Queen's Bench Division (Denman, J., and Pollock, B.).

The plaintiffs sued as holders of a bill of exchange to recover the amount of the bill from the acceptor, G. A. Dubeux, the sole defendant in the action, who traded as Dubeux & Co.

The statement of defence alleged that the bill had been delivered by the defendant to the drawers to discount, and they had not discounted it, and that the plaintiffs took the bill with notice of these facts, and had given no value for it.

Issue having been joined, the defendant filed his petition for liquidation in the County Court at Liverpool, and a liquidation having been resolved upon, a trustee was duly appointed.

A Master having made an order, under Order L. rule 2, "that such trustee be made a party to the action or served with notice thereof," Cave, J., at chambers, affirmed his order.

On appeal, the Queen's Bench Division set aside the order.

The plaintiffs appealed.

McLeod and *Hollams*, for the plaintiffs, cited *Ex parte Mills; in re Manning* (1), *Eldridge* v. *Burgess* (2), *Chorlton* v. *Dickie* (3).

* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

(1) 40 Law J. Rep. Bankr. 89; Law Rep. 6 Chanc. App. 594.

(2) 47 Law J. Rep. Chanc. 342; Law Rep. 6 Ch. D. 411.

(3) 49 Law J. Rep. Chanc. 40; Law Rep. 13 Ch. D. 160.

Barter v. *Dubeux* (*App.*), *Q.B.*

A. Charles and *E. Crofton*, for the trustee, were not heard.

BRAMWELL, L.J.—I am clearly of opinion that the judgment should be affirmed. I do not say that in no case may the trustee be made a party. This case appears to me to be in a dilemma—either judgment could be given against the trustee, if he is made a defendant, or it could not. I do not think it could. The utmost, however, that could happen to him would be a judgment, not against him personally, but making a declaration that the plaintiffs had a right of proof against the bankrupt's estate. That declaration should be made, not by the High Court, but by the Court of Bankruptcy. What the plaintiffs, in truth, ask, is to be enabled to prove their debt in the High Court instead of the Court of Bankruptcy. Otherwise, says Mr. McLeod, all the costs incurred in the action will be wasted, and for reasons of expediency the trustee should be made a party. Now I am not sure that the costs incurred might not be made available in case the Court of Bankruptcy thought that some question or issue ought to be tried by a jury. Provision might then perhaps be made so that the costs should not be thrown away. But, allowing that possibly the costs might be wasted, I am still of opinion that the plaintiffs have no right to bring the trustee into this Court as defendant, and that the proper Court in which to enforce their rights is the Court of Bankruptcy.

BRETT, L.J.—I agree that the appeal should be dismissed, on the ground that the plaintiffs have failed to shew that they are entitled to the order asked for, or any branch of it; that is to say, either that the trustee should be joined as defendant, or that any notice should be served upon him under Order L. rule 2. The action was on a bill of exchange; the claim is indorsed on the writ of summons, and there is no other relief claimed than judgment for the amount of the bill. Since action brought the defendant has become bankrupt. It is now suggested that the trustee in bankruptcy should be made defendant. If so, it is admitted that no judgment whatever could be given against him personally, either for the claim or for costs. It is suggested that an order should be made against him, declaring that the plaintiffs should be admitted to prove against the estate for the amount of the bill. I am of opinion that no such order should be made. No such order is claimed on the pleadings, and we should have to amend. But, apart from that, I think that, if the order asked for could be made by this Court, it could equally be made in the Court of Bankruptcy. The plaintiff, therefore, fails to shew any necessity "for the complete settlement of the question involved in the action," within the rule that the trustee should be made a defendant. Then the plaintiff asks for an order for service of notice upon the trustee, which it is said would prevent him from disputing the claim in the Court of Bankruptcy. I can see nothing in Order L. by reason of which the notice would bind him, if not otherwise bound. The plaintiffs have therefore failed to shew that, for the complete settlement of all the questions involved in the action, it is necessary to order a notice to be served upon the trustees under rule 2 of Order L. I therefore think the appeal should be dismissed.

COTTON, L.J.—I think the Queen's Bench Division rightly discharged the Order making the trustee a defendant. The order was made under rule 2 of Order L. There is no doubt that the rule may be applied to the case of a defendant becoming bankrupt; the question is, are we to apply it here? The question turns on the words of the rule, "If it be deemed necessary for the complete settlement of all the questions involved in the action." Now, where the action is brought against two defendants, and one of them becomes bankrupt and the other does not, then the rule applies; the trustee may be made a party, though the judgment is not against him personally, but that the plaintiff may be at liberty to prove against the estate. The order is made because it is necessary, with respect to the defendant who has not become bankrupt, that the action should continue. Here

there is one single debt due from one defendant, and the claim ought to be settled in the Court of Bankruptcy. If the matter is one which ought to be tried by a jury, that is not a reason for joining the trustee as defendant; the Court of Bankruptcy may direct an issue to be prepared and tried by a jury. It is said that costs have been incurred in the action which will be wasted. That is no reason for joining the trustee. The plaintiff is in the position of everyone else who brings an action—he is subject to lose his costs if the defendant becomes bankrupt, and he only gets his dividend with the other creditors instead of being paid his debt in full. It would, in my opinion, be wrong if, when the Legislature has provided another and more convenient mode for settling the questions between the parties, we should allow this action to be continued.

I am, therefore, of opinion that this appeal should be dismissed.

Judgment affirmed.

Solicitors—Roberts & Barlow, for plaintiffs; Gregory, Rowcliffes & Co., agents for Laces & Co., Manchester, for trustee.

[IN THE QUEEN'S BENCH DIVISION.]

1881. March 14. THE DUDLEY GAS COMPANY (*appellants*) *v.* WARMINGTON (*respondent*).

Gasworks Clauses Acts, 1847 *and* 1871—10 *Vict. c.* 15. *ss.* 38 *and* 49—34 *& 35 Vict. c.* 41. *ss.* 1, 3, 35, 44—*Penalty for not supplying Copy of Accounts—Time when Offence Complete—Effect of Incorporation of Gasworks Clauses Act*, 1847, *by Company constituted prior to* 1871.

[For the report of the above case, see 50 Law J. Rep. M.C. 69.]

[IN THE COURT OF APPEAL.]

1881. Feb. 24, 25, 26. April 1. HONCK *v.* MULLER.*

Sale of Goods—Successive Deliveries—Refusal to accept One Delivery—Right to cancel Contract.

The defendant, in October, 1879, *sold to the plaintiff* 2,000 *tons of iron, at* 42*s. per ton, free on board—"Delivery, November*, 1879, *or equally over November, December and January next, at* 6*d. per ton extra."*

The plaintiff refused to accept any iron in November; the defendant then declared the contract to be cancelled. The plaintiff claimed delivery of one-third of the 2,000 *tons in December, and one-third in January. The defendant refused to deliver.*

In an action for non-delivery,—

Held (*by* BRAMWELL, L.J., *and* BAGGALLAY, L.J.; BRETT, L.J., *dissenting*), *that the plaintiff's breach of contract in refusing to accept delivery in November, entitled the defendant to cancel the contract, and therefore the defendant was not liable. Judgment of* FIELD, J., *and* MANISTY, J., *reversed.*

Hoare *v.* Rennie (5 Hurl. & N. 19; 29 Law J. Rep. Exch. 73) *approved.*

Action for non-delivery of certain iron, which had been bought by the plaintiff from the defendant, through Mr. Caleb Bloomer, a broker. The contract of sale was as follows:—

"Middlesbrough-on-Tees, October 27, 1879.

"Sold to John Honck, Esq.,
"8 Hill Side,
"Crouch Hill, London.

"2,000 (two thousand) tons No. 3 G. M. B. Middlesbro' pig iron, at 42*s.* (forty-two shillings) per ton, f. o. b. maker's wharf here.

"Delivery, November, 1879, or equally over November, December and January next, at 6*d.* per ton (sixpence) extra.

"Payment net cash here against bills of lading.

"Tees conservancy dues payable by shipper.

"Under this contract buyer and seller

* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Brett, L.J.

alike shall be free from any liability, should they be unable to receive or deliver owing to strikes or other combinations, or to accidents or such like unavoidable circumstances, and the contract shall be prolonged for a period corresponding to the duration of interruptions arising from any of the above causes.

" (Signed, *per pro* E. C. Muller),
" T. C. Davison."

On the 1st of November, 1879, the defendant wrote to Mr. Bloomer, asking for a delivery order, and requesting to know whether there was any chance of the plaintiff's taking the whole of the iron in that month of November.

Mr. Bloomer wrote in answer, stating that the plaintiff could not yet decide, but that he would give seven days' notice of his decision when he had decided.

A correspondence ensued, of which the following letters are material:—

November 17, 1879. Defendant to plaintiff:—

" I beg reference to contract of the 27th of October, for 2,000 tons pig iron, according to which you have the faculty to take the whole in November, or one-third in each month — November, December and January. Will you be good enough to inform me what quantity you wish to take this month over and above the minimum quantity of 666 tons due this month, and kindly send me your delivery instructions."

November 22, 1879. Bloomer to defendant:—

" . . . . Mr. Honck asks me to say he will be obliged if you will defer shipping any of his iron until December, so allowing him to take delivery of all in December and January."

December 1, 1879. Defendant to plaintiff:—

" I beg to refer you to my letter of 17th ult., to which I have received no reply. I have since then written several times also to your broker, Mr. Caleb Bloomer, pressing for orders for delivery of your iron, but could elicit no satisfactory reply. You ought to have taken delivery of a large portion of your iron during last month, and as you have failed to do so, I have been put in a very awkward position with regard to your whole contract; in fact, I cannot keep any contract on my books which is not executed properly. I must, therefore, give you notice that I have removed from my books and cancelled the contract for 2,000 tons, No. 3, which you had with me. I do this in order to protect myself from any further loss in the matter."

December 2, 1879. Plaintiff to defendant:—

" Yours to hand in due course. My reason for not replying to yours of the 17th was, that Mr. Bloomer, my broker, did so, and as the end of the month drew on prices hardened; hence the reason I did not give shipping orders. I am, therefore, at a loss to see your reason for saying you have cancelled my contract to prevent further loss. In fact, I will not allow such a thing to be done.

" My iron is under offer, and I expect it to be accepted; you must, therefore, accept notice that I hold you responsible for any loss in any case. You will have shipping orders in a few days."

The defendant wrote in answer that he would stand by his letter of the 1st of December, and refused to deliver any of the iron.

This action was brought to recover damages for non-delivery of the iron.

The defendant denied his liability, but paid 66*l.* 13*s.* into Court.

The case was tried in London during the Trinity Sittings, 1880, before Field, J., who directed a verdict for the plaintiff for 933*l.* 6*s.* 8*d.*, less the 66*l.* 13*s.* paid into Court, and gave judgment for the plaintiff.

A rule *nisi* for a new trial was discharged by Field, J., and Manisty, J., and the defendant appealed.

February 24, 25, 26, 1881.—*MacIntyre* and *Henn Collins*, for the defendant.—As the defendant was prevented by the plaintiff's default from fulfilling the whole of the contract, he was not bound to fulfil a portion of it. On such a contract as this the option as to how the iron is to be delivered is in the buyer, for the seller cannot know what quantity he is to deliver until the buyer has declared that option. Here the plaintiff

k v. Muller (App.), Q.B.

ed no option in November. Even
ng that the contract bound the
nt to deliver in three successive
es, although no option was ex-
, or assuming that the plaintiff
pressed an option, then the case
rned by *Hoare* v. *Rennie* (1).
is no case in conflict with that
. In *Simpson* v. *Crippin* (2) the
to accept delivery was only a
as to an unsubstantial part of the
matter of the contract. In *Roper*
son (3) the point was given up.
TT, L.J., referred to *Jonassohn* v.
(4).]

balance of authority is over-
ng in favour of *Hoare* v. *Rennie*
See *Bradford* v. *Williams* (5),
& Co. v. *Sala & Co.* (6).

uestion was raised, but not de-
s to the measure of damages. On
nt the following authorities were
l to: *Roper* v. *Johnson* (3); *Frost*
ght (7); *Brown* v. *Muller* (8);
r. Forrester (9).]

les Russell and *Channell*, for the
.—The plaintiff on this contract
bound to express an option. If
was said on either side he was
to have 666⅔ tons in November,
s bound to take that much. The
here did not go to the whole con-
on of the contract, and did not
the defendant to repudiate the
t and declare it at an end—Note
lage v. *Cole* (10); *Simpson* v.
(2); *Freeth* v. *Burr* (11). The
in *Hoare* v. *Rennie* (1) has
uestioned in several of the later
cases, and is opposed to the balance of authority—Note to *Cutter* v. *Powell* (12).

MacIntyre, in reply, referred to *Deverill* v. *Burnell* (13).

Cur. adv. vult.

The following judgments were delivered on the 1st of April:—

BRAMWELL, L.J.—I think it unnecessary to determine which of the several meanings put on the agreement in this case is right. For whichever is adopted I think the result should be the same. But it seems to me that the meaning is, that the plaintiff had the option to have the 2,000 tons in November, or in equal portions in November, December and January; and that unless he elected in November in time to have the whole delivered in November if he so elected, or in time to have one-third delivered in November if he elected to have the iron in three deliveries, he has no cause of action.

And I think he did not elect. Such election, of course, includes notice of his option to the defendant. He certainly did not say in November that he would have all in November, nor did he say he would have three deliveries. What I have said seems to me the natural meaning; if it is not, then the contract means 2,000 tons in November unless the plaintiff should elect, as he might, to have them in equal portions in November, December and January. I think he did not so elect, and that having failed to take the 2,000 tons in November he has no cause of action. But I will assume, as the plaintiff says, though I think otherwise, that, whichever construction is right, the plaintiff elected to have the iron in three equal portions in November, December and January. I am of opinion even then that the defendant is entitled to our judgment. Before saying why, I think it fair to the defendant to say I can see no shuffling in his conduct, nor any motive for repudiating the bargain other than a legitimate one. I do not find that iron had risen in price. I think it very likely the iron was at the

url. & N. 19; 29 Law J. Rep. Exch. 73.
Law J. Rep. Q.B. 28; Law Rep. 8 Q.B.

Law J. Rep. C.P. 65; Law Rep. 8 C.P.

. & S. 206; 32 Law J. Rep. Q.B. 385.
Law J. Rep. Exch. 164; Law Rep. 7
9.
Law J. Rep. C.P. 492; Law Rep. 4
39.
Law J. Rep. Exch. 78; Law Rep. 7
1.
Law J. Rep. Exch. 214; Law Rep. 7
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cotch Sess. Cas. 75, 190 (4th ser.).
Wms. Saund. 548 (ed. of 1871).
Law J. Rep. C.P. 91; Law Rep. 9

(12) 2 Smith's Lead. Cas. at p. 40 (8th ed.)
(13) 42 Law J. Rep. C.P. 214; Law Rep. 8 C.P. 475.

wharf of the sellers, and that the defendant was pressed by them to take it.

But however this may be, I think his contention right.

The case for the plaintiff is that by the contract, or what was done under it, he was to take, and was entitled to have, 666⅔ tons in each of the months of November, December and January. That though he (the plaintiff) broke his contract in not taking the 666⅔ in November, and though the defendant at once gave notice he would not go on with the contract, he (the plaintiff) has a right to insist on the December and January deliveries. In other words, the plaintiff says that, having agreed to take 2,000, he has a right or power to demand and take 1,333⅓ and no more. I cannot think so. I think that contention is contrary to law and justice alike. I think where no part of a contract has been performed, and one party to it refuses to perform the entirety to be performed by him, the other party has a right to refuse to perform any part to be performed by him. I think if a man sells 2,000 tons of iron he ought not to be bound to deliver 1,333⅓ only, if it can be avoided. I can see no difference in principle between where the deliveries are at different dates and where they are to be all at once. I think the plaintiff no more entitled to the delivery of these 1,333⅓ tons than he would be if he was to take 2,000 tons in November, and send shipping for 1,333⅓ tons only in that month at such a time that no more could be delivered, and he said he would take no more. Suppose it was a purchase of 100 yards of silk at so much a yard, and the buyer came for fifty only, could he insist on it? Would it make any difference that fifty yards were to be taken and paid for on Monday, and fifty on Tuesday, and the Monday's delivery was not taken but refused, and then the Tuesday's was demanded? If there was a charter for an out and home voyage, and the charterer refused to load for the out voyage, could he insist on the ship taking his cargo for the home voyage? Suppose 10,000 tons of coal bought to be delivered at Gibraltar, Aden and Bombay, in equal quantities, at Bombay in January, at Aden in February, and at Gibraltar in March, and no delivery at Bombay, could the buyer be made to take the other deliveries? Suppose a contract to supply bread to a workhouse for a year from January 1st, and the contractor says he will supply and does supply none in January, can he insist on supplying in the other eleven months? Suppose he does not supply for eleven months, can he insist on supplying in December? Would it make any difference if he was paid monthly? I hope not. I think not. Suppose a man orders a suit of clothes, the price being 7*l.*—4*l.* for the coat, 2*l.* for the trousers, 1*l.* for the waistcoat—can he be made to take the coat only, whether they were all to be delivered together or the trousers and waistcoat first? The party to a contract so broken has a right,—not to rescind the contract—for rescission is the act of both parties—but a right to declare he will not perform a part only of his contract—namely, what would remain to be performed if the other party had performed his part, and so enabled the performance of the whole. If, indeed, the contract has been part performed and cannot be undone, then it must be proceeded with without such power of declaring off. If, in this case, the plaintiff had taken the November delivery, but had refused the December, the defendant would have been bound to make the January delivery. See what the consequence is of a different conclusion. The defendant was to sell 2,000 tons of iron and have so many pounds sterling; he is made to sell two-thirds only of the iron and have two-thirds only of the pounds sterling and a right of action. Suppose the November delivery would have been a profit to the defendant, and the December and January deliveries a loss, why is he to bear the loss and have no security that he will get the profit? This reasoning, no doubt, would apply where there is part performance, but then there is no help for it. It is asked whether every trifling breach of contract is attended with this consequence. I know not; but 666⅔ tons out of 2,000 are not a trifle. If it must be something that goes to the

' of the contract, as was said, one-third of the subject-matter

case of *Hoare* v. *Rennie* (1) is in The same thing was decided a ys ago in *Engelhart* v. *Bosanquet* It was there held that on a sale 00 tons of sugar, to come in two when the first ship was not equal tract, the buyer was not bound to ie other.

it is said that *Hoare* v. *Rennie* (1) en overruled by *Simpson* v. *Crippin* That is not so. That decision was right. The case was distinguish- om *Hoare* v. *Rennie* (1), for the ct had been part performed and not therefore be undone. One may s a respectful agreement with he learned Judges said in *Simpson ppin* (2)—namely, that they did derstand *Hoare* v. *Rennie* (1). her cases cited are distinguishable same ground.

as never yet been held that a man eak his contract, render the per- ce of the whole impossible, and, nothing has been done under it, on performance of the remainder. e v. *Cole* (10) has absolutely no- o do with the case. That was an on a specialty; this is not. As argument that in a case like the t there are really three contracts se parcels, that is wholly erroneous. el contracts the whole of what is one on one side is the considera- r the whole of what is to be done other. The seller does not sell, the does not buy, any parcel of 666⅔ ny more than when the suit of is sold there is a separate sale of aistcoat and trousers.

n of opinion that the judgment be reversed.

ALLAY, L.J.—The agreement in this as for the sale by the defendant to intiff of 2,000 tons of iron, to be de- at Middlesborough in November, or, at the option of the plaintiff, al proportions, but at an increased of 6*d.* per ton, in the months of ber, December and January.

(14) Not reported.

In the course of the argument three different views have been suggested as to the true meaning of the argument: First. That relied on by the plaintiff that unless he made an election to take all in November, the contract was for the delivery in three equal portions in the three months. Second. That relied upon by the defendant, that the plaintiff was bound to make his election in November, and to communicate it to the defendant in sufficient time to enable the defendant to deliver the whole, or the one-third, as the case might be, in that month. Third. An alternative suggestion of the defendant, that the plaintiff was to take the 2,000 tons in November, unless he gave notice to the defendant before the expiration of that month that he elected to have the cargo delivered in equal portions in the three months.

I agree with Lord Justice Bramwell in thinking the second view, that contended for by the defendant, is the most in accordance with the language of the correspondence, and further, that, whether it or the third be adopted, the plaintiff has no cause of action; it is not suggested that any notice was given by the plaintiff in the month of November. This would appear to me to be sufficient to entitle the appellant to a reversal of the decision from which he has appealed. But so strong an argument has been addressed to us in support of the construction of the contract contended for by the plaintiff that I deem it right to express my opinion as to what our decision ought to be upon the basis of such construction being adopted.

As to this also I have arrived at the same conclusion as Lord Justice Bramwell.

Were it not for the authority of *Simpson* v. *Crippin* (2), which has been much pressed upon us, I should have felt no doubt as to the propriety of holding that the refusal by the plaintiff to accept the first portion of the cargo in accordance with the provisions of the contract as construed by himself was a sufficient justification for the defendant's refusal to deliver the remaining portions. It is, to my mind, impossible to reconcile the decision in *Simpson* v. *Crippin* (2) with

that in *Hoare* v. *Rennie* (1), except in the manner pointed out by Lord Justice Bramwell, but I do not find that the decision in *Simpson* v. *Crippin* (2) was in any way rested upon the distinction pointed out by the Lord Justice. Indeed Mr. Justice Mellor stated in his judgment that he was unable to distinguish the two cases. If, then, the decision in *Simpson* v. *Crippin* (2) is to be considered as conflicting with that in *Hoare* v. *Rennie* (1)—and I think that it was so considered by the Judges who decided it—I am bound to say that I adopt the principles enunciated in the latter case as being more in accordance with reason and justice than those upon which the former was expressed to be decided. The principles upon which each case was decided are so clearly expressed in the reported judgments that I need not refer to them in detail.

I may mention that in the case of *Bradford* v. *Williams* (5), which was decided in the early part of the same year as *Simpson* v. *Crippin* (2), *Hoare* v. *Rennie* (1) was quoted and recognised, and the principles upon which it was decided adopted. *Bradford* v. *Williams* (5) was mentioned in argument in *Simpson* v. *Crippin* (2), but was not noticed in any of the judgments.

I am of opinion that the judgment should be reversed.

BRETT, L.J.—I am sorry to say that in this case I venture to differ from the judgment of my learned brothers.

This is a case of a contract for the sale and delivery of goods at a price per ton. If that price were one whole price the present question would not arise; but the question has been discussed at length before us with respect to contracts for successive deliveries of goods at a price per ton, so that the price is made up of a separate sum for each delivery. It does not seem necessary to decide precisely what were the rights of the parties as to the time of the deliveries. I should have been inclined to think that, where the contract was for delivery of goods by the vendor "free on board," the choice whether there should be one delivery in November, or three successive deliveries, would be the choice of the defendant. But it is immaterial to consider that. The contract was for three successive deliveries at a price per ton. The action was for non-delivery, and the question is whether the failure of the plaintiff to take the first delivery prevents him from requiring deliveries at the two successive periods. It is admitted by everybody that, if the first delivery was made, and the second was not offered to the purchaser, but the third was, then the failure to offer the second would be no objection to the vendor's right to insist upon the purchaser taking delivery of the third. It is said, however, that if there is a failure to offer delivery of the first, delivery of the second cannot be insisted upon. Now, in my opinion, the law is bound to interpret the contracts of merchants with reference to their known course of business and customs. A Court of law must determine from the language used, and the known course of business among merchants, not what the particular parties meant, but what the contract means among merchants in the ordinary course of their business. The meaning must be applied which ordinary business men, in their ordinary business transactions, are accustomed to apply to similar contracts, and in the same manner. The present contract, though a modern form of contract, has still been in existence for some years. The business construction which has prevailed with respect to these contracts is this: inasmuch as, where the deliveries are to be successive and the price is fixed for each delivery, the failure to proffer one of the deliveries can be satisfied by damages, therefore a failure in respect of one delivery does not prevent the liability of the vendor to make the other deliveries. This is not expressly decided in *Pordage* v. *Cole* (10), but it is stated in the note to that case as the result of many decisions in the Courts. The Courts do not apply the doctrine as an abstract proposition of law, but have gathered it from the course of business of merchants. The merchants, in their contracts, having given up their direct remedy by reason of this system of separating prices, have shewn an intention that, upon failure of one of the deliveries, the right to recover damages shall be a

k v. Muller (App.), Q.B.

nt remedy to the purchaser, and ch a failure shall not prevent the leliveries under the contract being l. But it is suggested that if there ilure with respect to the first de- then a right to throw up the ct is created in favour of the person t whom the failure is made. But Supposing at the time of the to make the first delivery there is ference between the contract and arket price of the goods, then no whatever is done to the person t whom the failure is made. But time appointed for the second y the difference may be enormous, is still said that if you have failed ke the second delivery, you can on being allowed to make the third. position is, that if you have made st where a failure would carry no uences of loss at all, although the to make the second would be of most consequence to the purchaser, re entitled to insist upon making ird, although the consequences of o the purchaser may also, if prices one down, result in serious loss. matter of business, I say, with all t, that the doctrine results in a ss absurdity. Is one bound to to such a conclusion where one's s to apply the construction which nduct of all reasonable merchants pon such contracts? I think not. the authorities, the note to *Pordage e* (10) seems to me distinct on the on. No distinction whatever is there between the first and any deliveries. *Simpson* v. *Crippin* (2) listinctly states that no such dis- on is to be made. It is objected he Judges in *Simpson* v. *Crippin* id that they could not understand se of *Hoare* v. *Rennie* (1). That, I t, only means that they could not stand that the principle of law was y applied in the latter case; in other , that they dissented from *Hoare* v. e (1). So do I on the ground ly pointed out, that it leads to a ss absurdity. I therefore prefer on v. *Crippin* (2), and think that Blackburn's observations in that were right.

In the Court of Appeal we are not bound to follow *Hoare* v. *Rennie* (1), and I think it was wrongly decided. Having the right to decide whether the view taken in *Hoare* v. *Rennie* (1), or that taken in *Simpson* v. *Crippin* (2), was right, I think, for the reasons given, that we ought to follow the latter case, and I am of opinion that the appeal should be dismissed.

Appeal allowed. Judgment for defendant.

Solicitors—Digby & Jones, for plaintiff; Van Sandau & Cumming, agents for Belk & Parrington, Middlesborough, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1881. March 5. } SOUTHERAN (*appellant*) *v.* SCOTT (*respondent*).

Bastardy Order—Subsequent Marriage of Mother—Liability of Putative Father—Statute 35 *&* 36 *Vict. c.* 65. *s.* 3.

[For the report of the above case, see 50 Law J. Rep. M.C. 56.]

[IN THE COURT OF APPEAL.]

(*Appeal from the Queen's Bench Division.*)

1881. May 23, 24. { HARE (*appellant*) *v.* THE CHURCHWARDENS AND OVERSEERS OF PUTNEY (*respondents*).

Rating — Successive Occupation — Liability of Outgoing Occupier — Bridge acquired by Board of Works — Liability to Rate—Beneficial Occupation—32 *&* 33 *Vict. c.* 41. *s.* 16—40 *&* 41 *Vict. c. xcix.*

[For the report of the above case, see 50 Law J. Rep. M.C. 81.]

[IN THE COURT OF APPEAL.]

1881. May 11, 26. MARSDEN AND ANOTHER *v.* MEADOWS. SALMON, *claimant.**

Bill of Sale—Sale by Sheriff—Receipt and Inventory—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *ss.* 3, 4, 8.

The sheriff, under a writ of fieri facias, seized goods of the defendant, and sold them to the claimant, who paid part of the purchase-money at the sale and the remainder next day, and the sheriff thereupon sent him an inventory of the goods with a receipt for the purchase-money attached to it. The receipt and inventory were not registered as a bill of sale under section 8 *of the Bills of Sale Act*, 1878. *The goods remained in the defendant's possession until again seized in execution on a judgment obtained by the plaintiffs*:—Held (*reversing the judgment of the Queen's Bench Division*), *that the receipt and inventory did not constitute a bill of sale, so as to require registration under the Bills of Sale Act*, 1878, *because the title of the claimant was complete without them, and they were not intended by the parties to be a record of the transaction, and therefore that the claimant was entitled to the goods as against the plaintiffs.*

Appeal from a judgment of the Queen's Bench Division upon a Case stated by order of a Judge upon an interpleader summons.

CASE.

1. On the 6th of January, 1879, the said sheriff was, under a writ of *fi. fa.* issued on a judgment obtained by a Mr. Copland against the above defendant, in possession of the whole of the goods, chattels, farm implements and other effects then being in and upon the premises of the said defendant at Billericay, in the county of Essex.

2. Upon the 6th of January, 1879, the said claimant agreed to purchase of the said sheriff the whole of the said goods for the sum of 65*l.*, and paid to him on that day a deposit of 40*l.* on account of the said purchase-money, and the said sheriff thereupon gave possession of the said goods, chattels, farm implements and other effects to the said claimant, who has since paid the rent of the premises, sent his cattle there, and allowed Meadows, the defendant, to occupy the premises and furniture without payment of any rent but painting pictures for the claimant, who is a picture dealer. Meadows is lessee of the premises from the Vestry of St. Michael, Paternoster Royal.

3. Upon the following day the said claimant sent to the said sheriff by post in a letter a cheque for the sum of 25*l.*, making, together with the said deposit, the said purchase-money so agreed on as aforesaid, and thereupon the said sheriff sent to the said claimant a schedule of the said goods [the case here set out a list of the goods, with the price of each article stated], and also a receipt for the said purchase-money attached thereto in the words and figures following:—

"Received of Mr. J. Salmon the sum of 65*l.*, for valuation at Mr. Meadows' farm, Billericay, Essex,

"January 7th, 1879,

"John Ballard,

"65." "*for* Frederick Smee"

—which said schedule and receipt were enclosed in the following letter:—

"Chelmsford: January 8, 1879.

"Dear Sir,—I am in receipt of your favour, for which I am greatly obliged. I enclose schedule and receipt as requested.

"Yours obediently,

"John Ballard.

"To Mr. J. Salmon,

"255, High Holborn, W.C.

"P.S.—I was late home last evening or should have sent off."

4. The whole of the said goods, chattels, farm implements and other effects then being upon the premises of the said defendant were, on or about the 31st of May last, seized by the sheriff of Essex under a writ of *fi. fa.* issued on a judgment obtained by the above-named plaintiffs against the above-named defendant, whereupon the said claimant then made a claim to the same as being his absolute and sole property.

Paragraph 5 stated that the sheriff issued an interpleader summons, and Den-

* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

J., ordered this case to be stated, ing admitted that the goods seized s said sheriff were the same goods se set out in the schedule set forth agraph 3 of this case, and it being dmitted that there was no question the *bona fides* of the said claimant's "

questions for the opinion of the are—

st, whether the said goods are the of the said claimant as against the laintiffs.

ondly, whether, under the circum- s heretofore appearing, the said le and receipt are such an inven- nd receipt as to require registration the Bills of Sale Act, 1878.

Queen's Bench Division (1) gave ent for the plaintiffs, holding that oods seized belonged to them as t the claimant.

claimant appealed.

ock (*McIntyre* with him), for the nt.—The principle of the decision *odgate* v. *Godfrey* (2) applies to this Here the transaction was com- before any assurance was given, e title of the claimant to the goods be good by reason of the sale and nt of the purchase-money, if no t had been given. It is true that *ate* v. *Godfrey* (2) is a decision upon ills of Sale Act, 1854, and by the 1878 the expression "bill of sale" le to include "inventories of goods eceipt thereto attached, or receipts rchase-moneys of goods" (3). But the addition of those words to the section defining a "bill of sale" does not take this case out of the authority of *Woodgate* v. *Godfrey* (2). Every instrument coming within the definition does not require registration as a bill of sale, but only instruments which operate as a means of transferring the property, or are meant by the parties to be a record of the transaction between them. The words with respect to receipts and inventories were added to the definition of "bills of sale" in order to meet cases like that of *Ex parte Cooper; in re Baum* (4).

R. V. Williams, for the plaintiffs.—The Queen's Bench Division thought the question was one of fact, namely, whether the receipt and inventory were intended to constitute a record of the transaction between the parties, and the Court drew the inference of fact that they were so intended. It is submitted the decision was right. Sales by the sheriff are expressly within the purview of both Bills of Sale Acts. *Allsopp* v. *Day* (5) was, in effect, a decision that no document constituted a bill of sale unless it was an "assurance." But that case was practically overruled by *Ex parte Odell; in re Walden* (6).

Williams, J., and Mathew, J.

8 Law J. Rep. Exch. 271; 49 ibid. 1; Law Ex. D. 24.

he Bills of Sale Act, 1878, s. 3, enacts: Act shall apply to every bill of sale exe- n or after the 1st day of January, 1879, whereby the holder or grantor has power, with or without notice, and either imme- or at any future time, to seize or take ion of any personal chattels comprised in subject to such bill of sale."

ction 4, "The expression 'bill of sale' shall (*inter alia*) inventories of goods with re- ereto attached, or receipts for purchase- of goods."

ection 8, "Every bill of sale to which this plies shall be duly attested, and shall be ed under this Act within seven days after the making or giving thereof, . . . otherwise such bill of sale," as against trustees in bankruptcy or liquidation, or assignees under any assignment for the benefit of creditors, "and also as against all sheriffs' officers and other persons seizing any chattels comprised in such bill of sale, in the execution of any process of any Court authorising the seizure of the chattels of the person by whom or of whose chattels such bill has been made, and also as against every person on whose behalf such process shall have been issued, shall be deemed fraudulent and void so far as regards the property in or right to the possession of any chattels comprised in such bill of sale, which at or after the time of filing the petition in bankruptcy or liquidation, or of the execution of such assignment or of executing such process (as the case may be), and after the expiration of such seven days, are in the possession or apparent possession of the person making such bill of sale (or of any person against whom the process has issued under or in the execution of which such bill has been made, or as the case may be)."

(4) 48 Law J. Rep. Bankr. 40; Law Rep. 10 Ch. D. 313.

(5) 7 Hurl. & N. 457; 31 Law J. Rep. Exch. 105.

(6) 48 Law J. Rep. Bankr. 1; Law Rep. 10 Ch. D. 76.

[BRETT, L.J.—Lord Justice Thesiger, in *Ex parte Odell; in re Walden* (6), distinguished that case from *Allsopp* v. *Day* (5) on the ground that in *Ex parte Odell; in re Walden* (6) there was no evidence of any sale except the document upon which the question turned.]

It is submitted that the true construction of section 3 of the Bills of Sale Act, 1878, requires that every receipt and inventory, which are intended to be a record of the transaction, requires registration as a bill of sale. In the present case the inference of fact drawn by the Court below was correct. The circumstances bring the case clearly within the mischief contemplated by the Act, and within the description in section 3 of the Act of 1878. There was no change in the apparent possession of the goods. *Woodgate* v. *Godfrey* (2), being a decision upon the earlier Act, has no application.

He also referred to *Gough* v. *Everard* (7).

McIntyre, in reply.

Cur. adv. vult.

The following judgment was delivered on May 26:—

COTTON, L.J.—This was an appeal by Joseph Salmon from an order of the Queen's Bench Division, deciding that goods seized by the sheriff belonged, as against the appellant, to the plaintiffs. The question is, whether a receipt and inventory taken by J. Salmon ought to have been registered under the Bills of Sale Act, 1878. The goods in question were originally those of William Meadows, and on the 6th of January, 1879, the sheriff took possession of them under a writ of *fieri facias*, issued on a judgment obtained against Meadows by a Mr. Copland. On the same day Salmon agreed to purchase from the sheriff the goods, which were all the goods then on a farm in the occupation of the defendant, and paid a deposit of 40*l.* on account of the purchase-money, and thereupon the sheriff gave possession of the goods to Salmon, who, nevertheless, allowed the defendant to remain in possession.

(7) 2 Hurl. & C. 1; 32 Law J. Rep. Exch. 210.

On the following day Salmon sent the sheriff a cheque for the remainder of the purchase-money, and on the 8th of January, 1879, the clerk of the sheriff's officer sent to Salmon a receipt dated the 7th day of January, together with an inventory of the goods. The inventory was apparently affixed to the receipt by a pin only. But as the letter and receipt were written on the same piece of paper, and the former referred to the inventory and receipt, I think that the receipt and inventory must be considered as one document.

The receipt and inventory came within the expression a "bill of sale," as interpreted by the 4th section of the Act of 1878, under which the question arises. But the question remains whether, substituting the words "receipt and inventory" in sections 3 and 8 of the Act for the expression "bill of sale," they are such an instrument as comes within the provisions of the Act. The words of the 3rd section are, "This Act applies to every bill of sale whereby the grantee has power to seize or take possession of any chattels comprised in or made subject to such bill of sale." This points to the bill of sale being an instrument on which the right of the claimant to some extent depends. Again, in the 5th section we find this enactment: "Any mode of disposition of trade machinery by the owner thereof, which would be a bill of sale as to any other personal chattels, shall be deemed to be a bill of sale within the meaning of this Act." This shews that as regards trade machinery the instrument, to come within the operation of the Act, must in some way dispose of the chattels. Section 8 provides that bills of sale to which the Act applies, not registered as required by the Act, shall, as regards chattels in the apparent possession of the person making the bill of sale, or in the case of the bill of sale being given by the sheriff, of the person against whom the process has issued, be null and void, thus assuming that when the bill of sale is avoided the title of the holder as depending upon it is gone. These provisions, in my opinion, lead to the conclusion that a document, to be a bill of sale to which the Act

s, must be one on which the title transferee of the goods depends, as the actual transfer of the pro- or an agreement to transfer, or as a ient or document of title, taken, to a expression found in some of the at the time as a record of the ction. Here the document was transfer of or an agreement to r the chattels, to which Salmon complete title before the receipt iven, and independently of it, and is no statement in the special case t the time of his purchase from the he required a receipt, though I it ought to be inferred from the of the 8th of January that when t the balance of 25*l.* he asked for a

conclusion, in my opinion, is, that nsaction of purchase and sale was ted before the receipt was given or for, and that the document is not a sale which, under the Act, requires ation. This decision is in accord- ith the reasoning of the Master of lls when giving judgment in the f Appeal in *Woodgate* v. *Godfrey* (2). ase, it is true, was a decision on rlier Bills of Sale Act, which does terpret "bill of sale" as including , but his reasoning applies to the n whether the instrument, though f sale within the interpretation of rm in the Act, is one to which the plies. In *Ex parte Cooper; in re* (4) Lord Justice James uses expres- hich shew that he thought such an nent as this would be within the t Act, but what he says was extra- l. Moreover, the decision in *Ex looper* (4) was explained in *Wood- Godfrey* (2) as depending on this, here was no sale independent of ument in that case, and probably pression of Lord Justice James o a receipt taken under the circum- existing in that case. In my we ought not to destroy a title, peached on the ground of fraud, mere want of registration of an nent, on which the plaintiff's title ot depend, unless, on the fair con- on of the Act, the Legislature has d it to be registered; and as, under the circumstances of the present case, the Act does not, in my opinion, apply, I think that the order appealed from should be reversed, and the goods declared to be the goods of Salmon.

BRAMWELL, L.J.—I am of the same opinion, and for the same reasons, but I wish to add a few remarks of my own. The Legislature has thought fit to enact in certain cases where the ownership of property is separated from the possession, the possession remaining in the former owner, that the transaction should be void as against certain persons—that is to say, against execution creditors, trustees in bankruptcy, and incumbrancers claiming under a subsequent bill of sale—unless the document affecting the transaction is registered as a bill of sale and attested by a solicitor. The Legislature has not thought fit to say that, as a general rule, wherever the property in goods is parted with by a person who still retains possession, the transaction shall be evidenced by some document which shall be registered and attested—that would be plain and intelligible; but section 4 has been drawn to include every possible thing which can be written on a scrap of paper, and to make it a bill of sale which must be registered. In my opinion, if that section is not to have the interpretation we are now giving it, it will become a positive snare.

It would hardly occur to anyone, I should think, to say to the sheriff's officer, after a sale by him, "Do not give me a receipt, or, if you do, have it registered as a bill of sale, and get a solicitor to witness it," unless by some happy inspiration it occurred to the buyer that the receipt was a bill of sale under the Act. The Act gives an interpretation to instruments which is not warranted. Everyone knows that a receipt is not admissible in evidence when there is a conflict between two persons as to the payment of money and payment has to be proved *aliunde*. Yet a receipt is put into the list of documents which require registration and attestation by a solicitor. Of course one must act upon the words found in the statute; but I think the meaning of the Legislature must have been that where a

receipt, either with or without an inventory, was intended to be a transfer, or a record of the transaction by which the property was transferred, it must be registered as a bill of sale and attested by a solicitor, otherwise it is void as against the classes of persons mentioned in the Act. It is a bill of sale if the parties agree that the transaction between them shall be shewn in that way. But when there is no evidence of any such intention, and the property was transferred by the bargain between the parties, and by the handing over of the purchase-money, a receipt cannot need registration. It would seem absurd to suppose that the claimant's title to the goods would have been good, if, when he sent the balance of the money, he had told the sheriff's officer not to send a receipt, but that his title is in jeopardy because he took a receipt. I think it impossible that the Legislature can have intended any such consequences as that. I think the question substantially is, not whether a bill of sale was given, but whether it was agreed for by the parties at the time. When a man says, "I am in a hurry for money; I will sell you these goods, but let them to me again," and a bill of sale is agreed for, I should have great hesitation in deciding that the bill ought not to be registered. I doubt very much whether the words of section 3 help the claimant. The words, "Whereby the holder or grantee has power to seize or take possession of any personal chattels," &c., are, I think, meant not to limit the effect of the other provisions in the Act, but to extend them to other cases coming within the description in that section. However that may be, I am of opinion that our conclusion is justified by the other reasons I have given.

I think the receipt, either with or without the inventory, was not a bill of sale so as to require registration within the meaning of the statute. The appeal must be allowed.

BRETT, L.J.—I think that, under the Bills of Sale Act, 1878, some receipts and inventories are to be treated as bills of sale, and as such require registration. The question we have to decide here is whether all are to be considered bills of sale. I am of opinion that this receipt and inventory are not to be considered a bill of sale because not used in any way as bills of sale are used, or in any analogous way. I think the principle of the decision in *Woodgate* v. *Godfrey* (2) applies to this case. The Legislature, in my view, meant to deal with bills of sale, which were instruments used as means of conveyance of property, and to provide for the registration of those instruments. Bills of sale were given by persons who, being owners of goods, passed the property in the goods by a bill of sale, and still remained in possession, so that, as far as the world was concerned, the bill of sale being secret, there was nothing to shew that the property had passed. The Legislature therefore declared that bills of sale must be registered. The moment the Act was passed the ingenuity of many persons was brought into play in order to evade and elude it. A person having the ownership of goods, and desiring to give the property in them to another, but not to give a bill of sale, effected his purpose by making a verbal agreement that the property should pass to the other, and by giving (amongst other documents) a receipt for the purchase-money with an inventory of the goods. The verbal agreement passed the property—the transaction being evidenced by the receipt and inventory, but the receipt and inventory not being published to the world, the transaction was kept secret, the person giving the receipt and inventory remaining in possession of the goods. Under such circumstances the receipt and inventory were used as a bill of sale would be used, or at all events in an analogous way. It was seen that the earlier Bills of Sale Act was being evaded by these means, and the later Act of 1878 was therefore passed. It recognises that an inventory and receipt used in the way I have described were used in a manner analogous to that in which a bill of sale was used, and therefore that they were a bill of sale. Here, when the receipt and inventory were given, the goods were not in the possession of the person who had become owner of them. They were in the possession of the law—that is, in the

possession of the sheriff who sold them to the claimant. No doubt if the sheriff had passed the property in them to a purchaser by a bill of sale the words of the Act would apply. I do not say whether, if there had been an agreement that the property in the goods should be transferred by the inventory and receipt, they would not have been a bill of sale which required registration. It is not necessary to determine that question. But here the whole transaction had been completed before the receipt and inventory were given. The property passed by delivery when the price of the goods was paid. There was no agreement that the receipt should be given; it was not a document made at the time the property in the goods passed, but a mere ordinary receipt for the payment of money. I think the judgment of the Master of the Rolls in *Woodgate* v. *Godfrey* (2) in principle governs this case. I am therefore of opinion that the receipt and inventory, under the circumstances in which they were given in the present case, did not constitute a bill of sale which required registration under the Act.

Judgment reversed.

Solicitors—The plaintiffs in person; G. H. Oliver, for the claimant.

[IN THE QUEEN'S BENCH DIVISION.]

1881. March 12, 16. THE MAYOR, &C., OF ROCHDALE *v.* THE JUSTICES OF LANCASHIRE.

Highway—Liability to Repair—Main Road—Road ceasing to be a Turnpike Road—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 *Vict. c.* 77), *s.* 13.

[For the report of the above case, see 50 Law J. Rep. M.C. 97.]

[IN THE QUEEN'S BENCH DIVISION.]

1881. Feb. 22. June 20. *In re* JOHNSON (*a solicitor*); *ex parte* EDWARDS.

Solicitor and Client—Rights of London Agent—Privity of Contract—Wrongful Detainer of Money—Summary Jurisdiction.

J., a London solicitor, received, as agent for R., a country solicitor, certain moneys for debt and costs recovered under a writ of fi. fa., and belonging to a client of R. At the time of receiving the moneys R. was indebted to J. for costs incurred as his London agent, in a sum equal to the amount so recovered:—Held, *that J. was, nevertheless, not entitled to retain this amount in satisfaction of his claim against R., but was bound to pay over the sum to R.'s client.*

This was originally an application on the part of Miss Edwards for a rule, calling upon Mr. Johnson, a solicitor of this Court, to shew cause why he should not answer the matters contained in certain affidavits, which alleged that he had improperly withheld from her a sum of 33*l.* 5*s.*, which had been recovered in an action brought by her against a Mr. Whitwell, and why he should not pay the costs of the application. The matter was referred to Master Butler to report thereon to this Court. On the 3rd of November, 1880, the Master reported as follows:—

"On the 3rd of November, 1879, the said Mr. G. Johnson was instructed, by Mr. W. R. Raynes, of Potton, in the county of Bedford, solicitor, to commence an action as his London agent at the suit of a Miss Edwards, against a Mr. Thomas Whitwell. In this action judgment was recovered for the plaintiff under Order XIV., rule 1, of the Rules of the Supreme Court, 1875. Mr. Raynes instructed Mr. Johnson to issue execution for the amount of the debt (33*l.* 5*s.*) and costs (9*l.* 16*s.* 6*d.*), and a writ of *fieri facias* was accordingly issued, directed to the sheriff of Essex. On or about the 13th of March, 1880, Mr. Johnson received from the sheriff of Essex the sum of 43*l.* 1*s.* 6*d.*, being the amount of debt and costs levied under the said writ of *fieri facias*. Mr. John-

son had no authority or instructions from either Miss Edwards or Mr. Raynes to receive this money, but he received it as Mr. Raynes's London agent. At the time of receiving this money Mr. Raynes was indebted to Mr. Johnson for costs incurred as his London agent (including the sum of 8*l.* 10*s.* 9*d.*) the amount of Mr. Johnson's agency charges in the action of *Edwards* v. *Whitwell* in a sum equal to or exceeding the amount (43*l.* 1*s.* 6*d.*) so received, and Mr. Johnson claims to retain this amount in part payment of his said costs against Mr. Raynes."

On the 17th of November, 1880, on reading the report of the 3rd and hearing counsel for Miss Edwards and Mr. Johnson, the Court ordered the matter to be referred back to the Master to further report as to the general practice between solicitors and their London agents, and also as to the form of the writ of summons and *fieri facias* mentioned in the report of the 3rd of November, and as to the practice of the two parties (Mr. Raynes and Mr. Johnson) as to accounts.

On the 9th of December, 1880, the Master made his further report, to the following effect:—

"I find the general practice between country solicitors and their town agents to be that where the writ of execution is issued by the town agent, the town agent receives the proceeds of such execution on behalf of the country solicitor; that the town agent is not entitled to retain any debt or any part of a debt so recovered.

"That he has a lien upon and is entitled to retain the costs so recovered for any costs that may be owing to him by the country solicitor on his general agency account. That the London agent is entitled to the same lien as, and no greater lien than, the country solicitor; and, therefore, that if the country solicitor could not retain the debt recovered as aforesaid against his client, so neither can the London agent retain it.

"The original writ in the action of *Edwards* v. *Whitwell* is hereunto annexed. It is indorsed, so far as is here material, as follows: 'This writ was issued by George Johnson, of No. 126, Fenchurch Street, in the city of London, agent for William Race Raynes, of Potton, in the county of Bedford, solicitor for the said plaintiff, who resides at Potton, in the county of Bedford. The address for service is 126, Fenchurch Street, aforesaid.'

"A copy of the writ of *fieri facias* in this action is also annexed hereto. It is indorsed, so far as is here material, as follows: 'This writ was issued by George Johnson, of 126, Fenchurch Street, in the city of London, agent for William Race Raynes, of Potton, in the county of Bedford, solicitor for the plaintiff, who resides at Potton.'

"I further find that there was not any practice as to accounts between Mr. Johnson and Mr. Raynes, as this was the first time Mr. Johnson ever received any money for or on behalf of Mr. Raynes."

Upon reading the Master's reports Mr. Dodd moved, on the part of Miss Edwards, for an order directing Mr. Johnson to pay over to her the 33*l.* 5*s.*, with costs.

[The above facts are taken from the judgment of Manisty, J.]

Cyril Dodd supported the application. —The authorities shew that these moneys were improperly retained by the London solicitor—*Lawrence* v. *Fletcher* (1); *Hanley* v. *Cassan* (2); *Cobb* v. *Becke* (3).

The town agent can, therefore, be compelled to pay over the amount recovered to the country client. The Master has found that the solicitor is acting contrary to the recognised practice; the client has therefore a right to the protection of this Court. In *Ex parte Bayley* (4) Lord Tenterden, C.J., said, "The Court exercises a jurisdiction over attorneys, and that is to be exercised according to law and conscience and not by any technical rules." This mode of procedure avoided the difficulties which arise in *Robbins* v. *Fennell* (5), where the

(1) Law Rep. 12 Ch. D. 1258.
(2) 11 Jur. 1088.
(3) 6 Q.B. Rep. 930; 14 Law J. Rep. Q.B. 108.
(4) 9 B. & C. 691.
(5) 11 Q.B. Rep. 248; 17 Law J. Rep. Q.B. 77.

; seems to have been hampered by echnical rules of law relating to y of contract.

· (*McIntyre* with him) shewed cause. is case is within the principle laid in *Robbins* v. *Fennell* (5), which i that the London agent had, under nstances like the present, a right to . moneys received by him in the ıry course of his business, as against untry client. *Robbins* v. *Heath* (6) tinguishable, for there the London had improperly detained the moneys, he Court had therefore a summary iction to compel the London agent ay them.

ELD, J.—It is a case *primæ impres-* *Hanley* v. *Cassan* (2) is an au- y on the other side, but in that case y was assumed.]

ıley v. *Cassan* (2) is distinguishable, se there the person who received noney received it as agent of the ry client; agency was assumed, ı is the very question in dispute If *Hanley* v. *Cassan* (2) be not guishable it is at variance with the decision of *Robbins* v. *Fennell* (5), ı it was distinctly held that there o privity between the country client he agent in London, and that an ı for money had and received could e maintained. *Cobb* v. *Becke* (3) the same effect. There is really no ction between an action for money nd received and a special applica- ıgainst the agents, as was pointed y Patteson, J., in *Robbins* v. *Heath*

ld replied.

Cur. adv. vult.

ı judgment of the Court (7) was une 20) delivered by

NISTY, J., who, after stating the already set out, thus continued: e part of Miss Edwards it was con- d that the money was improperly ed by Mr. Johnson, and that the had summary jurisdiction over him ıe matter. On the part of Mr. ıon it was contended that there was no privity of contract between Miss Edwards and himself, and no duty on his part to pay over the debts to her, consequently that the Court has no jurisdiction in the matter.

In support of the plaintiff's contention the following authorities were cited: *Ex parte Bayley* (4); *Hanley* v. *Cassan* (2) and *Robbins* v. *Heath* (6).

In support of the defendant's contention, the case of *Robbins* v. *Fennell* (5) was strongly relied upon. We have considered the authorities and have come to the conclusion that the Court has jurisdiction in the matter, and ought to interfere summarily to compel Mr. Johnson, as an officer of the Court, to pay over the money to Miss Edwards. We adopt the language of Lord Tenterden in the case of *Ex parte Bayley* (4), namely, "that the Court exercises a jurisdiction over solicitors, and that it ought to be exercised according to law and conscience, and not by any technical rules."

A country solictor, as a rule, employs an agent in London to conduct the proceedings in actions in which he is retained, and the London agent knows perfectly well that debts recovered in such actions belong to the country solicitor's clients, subject, of course, to any claim which the country solicitors may have by way of lien or otherwise.

Having regard to the well-known usage and practice as found by the Master, and to the fact that Mr. Raynes, the country solicitor, not only has no claim upon the money in question, but is desirous that it should be paid over to Miss Edwards, we are of opinion that it is a breach of duty on the part of Mr. Johnson not to pay it, and that this Court has summary jurisdiction over him as an officer of the Court, and ought to compel him to pay it.

The most disastrous consequences might result to suitors if the London agents of their solicitors might stop all moneys which come to their hands and appropriate them to the payment of debts due to themselves from the country solicitor without being liable either in an action or to the summary jurisdiction of the Court. Take the case of a country solicitor being discovered to be in a state of hopeless

11 Q.B. Rep. 237; 17 Law J. Rep. Q.B. 80. Field, J., and Manisty, J.

insolvency, and a debt of large amount due to a client, to have been received by his London agent. Can it be doubted but that an injunction would be granted at the instance of the client to restrain the London agent from paying over the money to the country solicitor, and commanding him either to bring it into Court or to pay it over to the clients? We think such an injunction would be granted as a matter of course, and, if so, we do not see why an order should not be made directing the London agent to pay over the money to the client in a case like the present.

Of course, if the country solicitor has any claim upon the defendant by way of lien or otherwise, it would be protected, but, in the absence of any such claim, it seems to us that it would be contrary to equity and conscience to permit the London agent to pay himself out of the client's money any amount of debt which may be due to him by the country solicitor.

The case of *Robbins* v. *Fennell* (5), which is so strongly relied upon by the counsel for Mr. Johnson, was an action at law, and the Court evidently found itself hampered by the technical rule of law as to privity of contract. In the case of *Robbins* v. *Heath* (6), which occurred in the following year, the application was to the summary jurisdiction of the Court, and the Court exercised it on the ground that the retention of the money by the London agents for the purpose of paying a debt due to themselves by the country attorney was an improper application of it.

We think the same ground exists in the present case, and that a rule absolute should issue ordering Mr. Johnson to pay the 33*l.* 5*s.* to Miss Edwards, together with the costs of this application.

Rule absolute.

Solicitors—John W. Sykes, for applicant; G. Johnson, defendant, in person.

(8) 10 Law Times, 189.

[IN THE COURT OF APPEAL.]

(*Appeal from the Queen's Bench Division.*)

1881. May 20. THE GUARDIANS OF THE FULHAM UNION (*appellants*) *v.* THE GUARDIANS OF THE ISLE OF THANET UNION (*respondents*).

Poor — Settlement — Irremovability — Penitentiary supported by Subscriptions — Bona fide Charitable Gift — 54 Geo. 3. c. 170. s. 6; 9 & 10 Vict. c. 66. s. 1; 39 & 40 Vict. c. 61. s. 34.

[For the report of the above case, see 50 Law J. Rep. M.C. 101.]

[IN THE QUEEN'S BENCH DIVISION.]

1881. March 15. SWAN (*appellant*) *v.* SANDERS (*respondent*).

Cruelty — Domestic Animals — Young Parrots — Omission to supply Water — Jurisdiction of Justices — Statute 12 & 13 Vict. c. 92. s. 2.

[For the report of the above case, see 50 Law J. Rep. M.C. 67.]

[IN THE QUEEN'S BENCH DIVISION.]

1881. April 2. THE CHURCHWARDENS OF WOOLWICH *v.* ROBERTSON.

Sea—Bodies cast on Shore—Buried by Parish—Expenses from County—48 Geo. 3. c. 75. ss. 1, 5, 6.

[For the report of the above case, see 50 Law J. Rep. M.C. 87.]

[IN THE QUEEN'S BENCH DIVISION.]

1881. March 25. HOLLINGBOURNE UNION (*appellants*) *v.* WEST HAM UNION (*respondents*).

Poor—Settlement—Children under Sixteen—39 & 40 Vict. c. 61. s. 35.

[For the report of the above case, see 50 Law J. Rep. M.C. 74.]

IN THE COURT OF APPEAL.]

880.
v. 30.
. 2, 3.

WAKE AND ANOTHER *v.* HALL AND OTHERS.*

ises—"*High Peak*" *Mining Customs ildings erected for Mining Purposes— t to Remove*—14 *&* 15 *Vict. c.* 94.

certain customs established as law by te, miners in a certain district have, on ring certain procedure, a right para- t to the title of the landowner to enter work for ore, and to impose on the sur- for the purposes of mining operations, ant to the customs, the burden of carry- uch buildings and machinery as may cessary. In such a case the miner is enant to the landowner, and neither the ine of waste nor the law of fixtures as en landlord and tenant applies; but iner has an easement over the land to n it for mining purposes what buildings eases, and he has also a right to remove buildings at the close of his mining tions within a reasonable time and s anything has occurred which would him a trespasser on the land.

oss appeals from the judgment of Coleridge, C.J., after trial without a

ie statement of claim alleged that plaintiffs were possessed of certain that the defendants trespassed on land, erected and occupied buildings on, pulled down a boiler shed, an ie house and chimney and other lings thereon, and also converted to own use mineral and other substances ging to the plaintiffs.

ie statement of defence denied the ations of the statement of claim, and ed a right to enter the land, and to he acts in question under certain ms and a certain statute.

appeared that the plaintiffs were wners in the district of the "King's l," in the hundred of the High Peak of yshire, and that this land was allotted eir predecessors under an enclosure nade in 1807. The defendants owned, r customs peculiar to the district, a mine in the same land which had been worked for two centuries down to 1872, when the working ceased. Since that time there had been no working of the mine, but in 1878 the defendants sold 117 tons of sludge, which contained a certain amount of lead ore. The defendants and their predecessors had erected during their occupancy certain substantial buildings for mining purposes, and in these buildings was machinery both fixed and unfixed. In 1873 and 1874 the defendants entered the land in question, pulled down some of these buildings and sold the materials and the machinery. In 1874 they converted other of these buildings into stables and dwelling-rooms, and let them for purposes unconnected with the mine. A quantity of *débris* from the mining operations remained on the land in hillocks, and these hillocks contained ore, for the purpose of extracting which such hillocks are sometimes worked and reworked; but there was no evidence that the defendants had so worked these hillocks.

The plaintiffs claimed the buildings and machinery which the defendants had sold, and the defendants claimed to enter on the land and to use or remove the remainder of the buildings.

The following admissions were in substance agreed on at the trial:—

It was admitted that the land in question was within the King's Field, that the defendants had the mining rights given by the statute and customs; that up to June, 1872, all buildings on the land were erected and used for mining purposes; that in June, 1872, the defendants suspended working the mine, but that it remained registered in their name; that in 1873 and 1874 they pulled down certain buildings and converted certain other buildings and let them for purposes unconnected with the mine; that it had been the practice in the district to work and rework the hillocks of mineral substances left on the land; that between 1875 and 1878 the defendants prevented one G. Hall from removing spar from the land in question; that it had been the practice in the district to remove and sell removable machinery; that it had been the practice to suspend working for many years and

oram Lord Selborne, L.C.; Baggallay, L.J.; rett, L.J.

then to resume; that the hillocks were not yet exhausted.

By 14 & 15 Vict. c. 94 ("An Act to define and amend the Mineral Customs of certain parts of the Hundred of High Peak, in the county of Derby") it was provided that "the schedules to this Act shall be considered as part thereof;" by section 2 that "the word 'gift' shall mean the setting out by the barmaster of any ground in manner hereinafter provided; the word 'founder' shall mean the point at which a vein of ore shall first be found; and the words 'founder's meers' shall mean the first two meers to be set out to the finder under the provisions of this Act; the words 'mine or mines, vein or veins' shall mean a mine or mines, vein or veins, of lead ore, and shall include parts of or shares in any mine or vein, ... and all minerals containing lead ore; the word 'ore' shall mean lead ore and belland exclusively." The Act also provided for the appointment of a steward, a barmaster and deputies, for a grand jury of twelve men resident within the jurisdiction, for proceedings in causes brought in the barmote Courts, and the first schedule contained twenty-eight articles and customs, which are sufficiently set out in the judgment of the Court.

Lord Coleridge, C.J., on further consideration, held that the defendants had substantially ceased working the mine in 1872, and that since that date the plaintiffs had been in the position of any other landowners; that any building erected since that date was a trespass, and the pulling down any building and selling the materials a conversion, the dealing with any minerals and rubbish other than lead ore or belland by the defendants an infraction of the plaintiffs' rights, and that the sludge was not lead ore or belland; that the plaintiffs could not recover for the machinery fixed or unfixed, nor for the buildings connected with it and used as part of it; and gave judgment that the plaintiffs should recover possession of the land with the buildings, with damages in respect of the defendants' occupation since December, 1872; that the plaintiffs should recover damages for so much of the sludge removed as did not consist of ore or belland; that the plaintiffs should recover damages in respect of buildings pulled down since December 31, 1872, except the buildings used with the machinery and removed prior to December 31, 1874.

The plaintiffs and defendants both appealed.

Mellor and *Gould*, for the plaintiffs.—The learned Judge having given judgment in part in favour of the plaintiffs and in part in favour of the defendants, both parties have appealed. The contention of the plaintiffs is that as they were owners of the soil the buildings in question belong to them. These buildings must not be considered as fixtures on the footing that the plaintiffs and the defendants were in the relation of landlord and tenant, for the principle of law which would apply between an heir and an executor is more in point here; but further, the attempt to remove these buildings was made after the tenancy (the defendants having abandoned possession six months before), if there ever was any, had expired; and, moreover, the defendants are liable, even if there was a tenancy, for at most they could in such a case only pull down so much of the building as was necessary for the purpose of removing the machinery —*Fisher* v. *Dixon* (1). The question is not to be decided by considering who originally annexed the building to the freehold, but by considering the purpose for which it was so annexed—*Minshall* v. *Lloyd* (2).

[Brett, L.J., referred to *Climie* v. *Wood* (3).]

In that case Willes, J., only held that a tenant may remove certain kinds of fixtures in certain cases during his term, "or it may be within a reasonable time after its expiration," and that is founded on *Penton* v. *Robart* (4).

In *Pugh* v. *Arton* (5) it was held that in the absence of special contract tenant's

(1) 12 Cl. & F. 312.
(2) 2 Mee. & W. 450; 6 Law J. Rep. Exch. 115.
(3) 38 Law J. Rep. Exch. 223; Law Rep. 4 Exch. 328.
(4) 2 East, 88.
(5) 38 Law J. Rep. Chanc. 619; Law Rep. 8 Eq. 626.

v. *Hall* (*App.*), *Q.B.*

cannot be removed after the ex-
. of the lease; and in *Stanfield* v.
yor of Portsmouth (6) there was a
it that certain things should be
l. *Ex parte Stephens* (7) decided
trustee in bankruptcy who had
ied could not, though in possession
premises, remove the tenant's

IT, L.J.—Was he ever tenant if he
ied?]

ay be he never was—*Ex parte*
'8). If this case is not covered
ority then the general rule of *quid-*
ntatur solo, solo cedit will apply.
ncourt v. *Gregory* (9), *Holland* v.
(10) and *Elwes* v. *Mawe* (11),
o cited.

m, for the defendants.—The de-
s were entitled to enter and to
these buildings. They were not
ers, for the mine owner's rights
he customs of the country superior
of the surface owner; and further,
ace owners never had any property
land on which those buildings
or at the highest they only owned
face subject to the use of it for
purposes. The notes to *Elwes* v.
11) shew that where the machinery
the principal thing and the build-
but subsidiary, then the building
removed. *Elwes* v. *Mawe* (11),
, is not a decision adverse to the
nts, for the decision there was
rules as to trade and agricultural
were not the same. *Penton* v.
'4) is in favour of the defendants.
ldings here were like the pans in
v. *Salmon* (12).

D SELBORNE, L.C.—The Court is
ion that these buildings were not
ole fixtures between landlord and
nor fixtures removable as trade
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om. B. Rep. N.S. 120.
Law J. Rep. Bankr. 22; Law Rep. 7
7.
Law J. Rep. Bankr. 22; Law Rep. 10
0.
Law J. Rep. Chanc. 107; Law Rep. 3

1 Law J. Rep. C.P. 146; Law Rep. 7 C.P.

East, 38; 2 Smith's L.C. (8th ed.), 169.
H. Black. 259*n*.

Mellor, in reply, cited *Whitehead* v. *Bennett* (13).

Cur. adv. vult.

LORD SELBORNE, L.C. (on Dec. 3), read the judgment of the Court.—The plaintiffs' appeal in this case raises the question whether the defendants were entitled (as Lord Coleridge has held) to pull down and remove the materials of an engine house, boiler house and other buildings (all of them brick or stone structures with foundations sunk to a considerable depth) which they had erected for mining purposes upon the plaintiffs' land within a district called the King's Field, or the King's Fee, in the hundred of the High Peak of Derbyshire.

The hundred and the mineral duties in this and some other parts of it belong to the Crown in right of the Duchy of Lancaster; and there can be no doubt that the King's Field or King's Fee was anciently Crown property. Before the time of legal memory (as appears from a statute passed in 1851) there were certain mineral laws and customs in force throughout this district, with Courts to administer them, which (as amended and established by that statute) subsist to this day. By these laws and customs any subject of the realm was entitled to search for and to work any mines or veins of lead ore which might be found within the district, paying royalties to the Crown or its lessees. Such laws, customs and Courts could not have originated otherwise than by grant, licence or other authority of the Crown while it retained the ownership of the soil, and all grants of land within the district must be taken to have been made by the Crown subject to those laws and customs, and to the mining right thereby conferred or recognised. The effect practically was to except out of all such grants, and to reserve to the Crown, all mines and veins of lead within the district, to be worked by such persons as should entitle themselves to work according to the custom on payment or render to the Crown of its accustomed dues and royalties.

The plaintiffs' title to the land on which the buildings in question were

(13) 27 Law J. Rep. Chanc. 474.

erected cannot (in my opinion) stand higher than that of a grantee, subject to such an exception and reservation, and I consider the title of the defendants, who were miners working under and according to the custom (as their predecessors had been in the same place or on the same view for two centuries), to have been substantially equivalent to that of licences admitted by the proper officers of the Crown to work the minerals reserved to the Crown and to exercise all privileges incident by the custom to the right of working such minerals.

Under the Act of 1851, and the customs scheduled to it (which were thereby established as the only conditions to be thenceforth in force against owners of the soil), books were to be kept by an officer called the barmaster for the registry of mineral titles acquired by gift or transfer in the customary way. Every one was to be at liberty to search for veins of lead ore "under all manner of lands of whose inheritance soever they might be" upon certain conditions. When any new vein was found the "first finder" was to have measured and set out to him by the barmaster, in the presence of two grand jurors, "two meers in length of the vein," and a third "meer" (it is not necessary to state its dimensions) was at the same time to be allotted to the Crown lessees, or (if there were none) to the Queen. If neither the Crown lessees nor the Queen chose to work this third "meer" the first finder was to be entitled either to purchase it from the Crown on certain terms or to work through it, reserving the ore found there (less expenses) for the Crown. Every person working any such vein was to pay duties called "lot and cope" to the Crown, and the customs made careful provisions for the manner of ascertaining them. No render of any kind was to be made to the landowner, who, if he should himself desire to work any vein of lead within his own land, had no greater or better right than that which was open under the custom to all the Queen's subjects, and if he worked the mines at all he could only do so upon the customary terms and on payment of the customary royalties.

The 4th and 5th customs scheduled to the Act define the miner's surface privileges. Under the 4th they were to have set out for their use by the barmaster, without any compensation to the occupiers or landowner, ways from the mine to the nearest highway, and also to the nearest running stream, spring or natural pond, such ways, and also the water of such stream, &c., to be used by them for mining purposes only, and "all rights of way to cease when the mine should be no longer worked."

The 5th custom (so far as material) is in these words: "Every miner shall, so long as his mine shall be worked, be entitled, without making any payment for the same, to the exclusive use of so much surface land as shall be thought necessary by the barmaster and two of the grand jury, and be set out by them for the purpose of laying rubbish, dressing his ore, briddling, making meers or ponds, and conveying water thereto, and any other mining purposes."

It is not disputed that under these words the miner was entitled to erect upon the surface so set out for his exclusive use any buildings necessary or proper for mining purposes, such as those now in question are admitted to have been, and the buildings in question were in fact created for such legitimate mining purposes upon surface ground so appropriated for the exclusive use of the defendants or of their predecessors in title, while working their mine according to the customs. Among the admissions entered into between the parties at the trial is one to this effect—that "it has been the practice in the district for miners to erect buildings and fix machinery similar to the buildings and machinery of the defendants for mining purposes, and from time to time to alter and vary the description and character of the buildings and machinery as improvements have been discovered and introduced." This is, in my judgment, material, not indeed as adding anything to the scheduled customs (which would be contrary to the statute), but as shewing how the 5th of the scheduled customs has been always in practice understood and acted upon.

Two more only of the scheduled cus-

toms require to be mentioned. The 19th provides that if the barmaster "finds any mine or vein neglected and not wrought, and not hindered by water or for want of air, he may, if required so to do by any person or persons, give notice that the mine will be forfeited at the expiration of three weeks, if not duly and reasonably worked to the satisfaction of the barmaster and grand jury, and no other sufficient reason assigned to them, and that if, at the expiration of that time, the mine or vein is so worked the barmaster may then give such mine or vein to any person or persons willing to work the same."

The 2nd custom gives the landowner power "to sell and dispose of the calk, feagh, spar and other minerals and rubbish (except lead ore), and to remove the same from his land so soon as the lead ore has been extracted from it, when and as often as he thinks proper, and when not required for the use of the mine, but not so as to destroy or injure any mineral property without the consent of the barmaster and any two members of the grand jury." The term "mineral property," under the interpretation clause of the Act, includes "the works, rights and appurtenances connected with mines and veins of lead, and also lead ore."

No notice of the forfeiture was given to the defendants under the 19th custom. They worked their mine down to June, 1872, and according to the admissions on both sides they then suspended working the mine; but it remained till the commencement of the action—I still refer to the admissions—in the "possession of the defendants and registered in their names in the barmaster's books." In 1873 and 1874 they pulled down the buildings in question and sold the materials together with the fixed and unfixed machinery, which the buildings had contained. In 1874 they converted other buildings (still standing upon the land) to uses unconnected with mining; and they continued so to use the latter buildings till the action was brought. The working of the mine was never resumed; the fact being that, although not exhausted, it had ceased to be remunerative.

There were upon the ground, till after 1874, divers hillocks of material, raised from the mine, composed of spar and other mineral substances containing lead capable of being extracted, and it had been the practice of the defendants and their predecessors, and of the district generally, to work and rework such hillocks by certain processes for the purposes of extracting the lead contained in them.

Upon these facts, reasoning in some degree from the analogy of the law of removable fixtures, but more (as it seems to me) from the special nature of the customs, and endeavouring to interpret those customs on points where they were not explicit, and in the absence of authority, "so as to do justice," Lord Coleridge has held that the miners, "having erected (possibly very expensive) machinery and machine houses in the exercise of their own rights and without any reference to a bargain with the landowner," had a right to remove them at any time prior to a complete abandonment of the mine. The point, as far as I know, is new. It ought, in my opinion, to be determined on the same principles as if similar buildings had been erected and afterwards removed by an owner in fee-simple of minerals reserved and excepted by a deed granting land subject to such reservation and exception with power for the mineral proprietor to use the surface of the land for all purposes incident to the working of the mines including the erection for those purposes of buildings of this character. The rights of the Crown and of the miners, whom I regard as in substance licensees of the Crown under the High Peak customs, seem to me to stand upon the same footing.

Not much light for the determination of this question is (in my judgment) derivable from the law of removable fixtures. Buildings of this character are certainly not removable fixtures as between landlord and tenant without a contract to that effect (unless they come within the 3rd section of 14 & 15 Vict. c. 25), whether they are erected for trade or for any other purpose. I do not dwell upon this (which I have always understood to be clear law), because it is very satisfactorily dealt with by the able

judgment of Vice-Chancellor Kindersley in *Whitehead* v. *Bennett* (13), cited by Mr. Mellor in reply.

But the question in the present case, where the miner has no estate at all in the land, where he is neither tenant nor trespasser, but has a right paramount to the title of the landowner to impose upon the surface for the purposes of his mining operations the burden of carrying such buildings and machinery as may be necessary or proper for those operations, as incident and appurtenant to his own mining property, appears to me to be entirely different.

As between landlord and tenant, the tenant makes the buildings which he erects part of that land in which he has himself an estate in possession, the reversion being in the landlord. It is by virtue of his tenure of the land and of the terms of that tenure that he is (on the one hand) prevented from pulling them down. He cannot commit waste, and that is the only reason that I am aware of why he cannot pull them down and remove them during his term. The principle is so stated by Lord Ellenborough in the case (referred to during the argument) of *Elwes* v. *Mawe* (11). The general rule, he says, "on this subject is that which obtains between heir and executor, and that rule (as found in the Year Book) (17th ed. 2) is that, where a lessee, having annexed anything to the freehold during his term, afterwards takes it away, "it is waste." But between the miner and landowner under the High Peak customs there is no privity of title. The miner does not hold of the landowner, he has an easement over the land entitling him for particular purposes to use the surface. He puts then what he pleases (for those purposes) in the exercise of that dominant right, and he may (as it seems to me) by virtue of the same right also remove it; he is not a trespasser in so doing—the doctrine of waste is inapplicable to his case. In the absence of any positive law or judicial authority applying to such a case it has been urged that the maxim *quidquid plantatur solo, solo cedit* is applicable. I think that reason and principle are against so applying it.

Why should these erections, created with the miner's money for the miner's purposes, as incident to his mineral property, be treated not as part of that property but as accretions to the estate of the landowner who is a stranger to it? Why should not the miner's right to the exclusive use of that part of the surface enable him to do with the materials which he has placed upon it, whether structures of brick and stones, or anything else, and whether fixed into the ground or not, whatever is necessary or convenient for the purposes of his mining operations, so long (at all events) as those operations continue? How can it be consistent with the purpose for which he has this right that the landowner should be entitled to come in and to say, This is part of my land, you have made it so; it is now mine and not yours?

If the mine-owner has the right of alteration and removal during the continuance of the mining operations, I find nothing in the customs of the High Peak from which I can infer that he will not be entitled also to remove the same buildings at the close of those operations, provided he does so within a reasonable time and before his surface rights have so come to an end as to make him a trespasser in law by remaining upon the land. The inferences suggested to my mind by the customs are all in the opposite direction. By the 2nd custom the landowner's right to take away rubbish from which the lead has been extracted is limited, so that no injury be done (without consent of the barmaster) to the mineral property, which, in the sense of the Act, includes all the works and appurtenances connected with the mine. Under the 10th custom, whatever is the law on this subject as to an ordinary miner must (I suppose) be equally the law as to the Queen, if working by Her Majesty's own officers the third mere reserved to the Crown. Under the 19th section the mine may be forfeited and at the same instant of time may be given by the barmaster to another miner; nor do I see what there is to prevent the barmaster from simultaneously continuing to the succeeding miner under the 5th custom the same exclusive surface rights over exactly the same space of land which had

been enjoyed by the person who incurs the forfeiture. It is not pretended that the succeeding miner is in that case to have the benefit of the buildings erected with his predecessor's money without paying for them, or that the landowner (who is excluded from the use of that part of the surface and may so continue, as the facts of this case shew, for centuries) is either then to come in and take down these buildings, or to receive compensation from the incoming miner for allowing them to remain. The true implication from the fact that they were created by virtue of, and were merely incidental to, a right to the exclusive use of the surface by a person who has ceased to have that right, seems to me rather to be that he not only may, but ought to, remove them, if he is required so to do by the person (whether miner or landowner) who succeeds to that right. If not required so to do, he may either make his own terms with the succeeding miner or with the landowner, or, if he thinks it better to abandon than to remove them, he may take that course.

In the present case, the buildings were in fact removed while the defendants remained in possession, no forfeiture having been declared and no conclusive act having been done shewing any purpose of abandonment, and there being at that time still upon the ground hillocks forming part of the mineral property from which lead might have been extracted. The 5th custom does not say that the miner shall immediately become a trespasser upon the surface when he ceases to work the mine, but only that his right to the exclusive use of it without payment is to be "so long as the mine shall be worked." The 19th custom proves that a forfeiture is not *ipso facto* incurred at the very moment when the working ceases, even when there is such a neglect to work as is under that custom a just cause of forfeiture. I cannot hold that at the time when these buildings were removed there had been any such complete abandonment of the mine (in which there was still lead ore, and which had been in work for 200 years) as to make the defendants trespassers.

My conclusion, therefore, on the important question raised by the plaintiffs' appeal is the same with that of Lord Coleridge, and I think that the appeal should be dismissed with costs.

Upon the cross appeal I do not consider it necessary to say much. There was no forfeiture declared under the 19th custom, but I think that by pulling down and removing the engine house and other buildings necessary for working the mine and converting the buildings which remained into stables for horses and letting them for purposes unconnected with mining operations, the defendants showed conclusively their intention to abandon the mine; and that, having done so, they had no longer right to use the surface land which had been allotted to them under the 5th custom, or to remain in possession of it for other than mining purposes. I think that after that time they have been properly treated as trespassers and as having abandoned to the landowner the buildings which they neglected to remove while they had the right to do so. I hold that any such removal ought to be either during the continuance of the surface privileges, or at least within a reasonable time after their cessation.

The cross appeal, therefore, must also be dismissed with costs.

Appeal dismissed.

Solicitors—Geare & Son, agents for Wake & Son, Sheffield, for plaintiffs; W. & J. Flower & Nussey, agents for Joseph Hall, Castleton, for defendants.

[IN THE QUEEN'S BENCH DIVISION.]

1881. May 23. } MARTIN *v.* BARKER.

Licensing Acts — Excise Licence—Sale during Closing Hours—37 & 38 *Vict. c.* 49. *s.* 3.

[For the report of the above case, see 50 Law J. Rep. M.C. 109.]

[IN THE COURT OF APPEAL.]

1881. June 16, 27.

M'MAHON *v.* FIELD.*

Contract—Measure of Damages—Remoteness.

The plaintiff sent some horses to stables with which the defendant had contracted to supply him during a fair. Another person to whom the defendant had subsequently let the same stables, turned, with the assistance of the defendant's servants, the plaintiff's horses out of the stables without their clothing, and while they were standing in the defendant's yard until other stables could be procured, some of them caught cold and became depreciated in value. The jury found that the depreciation in value was the result of the breach of contract by the defendant:—Held (*by the Court of Appeal—dubitante* BRAMWELL, L.J.), *that the defendant was liable for the depreciation thus caused, and that the damage was not too remote.*

Hobbs *v.* The London and South Western Railway Company (44 Law J. Rep. Q.B. 49; Law Rep. 10 Q.B. 111) *questioned.*

Appeal from the judgment of Fry, J., on further consideration, after trial with a jury.

The case is reported *Ante*, p. 311.

The defendant contracted with the plaintiff to provide stabling for twelve horses during the fair at Rugeley. The plaintiff sent his horses by rail to Rugeley; they were put into the stables, but a few hours afterwards another man, to whom the defendant had subsequently let the same stables, came, and with the assistance of a servant of the defendant turned the plaintiff's horses out without their clothing and put his own into the stables. The plaintiff's horses were kept standing in the defendant's yard for some hours while the plaintiff was finding other stables; some of them caught cold, and the plaintiff brought his action to recover damages for loss of market and depreciation consequent on the horses catching cold, and for the expense he was put to in finding another stable.

The jury found that there had been a breach of contract, that the cold caught by the horses was the result of that breach, and they assessed the damages for the injury so caused at 50*l.*

Fry, J., on further consideration, held that the defendant was not liable for the injury suffered in consequence of the horses having caught cold.

The plaintiff appealed.

McIntyre and *Marshall*, for the plaintiff.

B. T. Williams and *Higgins*, for the defendant.—*Hobbs* v. *The London and South Western Railway Company* (1), *Hadley* v. *Baxendale* (2), *Clayards* v. *Dethick* (3) were cited and discussed.

Cur. adv. vult.

BRAMWELL, L.J. (on June 27).—I am much embarrassed by this case. I am not satisfied as to the facts. I think it must be taken that the plaintiff hired stable room, and that the defendant did not find it, so that the contract was broken. But then the rest is in a mist: the plaintiff's horses were received into the stables of the defendant and then another person with horses turned the plaintiff's horses out of the stable without their clothing, and placing himself at the door with a pitchfork, declared that anyone interfering with him should incur the danger of an attack. The plaintiff's horses were accordingly turned out, and it would seem that the defendant was a party to that in some way. It does not appear why the clothing was not put out with the horses, so that the horses stood unclad in the yard of the defendant by the leave of the defendant while the plaintiff was seeking stable room elsewhere. The jury found in effect that the conduct of the plaintiff was not unreasonable, although the horses did, in fact, catch cold. Now I cannot tell whether the horses caught cold by reason of their sudden ejection from a warm stable—if it were so, the defendant would, I think,

* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

(1) 44 Law J. Rep. Q.B. 49; Law Rep. 10 Q.B. 111.

(2) 9 Exch. Rep. 341; 23 Law J. Rep. Exch. 179.

(3) 12 Q.B. Rep. 439.

not be liable; but I do not think that the evidence points to that, the evidence is that the horses caught cold because they remained three hours in the defendant's yard. Now it is difficult to say that the defendant is liable for this. Did the defendant cause the horses to be in the yard for three hours without clothing? The plaintiff without doubt must be taken to have acted reasonably; but the case is something like *Clayards* v. *Dethick* (3)—a case which, I may observe, I think was wrongly decided, for the criterion is not whether the plaintiff behaved reasonably. I daresay he did, just as one who leads a forlorn hope may act reasonably, for the risk may be one which he may act reasonably in thinking it fit to run. So here, if the plaintiff had exercised the horses, or had had them trotted up and down, perhaps the result might have been different; but he chose to leave them standing in the defendant's yard, and so they caught cold. If this case were left to me alone I should say that the plaintiff was not entitled to recover this sum of 50*l.*, but, knowing the opinion of the two other Lords Justices, I think I ought not to say so, for I am not prepared to dissent from their opinion. I think the case of *Hobbs* v. *The London and South Western Railway Company* (1) does not govern this case. It was there said the measure of damages was to be judged, not by the mere excess of the walk, but by the casualties which might occur. The illustration was given of a person walking home who made a false step in the dark. I must say I doubt whether in such a case the passenger delayed by the fault of the railway company till it was dark might not recover. The event which occurred might, I should think, be expected to occur, or at all events, it was not unexpectable. The same thing may be said of a cold caught in the circumstances of that case; but it would be otherwise if in a civilised country the passenger so delayed till dark were assaulted and robbed by footpads. However, I think the one case does not govern the other: here without a breach of contract the damage would not have arisen; what happened could not have occurred without that breach, and although that breach may not immediately have caused it, it was, however, the event, without which the damage could not happen. I do not, therefore, dissent, and agree that the plaintiff must recover, and this appeal be allowed.

BRETT, L.J.—Since the case of *Hadley* v. *Baxendale* (2) this question is, in my opinion, a very difficult question, and that because the Court and not the jury has to decide and answer a question of fact. The rules in *Hadley* v. *Baxendale* (2) are that it must be considered, first, whether the damages were the necessary consequence of the breach; secondly, whether they were the probable consequence; and, thirdly, whether they were in the contemplation of the parties when the contract was made.

The two last questions are matters of fact which the Court has to determine as a matter of law. The question here is whether the catching cold by these horses is within any of these rules. It is clear that it was not the necessary consequence of the breach of contract, but it was the probable consequence, and, if so, it was a consequence which was in the contemplation of the parties. The facts of this case induced the jury to find that the contract had been broken, and that the damage incurred was a result of that breach. The antithesis is, Was the damage the result of any breach of contract, or of the conduct of the plaintiff?—and the facts here caused the jury to say that it was the result of the breach of contract. Can it be said that that question ought not to be left to the jury? Consider the facts. The plaintiff brought twelve horses to Rugeley by rail from Ireland. He had taken stabling, and probably the stabling was well known to both parties. The time was fair-time, and the defendant then let the stables to some one else, and when the plaintiff arrived he turned the other horses out and put the plaintiff's horses in. As was the inevitable consequence, the other man returned, and with the assistance of one of the defendant's servants, turned the plaintiff's horses out. No other stabling could be at once procured for that number of horses, so that these horses which had arrived from a feverish railway journey

were thus put into the stable and remained there just long enough to have their clothes removed, and then were turned out. Now this is a way in which no one would treat horses if he understood anything about them, as it was probable and almost certain that they would catch cold whether they had or had not their clothing on. As a matter of fact this was a probable consequence, and so the jury have said. Then it is said that the case of *Hobbs* v. *The London and South Western Railway Company* (1) governs this case. One is unwilling to say that one can distinguish the facts of the two cases; but I must say that if I acquiesce in that decision I yet cannot agree with it.

If the facts of that case are considered they must be considered with regard to the nature of the station, the nature of the neighbourhood, and the accommodation, whether of conveyances or lodging, to be found at hand. In that case the Judges thought that the cold caught by the passenger was not the natural consequence of the breach of contract, and that it was too remote? Why was it too remote? If there had been at the station in question accommodation which the passengers had rejected, then it would have been their own fault, but there was no such accommodation at Esher station, so that they did what it was reasonable and necessary they should do. Suppose that a man let lodgings to a woman and they turned her out in the middle of the night without warm clothing would it not be a natural consequence that she should catch cold?—and if he were to use any force and she died, he would be guilty of manslaughter. However, in the case of *Hobbs* v. *The London and South Western Railway Company* (1) the Judges held that the consequence was so improbable that the question ought not even to be left to the consideration of a jury. Perhaps some more special knowledge of that station was required. It is, however, not necessary to say more than that one is not content with the decision. But still there is a difference, as it is a fact that people do get out and do walk home at night and do not catch cold; therefore it is not so probable or inevitable a consequence of the breach of contract that the passenger should catch cold as that the horses in the case now before us should be injured. There is a difference between turning a female out at night at a station some distance from home and turning out horses just off from a feverish journey after putting them for a short time into warm stables.

It is, therefore, not necessary to say that I should not have decided *Hobbs* v. *The London and South Western Railway Company* (1) as it was decided; but that case is certainly so near the line as to lead one to find, if possible, some distinction. The appeal must be allowed; but I do not consider that we are overruling Mr. Justice Fry, save in form, as he and the jury both were of opinion that the plaintiff should recover this sum.

Cotton, L.J.—I also agree that the plaintiff should recover this sum of 50*l*. The question is, whether the damage suffered is too remote. It has been said that it is almost impossible to lay down a line, just as it is impossible to draw a line between twilight and night. The rule has been stated to be that the injury is one that may fairly have been contemplated as the possible result of a breach of contract. I must except to that statement of the rule as the parties to a contract do not contemplate a breach of that contract. I should rather ask whether the damage is the natural and probable result of the breach of contract without an accident intervening. It was said in *Hobbs* v. *The London and South Western Railway Company* (1) that catching cold is an accident. In some sense it may be, but also in many circumstances it cannot properly be said to be an accident. The question here then arises, Is the damage here complained of the probable result, without accident, of the breach of contract? The weather in May, and the difficulty at fair-time of getting stable room, are circumstances known to all, and so ought to be considered as having been in the contemplation of the parties to the contract; and that horses would, if exposed, catch cold without any accident intervening may also be considered to be in the same category.

A doubt occurred to me whether the

Mahon v. *Field* (*App.*), EXCH.

ce of clothing was the cause of the
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would be answerable. Whether the
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be considered with reference to the
to which it relates. The plaintiff
one nothing unreasonable, and the
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ible. I do not consider it necessary
ter into a minute examination of
v. *The London and South Western*
ay Company (1). I do not, however,
r in the conclusions of fact which
ourt there drew.

Appeal allowed.

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rs—Hamlin & Grammer, agents for Cart-
ht, Chester, for plaintiff; Paterson, Snow
oxam, agents for Armishaw, Rugeley, for
dant.

IN THE COURT OF APPEAL.]

31.
9, 11.
30.

POYSER *v.* MINORS.*

nty Court—Rules regulating—Prac-
Effect of Nonsuit—19 & 20 *Vict. c.*
. 32—County Court Rules, 1875,
XVI. rule 17.

onsuit in a County Court is a bar to
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the County Courts Act, 1856 (19 &
t. c. 108), *s.* 32, *five County Court*
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," *and the rules so framed are to be*
ed by the Lord Chancellor.

Order XVI. rule 17 *of the County*
Rules, 1875, "*any judgment of non-*
unless the Judge otherwise directs,
shall have the same effect as a judgment
upon the merits for the defendant."

The plaintiff sued in a County Court while abroad, without giving security for costs, as required by the rules, and was nonsuited, the nonsuit not to be a bar to the re-entry of the cause. He afterwards sued in the High Court for the same cause of action. The Judge held that the above rule applied only to nonsuits on the merits, and gave judgment for the plaintiff:—

Held (*by the Court of Appeal*), *that the rule applies to all nonsuits.* Held (*by* BAGGALLAY, L.J., *and* LUSH, L.J., BRAMWELL, L.J., *dissenting*), *that the County Court Judges had power to make the rule, and that the defendant was entitled to judgment.*

This case was tried before Mr. Alfred Wills, sitting as Commissioner. At the trial judgment was given for the plaintiff, and the defendant appealed.

The question on which the judgments in the Court of Appeal turned was whether a nonsuit in a County Court is a bar to an action for the same cause of action, subsequently commenced in the High Court of Justice. The circumstances under which the question arose, the words of the material sections and rules, and the documents, are set out in the judgment of Lush, L.J.

April 9 and 11.—*Jelf* and *Archibald*, for the defendant, in support of the appeal.

Bosanquet and *Darling*, for the plaintiff.

Cur. adv. vult.

June 30.—The following judgments were read:—

LUSH, L.J.—This action is brought to recover 37*l.* 2*s.*, for goods sold and delivered. The writ is dated the 11th of January, 1881.

The material ground of defence was that on the 5th of May, 1880, the plaintiff sued the defendant in the County Court of Lichfield for the same debt, and that in that action judgment of nonsuit was given against him, which judgment remained in force.

At the trial of this action in the Court below a certified copy of the entry in the

ram Bramwell, L.J.; Baggallay, L.J.; and
.J.

minute book of judgments in the County Court was put in evidence, and from this it appeared that the plaintiff was represented at the trial by counsel, and the defendant by his solicitor; that judgment of nonsuit was given with costs, but accompanied with an order that such judgment was not to be a bar to a re-entry of the cause for trial.

No application to re-enter the cause pursuant to such leave, or to set aside the nonsuit as irregular, was made until long after the time limited for this purpose by the Consolidated County Court Orders, so that the nonsuit has, according to the terms of Order XVI. rule 17 of those Orders, the same effect as a judgment for the defendant upon the merits—that is, it is a bar to this action.

When the plaint was entered in the County Court, and the summons applied for, nothing was said to the Registrar to the effect that the plaintiff was out of the country, consequently no security for costs was given or required, but the summons was given out as to an ordinary suitor residing in England at the time, whereas, in fact, the plaintiff had gone to America to reside, and had left his wife to wind up his affairs. The 4th of the Consolidated Orders (rule 2) prohibits the summons being issued under such circumstances until security for costs has been given, either by a deposit of money or otherwise, or by the undertaking of a solicitor to see them paid.

When it was disclosed at the trial that the plaintiff was out of the country and security had not been given, the learned Judge of the County Court considered that he had no alternative but to nonsuit the plaintiff; but he reserved leave to re-enter the cause upon security being given. No further step was taken by the plaintiff in the County Court, but eight months afterwards this action was brought.

The learned Judge who tried this action, and whose judgment we are called on to review, held that the nonsuit mentioned in the rule in question was a nonsuit on the merits, and that although the failure to give security for costs might be a good reason why that action should fail, it was not a bar to this action; and he gave judgment for the plaintiff, but stayed execution for a time to give an opportunity of appealing.

We are unable to agree with the learned Judge in his construction of the rule. It does not in any way suggest that any enquiry is open as to the ground on which the nonsuit proceeded, or whether the plaintiff was rightly nonsuited or not. The words are "any judgment of nonsuit shall have the same effect as a judgment for the defendant upon the merits." We think we cannot go behind the record. The judgment, if erroneous, stands on the same footing as an erroneous judgment for the defendant, and should have been appealed against, or set aside in the County Court. But as nothing was done to test its validity, we think it cannot now be impeached.

On the argument before us a new point was started, and this ultimately became the point mainly relied on. It was, that the County Court Order XVI. rule 17 was *ultra vires*, and that, supposing that to be out of the way, the plaintiff was only exercising his common-law right in bringing a second action. We reserved our judgment in order to look into the statutes under and in connection with which the Consolidated County Court Orders were made.

These Orders were issued in 1875, and supplemented in 1876. Many of these were taken from the Orders which were framed under the Judicature Act, 1873, and which were incorporated into the Judicature Act, 1875. The rule in question is a copy of rule 6 of the 41st of such Orders, and, like many others of the Consolidated Orders, it was intended to assimilate the practice of the County Courts to that of the High Court. They were framed by a committee of County Court Judges appointed by the Lord Chancellor under the County Courts Act, 1856.

The words of the 32nd section of that Act are, "The Lord Chancellor may appoint five County Court Judges, and from time to time fill up any vacancy in their number, to frame rules and orders for regulating the practice of the Courts, and the forms of proceedings therein, and from time to time to amend such rules and

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first County Court Act (the 9 & 10
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rule in question puts a restriction
this liberty, and subjects it to the
tion of the Judge, to be exercised at the time when he pronounces judgment of nonsuit. "Any judgment of nonsuit, unless the Judge otherwise directs, shall have the same effect as a judgment upon the merits for the defendant;" but when he does not otherwise direct, the rule goes on to declare that he may set aside the nonsuit "in any case of mistake, surprise or accident"—words large enough to embrace every contingency to which the failure may be attributed, which reasonably entitles the plaintiff to have the validity of his demand effectually tried. It is more beneficial to both parties to have a second trial in the same action than to waste the costs already incurred and begin the litigation *de novo*.

Is a rule which has this effect covered by the authority given to the committee of Judges by the Act of 1856, "to frame rules and orders for regulating the practice of the Courts and the forms of proceedings therein"? This is the question we have to decide, and although we are not precluded from forming our own opinion by the consideration that these rules were framed by five Judges of great experience, and deliberately and formally adopted by the Lord Chancellor, and that they have been accepted and acted upon in all the County Courts in England for more than five years without any such objection having been taken before, but are bound to form our own opinion notwithstanding,—we cannot but hold that these considerations ought to have great weight, and that nothing short of strong conviction that the Act has been strained and that it will not bear such a construction would justify us in declaring the rule to be *ultra vires*.

After the best consideration I can give to the case, I am not only not convinced that the Act has been misconstrued, but am of opinion that the Lord Chancellor and the learned Judges were right in the view which they have taken of their authority under the Act of 1856.

"Practice," in its larger sense—the sense in which it was obviously used in that Act—like "procedure," which is used in the Judicature Acts, denotes the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right

and which by means of the proceeding the Court is to administer—the machinery as distinguished from its product.

"Practice" and "procedure," as applied to this subject, I take to be convertible terms.

The rule in question is, as I before observed, a copy of Order XLI. rule 6 of the Rules of Court, which were framed by the Judges under the Judicature Act of 1873, and adopted as part of the Act of 1875. The particular rule was originally in the schedule to and formed part of the Act of 1873. How is it regarded in that statute? Is it regarded as a matter of practice or something higher in the nature of substantive law?

The 69th section (1), which declares the rules in the schedule to be part of the Act, says, "As to all matters to which they extend those rules shall regulate the proceedings in the High Court, unless and until, by the authority hereinafter provided, any of them may be altered or varied; but such rules shall for all purposes of this Act be Rules of Court capable of being annulled or altered by the same authority by which any of the Rules of Court may be made, altered or annulled after the commencement of this Act."

The authority referred to is contained in the 74th section (1), by which the Supreme Court may alter or annul any Rules of Court for the time being in force, or make any new Rules of Court for the purpose of regulating all such matters of practice and procedure in the Supreme Court, or relating to the suitors or officers of the Court, or otherwise as under the provisions of this Act are, or may be, regulated by Rules of Court.

And by the 68th section (1), Rules of Court may be made for (amongst other things) "the regulation of any matters relating to the practice and procedure of the said Courts respectively"—the High Court and Court of Appeal.

In these sections the rules in this schedule are regarded as Rules of Court for regulating its practice and procedure; and apart from statutory restriction such rules are within the competence of every Court to make for itself.

Rules of substantive law which the Court has to administer are enacted and declared in the body of the Act, and these are by the 91st section to be "in force and effect in all Courts whatsoever in England so far as the matters to which such rules relate shall be respectively cognisable by such Courts." But the schedule is headed "Rules of Procedure," and these are rules for regulating the practice of the High Court only, and would not by virtue of that Act be applicable to County Courts. If, therefore, the practice was to be uniform it was necessary to frame rules for the County Courts in order to make it so.

Surely it is highly expedient that Courts administering the same law, whose jurisdiction is in the main concurrent, as far as it extends, with that of the High Court, should as far as practicable, having regard to their more limited jurisdiction, be guided by the same rules of practice, and I cannot help thinking that if it had been thought that "Rules for regulating the practice in the County Courts" in the Act of 1856 meant something different from and short of "Rules of Procedure" in the Judicature Act of 1873, a further authority would have been given either in one of the Judicature Acts or some later County Court Act.

Turning to the 46th article in the schedule to the Act of 1873 we find additional proof that the rule in question was regarded as a rule of "practice." It is there associated with others which come within the narrowest and most technical definition of "practice," the whole article forming a wholesome provision for putting an end to vexatious and capricious proceedings by which litigation was often needlessly prolonged and rendered needlessly oppressive.

That article forbids a plaintiff, first, from discontinuing his action without leave of the Court if he has taken any step after delivery of the statement of defence; secondly, from withdrawing the record without such leave; and thirdly, from bringing a second action for the same cause after being nonsuited, except

(1) Repealed—Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 33. There are similar provisions in sections 16 and 17 of that Act.

er v. Minors (App.), Q.B.

leave to do so was given him, and ling him, instead of resorting to pedient, to apply to set aside the ; and proceed to a second trial in ne action. This latter purpose is ed by the rule in question.

lastly, the same article forbids the ant from withdrawing his defence le or in part without leave.

ie Judges at the County Courts had e power to adopt these wholesome hey certainly ought to have had it, I before observed, I cannot help ig it would have been given them d been considered to be wanting. these reasons I am of opinion that bjection also fails, and that the ent of the Court below must be ed and judgment given for the de-t, with costs both in this Court and urt below.

BALLAY, L.J., concurred with Lush,

WELL, L.J.—I have very great lty in this case. My brother Lush voured me with his judgment. I agree with him, with all respect to rned Judge before whom the case ied, that the judgment cannot be ted on the ground on which it was and that it must be reversed, the County Court rule, Order XVI. ', was *ultra vires* of those who made onsidering whether it was one must er to some extent Order XLI. rule 6 Judicature Orders. This rule has been a difficulty to me. It sup-a "judgment of nonsuit" may be There really in strictness never "judgment" of nonsuit. No plain-uld be nonsuited against his will. led to appear at the appointed time, lly at *nisi prius* (I believe there other stages of a cause in which might be a nonsuit), and his non-ance was recorded, returned to the in Banc, and then judgment was against him, that the defendant go it day, &c., the same judgment, as ny other cases—a judgment conse-on his not prosecuting his action—gment because he was nonsuit. If he insisted on appearing he could not be nonsuit. The expression, then, "judgment of nonsuit" seems inaccurate. But, setting aside this difficulty, which, were it necessary, I could shew is not merely verbal, I have never been able to see when under the other rules a nonsuit can happen. I need not discuss nonsuits before trial. None are provided for by the rules. Now what is to happen at the trial? By Order XXXVI. rule 18, if plaintiff appears and defendant does not, plaintiff may prove his claim. What is to happen if he does not prove his claim is not said. I should have thought verdict and judgment for defendant, if the case were before a jury, judgment for him if not. Was it contemplated that a Vice-Chancellor should nonsuit? Suppose plaintiff insists on appearing. What is the use of a nonsuit if it is a bar to a future action, unless ordered to the contrary. And if it may be, and is, why could not the power be given to the Judge or Court to say that any judgment of whatever kind should not be a bar if so ordered? However, it might be said that this was the object of the rule, and that under the former rule 22 of that Order, by which the Judge may give judgment for plaintiff or defendant, or "enter any other judgment," the Judge could give "judgment of nonsuit." But that rule 22 is repealed, and in lieu of it is a rule that the Judge may "direct judgment for any or either party, or adjourn the case for further consideration, or leave either party to move for judgment." This does not seem to authorise "judgment of nonsuit," which is not a judgment for the defendant, save that it is against the plaintiff. Rule 18 seems the only one under which such a judgment can be given. The judgment when defendant appears is provided for by rule 19 and rule 22, now rule 22*a*. It seems strange that such a judgment can be given only where the plaintiff appears and the defendant does not. I cannot but doubt whether rule 6 of Order XLI. did not slip in *per incuriam*, and whether it can be applied—now especially. However, there it is, and it has been acted on, and probably would be supported if possible.

I should have thought it *ultra vires* except that it is embodied in a statute. Still, however doubtful the parentage, there is its offspring, the County Court rule, which we must now consider.

I quite agree with my brother Lush that the question is, Is the County Court rule which is in question covered by the authority to frame rules and orders for regulating the practice of the Courts and forms of proceedings therein? I need hardly say that I quite agree with him that it is strongly in favour of the validity of such a rule, that it was framed by five learned County Court Judges and passed by the Lord Chancellor, and that it has been in universal operation unchallenged for five years. This would weigh with much greater weight if I knew that the rule had been made and certified after consideration of the question now before us, but probably it was not—probably the Judicature rule was simply adopted. Further, it assimilates the County Court practice to that of the High Court, if indeed Order XLI. rule 6 is operative. But this is certain—unless the rule could have been validly made on the passing of the Act of 1856, it could not be validly made when it was; would it have been tolerated in 1856? My difficulty is to see how, if it operates as contended, it is a rule of procedure or practice; how it is a rule which does not do more than "regulate the practice of the Courts and forms of proceedings therein." I have already made some remarks on nonsuits. I agree with what my brother Lush says, but for and until this rule the judgment of nonsuit authorised by the first County Court Act (9 & 10 Vict. c. 95) would not have precluded a second action. It would have been no bar to a second action. Why? Why was not a nonsuit in actions in the superior Courts a bar to a second action? Because there was no judgment on the matter in dispute; because the matter was not *res judicata*; because the maxim *Nemo debet bis vexari pro eâdem causâ* did not apply. The same thing was true of a second action after a discontinuance. It was even true where there was a verdict, unless he was barred by the judgment, as where the judgment was *quod* (defendant) *eat sine die*, and not *quod querens nihil capiat per breve*—*Cro. Jac.* 284 (2). To be barred, a plaintiff must have had a judgment against him on demurrer, verdict or confession, and in bar of his right. This is a rule of law consequent on such judgment, and to give such an effect to a judgment of nonsuit is to alter the law, and, with all submission, to alter it anomalously, and to give an arbitrary effect to a proceeding, which effect is without principle. I cannot agree then with my brother Lush that all that the rule does "is to put a restriction on this liberty," namely, of bringing a second action, "and subject it to the discretion of the Judge." The rule takes away this right in law. I do agree with his distinction between practice to enforce a right and the law which gives and defines the right. But then I ask whether it is not the case that a man has a right of action, which the law says he shall not lose by bringing an action and being nonsuited, but these rules say he shall lose thereby. I agree also that the Judicature Orders treat this as a matter of practice; but with all respect to those rules, I cannot think that any implication therefrom can reverse a rule of known existence, and of which the reason and principle are known. It was perfectly competent to those who framed the rules under the Judicature Act, even without a statutory effect being given, to say there should be no discontinuance, no withdrawing the record, &c., and they might have said there should be no nonsuit. They might have added that any nonsuit might be set aside, and so have made it like what Order XLI. rule 6 says it is, to this extent, at least, that the action might be resumed in the same Court. It may be said that if this can be done, why cannot they do what they have done? I say it is not the same thing. They have made a nonsuit a bar to a second action in the same or any other Court. They have altered the law of the land. I think this was *ultra vires*,

(2) But see the form of "Judgment on a nonsuit," which is thus given in Chitty's Forms (10th ed. 1866): "Therefore it is considered that the plaintiff take nothing by his said writ, and that the defendant do go thereof without day, &c."

and that therefore the judgment ought to be affirmed.

I cannot agree with the case cited to us—*King* v. *Hawksworth* (3).

Appeal allowed. Judgment for defendant.

Solicitors—Ashurst, Morris, Crisp & Co., agents for W. Morgan, Stafford, for plaintiff; Jennings, Son & Burton, for defendant.

[IN THE COURT OF APPEAL.]
(*Appeal from the Queen's Bench Division.*)

1881.
March 29.
April 1, 2.

ROBINSON *v.* CURRY.*

Action for Penalty—Limitation—"Party grieved" — Common Informer — Goldsmiths' Company—Counterfeit Hall Marks —31 Eliz. c. 5. s. 5—3 & 4 Will. 4. c. 42. s. 3—7 & 8 Vict. c. 22. s. 3.

An action by an officer of one of the Companies of Goldsmiths, suing for penalties under section 3 of the 7 & 8 Vict. c. 22, is not an action by a "party grieved," within 3 & 4 Will. 4. c. 42. s. 3, and consequently can be brought more than two years after the cause of action accrued; nor does the limitation of one year imposed upon informers suing for penalties by the 31 Eliz. c. 5. s. 5 apply to such an action.

Judgment of the Queen's Bench Division reversed.

Appeal from a judgment of the Queen's Bench Division on demurrer to a statement of claim.

The case in the Queen's Bench Division is reported, and the facts fully stated, *Ante*, p. 9.

The Queen's Bench Division gave judgment for the defendant.

A. Wills and *R. E. Webster* (*Coxon* with them), for the plaintiff.—First, the Goldsmiths' Company, suing for penalties under section 3 of 7 & 8 Vict. c. 22, are not "parties grieved" within the meaning of 3 & 4 Will. 4. c. 42. s. 3, and this action is not therefore subject to the limitation of two years imposed by the statute. A person who bought silver wares with the Goldsmiths' mark improperly put upon them would be a "party grieved" according to the natural meaning of those words—not the company themselves, who are no more "parties grieved" than the rest of the public. Actions for penalties were given by statute to "parties grieved" long before the earlier Statutes of Limitation were passed. As an instance may be mentioned the 23 Edw. 3. c. 6; and other instances occur constantly down to the passing of the 3 & 4 Will. 4. c. 42. There are also to be found numerous instances in which a penalty is given by statute, not to the "party grieved," or to a common informer, but to some public body for the vindication of public rights, such as to the Trinity House or a corporation, the theory of legislation being the same as in the present Act. It has long since been decided that where a penalty is given to a specific person or body, the penalty becomes that of the person or body, and on bringing the action the plaintiff is entitled to costs under statute, but the contrary is the case with respect to common informers, whether suing on their own behalf or *qui tam*. The penalty then does not vest until action brought, and the plaintiff is not entitled to costs by statute—*The Mayor of Plymouth* v. *Weeming* (1), and the authorities cited in the note to that case. The judgment in the Court below assumes that all actions for penalties must be brought either by "parties grieved" or common informers, and decides that the Act having given the Goldsmiths' Company power to recover the penalty and apply it to their own purposes, the company must be a party grieved. But a party grieved is not brought into existence by the Act. In *Shinler* v. *Roberts* (2), mentioned by Mr. Justice Field in his judgment, there is nothing to shew that the person suing was not a "party grieved." Mr. Justice Field was under a misapprehension in thinking that the 12 Geo. 2. c. 26 is

(3) 48 Law J. Rep. Q.B. 484; Law Rep. 2 Q.B. D. 371.

* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Lush, L.J.

(1) Willes Rep. 440.

(2) Buller's *Nisi Prius*, p. 197.

altogether repealed. Section 3 is still in force and a clear distinction there drawn between a party grieved and a company. In *Dyer* v. *Best* (3), relied on by Mr. Justice Manisty, the action was by a common informer, and no question such as the present one really required to be decided. *Boyce* v. *Higgins* (4), it is submitted, tells in favour of the plaintiff. The decision is that where a party is only grieved as one of a class he is not grieved within the meaning of the Act. His grievance must be personal and private. In the present case there are several goldsmiths' companies who might sue; it cannot be said that any have a private or personal grievance.

Secondly, it is submitted that the 31 Eliz. c. 5. s. 5 does not apply so as to limit this action to one year. The section is aimed at common informers. In *Dyer* v. *Best* (3) it was held that the expression "and to any other who shall prosecute in that behalf" was to be read as comprehending cases where the penalty is given partly to the Queen and partly to a person suing *qui tam*, and also when the person sues alone as informer. The preamble of the Act speaks of common informers. The Goldsmiths' Company are clearly not within the description, "any other who shall prosecute in that behalf." They are one of a limited class to whom an action is given, and the decision in *Dyer* v. *Best* (3) has no application to them. The words "any other," &c., cannot cover all classes of penal actions, because "parties grieved" are clearly not within those words. By 21 Jac. 1. c. 4, common informers are compelled to bring local actions, and to state in an affidavit made on the issue of the writ that the cause of action arose within a year. Lord Coke, in his 4th Institute, treats that Act as directed against common informers; and in *The Guardians of St. Leonard's, Shoreditch* v. *Franklin* (5), Lord Coleridge, C.J., says that corporations, under any of the old penal statutes, could not be common informers because they could not perform the conditions precedent to maintaining the action. The statute 7 Hen. 8. c. 3 imposed limitations upon three classes of actions—where the penalty was forfeited to the Queen, her heirs or successors only, where a common informer sued for his own benefit alone, or where he sued for the Queen and on his own behalf. That Act was repealed by the 31 Eliz. c. 5, which, it is submitted, applies only to cases where the penalty is forfeited to the Queen, or to the Queen and an informer suing *qui tam*. It has no application where a common informer sues to recover the whole penalty for his own profit. In *Culliford* v. *Blandford* (6) the statute of Elizabeth was held not to apply to a common informer where he could recover the whole penalty; so also in *Chance* v. *Adams* (7). Then came *Dyer* v. *Best* (3), which followed the decisions in *Lookup* v. *Frederick* (8) and *Barrett* v. *Johnson* (9), though it is to be observed that this last case was decided upon an Irish statute which, though in terms it corresponded to the statute of Elizabeth, did not repeal a statute corresponding to the 7 Hen. 8. c. 3. It is submitted that the two earlier decisions in the Exchequer Chamber—*Culliford* v. *Blandford* (6) and *Chance* v. *Adams* (7)—are right; and the two later—*Lookup* v. *Frederick* (8) and *Dyer* v. *Best* (3)—are wrong. The Goldsmiths' Company are therefore not brought within either the 3 & 4 Will. 4. c. 42. s. 3 or the 31 Eliz. c. 5. s. 5. No Statute of Limitations applies to this action, and where, as here, the action is brought in the performance of a public duty no great harm is likely to result from the omission of the Legislature to impose a limitation.

They also referred to *Buller's Nisi Prius*, pp. 195, 196, 197; *Shepherd* v. *Hills* (10) and *The Cork and Bandon Railway Company* v. *Goode* (11).

W. F. Jones and *F. O. Crump*, for the

(3) 35 Law J. Rep. Exch. 105; Law Rep. 1 Exch. 152.
(4) 14 Com. B. Rep. 1; 23 Law J. Rep. C.P. 5.
(5) 47 Law J. Rep. C.P. 727; Law Rep. 3 C.P. D. 377.
(6) 2 Shower, 353.
(7) 1 Raym. 77.
(8) 4 Burr. 2018.
(9) 2 Jones, Irish Exch. Cases, 197.
(10) 25 Law J. Rep. Exch. 6; Law Rep. 11 Exch. 55.
(11) 13 Com. B. Rep. 832; 22 Law J. Rep. C.P. 198.

defendant.—The goldsmiths' companies are "parties grieved" within the 3 & 4 Will. 4. c. 42. According to the constitution of the companies each can only mark plate within its own limits. Thus the Birmingham company can only mark in Birmingham. The company whose mark is counterfeited is the one that must sue, and having a particular interest in its own mark it is a "party aggrieved" within the statute. Penal actions are divided into two classes—those brought by "parties grieved," and those by common informers. The Goldsmiths' Company must come within one of these two classes. The 7 & 8 Vict. c. 22 having given the company the right to recover the penalty and apply it to their own purposes, they become "parties grieved." *Buller's Nisi Prius*, p. 197, where *Shinler* v. *Roberts* (2) is cited. The penalty is to be applied in defraying the companies' expenses in assaying gold and silver wares. It is given to the companies in satisfaction of the injury done to them by an interference with gold and silver wares. The whole course of legislation with respect to these companies (beginning with the 28 Edw. 1. c. 20) shews that the marking and stamping of plate is a privilege given to them. It is both their interest and their duty to sue for the penalty if an offence under section 3 of the 7 & 8 Vict. c. 22 is committed, and they are none the less "parties grieved" because the interest which they have in their public capacity is interfered with. If the true construction be that the companies have no exclusive territorial area of jurisdiction, it is still contended that each of the companies has an interest in the protection of the marks of all, and where the penalty is recovered by one, it is recovered in satisfaction of the injury done to all. If the companies are "parties grieved" within the 3 & 4 Will. 4. c. 42 it is not necessary to contend that they are common informers, so that the limitation of one year provided for by the 31 Eliz. c. 5 applies to them. But it is contended that they must be subject to one or other of the limitations. The Legislature cannot have intended actions like the present to be subject to none. The 31 Eliz. c. 5 is very wide in its terms, and is intended to cover all classes of informers. Mr. Justice Blackburn, in *Lewis* v. *Davis* (12) expressed a doubt whether the decisions to the effect that actions by parties grieved were not within the 31 Eliz. c. 5 would be followed in the Exchequer Chamber.

A. Wills replied.

BRAMWELL, L.J.—With great respect to the opinion entertained by Mr. Justice Field and Mr. Justice Manisty, I think their judgment cannot be upheld. I think the fallacy which has led to an erroneous decision in the present case, and in *Dyer* v. *Best* (3), has arisen from supposing that all actions for penalties must be brought either by a common informer or by a party grieved, and, consequently, that everyone who sues for a penalty is within one or other of those classes. If that were so one would find words to bring the case within one or other of these categories, but I cannot understand how this can be said to be an action by a "party grieved." The expression is not a technical one. It is an ordinary expression, and the words must have their ordinary meaning. The argument seems to be irresistible that a "party grieved" is not brought into existence for the first time by a statute giving a penalty; he is supposed to exist before, and the statute gives him a remedy on account of his grievance. There may be cases of "parties grieved" within the meaning of a particular statute, to which the argument would not apply; there are some cases no doubt where the grievance is made a subject-matter of complaint for the first time by the statute; but as a general rule the argument seems irresistible. Here it is admitted that, apart from the statute, no action could be maintained by the plaintiff, or all the goldsmiths' companies together, against the defendant. I therefore think it is not an action by a "party grieved." It is said that the case is in a dilemma, because, if not an action by a "party grieved," it is one by a common informer under the statute

(12) 44 Law J. Rep. Exch. 86; Law Rep. 10 Exch. 86.

31 Eliz. c. 5. The statute in terms is applicable to proceedings by the Crown, and to proceedings *qui tam*; and in terms, it is not applicable to the case of an informer suing for his own exclusive benefit. In the time of Lord Holt it was held—in *Culliford* v. *Blandford* (6)—that the statute did not apply to the ordinary action by a common informer suing for his own benefit, and the decision was confirmed by a judgment of the Exchequer Chamber, which has not yet been impeached. If so, that would cover this case, even supposing the Goldsmiths' Company were in the plight of common informers, because no other statute, except the 3 & 4 Will. 4. c. 42, is applicable to impose any limitation upon the plaintiff. It is said to be inconceivable that no Statute of Limitations is applicable to an action of debt by a common informer, and that such an action can be brought at any time within twenty years.

But there is this safeguard, that a common informer, under the statute of James, must make an affidavit that the cause of action arose within a year. It is not to be assumed that he would take a false oath, and if he did so wilfully or by mistake, it would be the duty of the Court—I may say *ex debito justitiæ*—to set aside or stay the proceedings. Looking at the words of the statute of Elizabeth, I am of opinion that they do not include the case of a common informer who is not suing *qui tam*. They have been held not to include that case in Lord Holt's time, and I must prefer the construction there put upon the statute to that in *Dyer* v. *Best* (3) and *Lookup* v. *Frederick* (8). Treating the plaintiff as a common informer, these considerations would be enough to dispose of the case in his favour; but I am certain that persons suing for penalties are not divisible into two classes only—"parties grieved" and common informers. There are three classes, or, if divided into two, there is a subdivision of one of them—the Crown, common informers (including those who sue *qui tam* and those who sue for their own peculiar benefit and profit) and bodies suing in the performance of a public duty as a kind of public prosecutor, bringing an action in the same way as an indictment might be preferred where there was no plaintiff who could sue. It is said to be inconceivable that no limitation of time should be imposed on such an action. The answer is that, if that argument were to prevail, the words *casus omissus* might be banished from our language. But one can see that this case is entirely different from that of the common informer in general. It is one thing where an informer is suing wholly for his own benefit or *qui tam*; but where a public prosecutor is suing, as it were, for the benefit of the public, I can see no reason why any limitation of time should be imposed any more than in the case of an indictment, if the Act which imposed the public duty, for the breach of which the indictment was preferred, stated no limitation of time. To my mind a limitation of time in the case of such an action as the present was not within the contemplation of the Legislature. It is not a *casus omissus*, because the Legislature were not dealing with or thinking of the case of a person in the position of a public prosecutor bound to take proceedings for the protection of the public.

I am therefore of opinion that the action is not one by a "party grieved" within the 3 & 4 Will. 4. c. 42, nor one within the clause in the statute 31 Eliz., which deals with actions *qui tam*. If I am right in this view I should not think there was any necessity for the plaintiff in this case to make an affidavit that the cause of action arose within a year. At any rate, if it was not made, there was no application to set aside the proceedings on that ground, and in my opinion such an application was properly not made, because, if made, it ought to have failed. Under these circumstances I think the judgment should be reversed, and judgment should be given for the plaintiff.

BAGGALLAY, L.J.—I am of the same opinion. The short question involved in this appeal is whether the Goldsmiths' Company in London, suing for penalties under the 7 & 8 Vict. c. 22, are "parties grieved" within the meaning of the 3 & 4 Will. 4. c. 42. If so, they must commence their action within two years. The Judges of the Queen's Bench Division

of opinion that the several companies oned in the Act of 7 & 8 Vict. c. 22 "parties grieved" within the mean- 3 & 4 Will. 4. c. 42. I am unable rive at that conclusion for this n. The law affecting these com-s, which are the subject-matter of ct 7 & 8 Vict. c. 22, is not defined ontained in that Act alone, but is to nd in that Act and the 12 Geo. 2.

I am of opinion that the two Acts be read together—omitting of course portions of Geo. 2 as have from to time been repealed. That being e have got in the 3rd section of the f Geo. 2 an actual indication that party grieved," with reference to ubject-matter of the statute, is a dis-person from the company, because ction provides that any shopkeeper ner person exporting or exposing for old or silver wares below their re-ve standards, shall be exempt from ution if within fourteen days next notice to him that he has done so nake known to the party aggrieved warden," &c., of the company the and address of the worker of the , or of the person from whom he it them. No doubt that section to a different offence from the one present case, but still a distinction ry clearly drawn between a party ed by the act complained of, and the miths' Company, who are the autho-under the Act of 7 & 8 Vict. c. 22, t the law in force. I think it is fore impossible to consider the com-"parties grieved" within the 3 & 4 4. c. 42. With reference to the r suggestion that, if not limited to ears under 3 & 4 Will. 4, the action ited to one year under the 31 Eliz. the Act of Elizabeth first of all the action of the Queen to two and "to any other person who shall cute in that behalf" to one year. shortly after the passing of the Act held not to apply to a common in-r suing for his own benefit, but to *m* actions only. That view was ited from in the recent case of *Dyer t* (3), and it was held that the pro-s of the statute applied to common ners as well as to those suing *qui tam*. I confess I see much force in the arguments and judgments of that case.

But, assuming it to be a right decision and an authority which we ought to recognise here, it appears to me impossible to say that the Goldsmiths' Company are common informers. Any person may sue as a common informer. Here the Act specifies the several goldsmiths' companies as able to sue. For these reasons I am of opinion that the Goldsmiths' Company are not subject to the limitations imposed either by the 3 & 4 Will. 4. c. 42 or the 31 Eliz. c. 5.

LUSH, L.J.—I am glad that the question has been so fully and elaborately argued, as otherwise I should not have been able to gain so clear a view as I think I now have gained of the bearing of the particular statutes upon the particular facts in this case. I have come to a very clear conclusion that the judgment is one that cannot be upheld. Now it has not been very seriously contended, nor, in my opinion, could it be, that the limitation of one year is applicable to this case. That limitation is applicable only to penalties which are given to any person who sue for the same—they belong to what are called "actions for profit;" whether *qui tam* or not is immaterial. In order to come within the limitation the penalty must be given to any person—any one of the public who chooses to sue for the penalty. That is not the case here: the penalty is to be recovered by either of these specified goldsmiths' companies. Then are the company bound as "parties grieved" by the limitation of two years? Now the 3rd section of 7 & 8 Vict. c. 22 does not call them parties grieved; therefore if they are within the limitation of two years imposed by the 3 & 4 Will. 4. c. 42 they must be parties actually grieved—who have sustained some grief or damage by reason of the act done for which the penalty is fixed. That is the clear meaning of "party grieved." It is not a legal, but a popular term. The party grieved must be one who has a cause of action as soon as the act has been committed. Various instances are to be found in the books of actions by "parties grieved." Debt, for instance, for not

setting out tithes—there the clergyman is grieved; debt on an escape—there the creditors are grieved; debt against a sheriff for extortion—there the person against whom extortion has been used is grieved; and there are many other examples. I take it to be clear law that the party grieved must be a person who has sustained a legal loss or liability by an act done in respect of which the penalty is given. Are the Goldsmiths' Company in that position? The penalty is imposed by the Act upon every dealer in gold and silver wares who shall exchange or expose for sale, or shall export or import, or attempt to do so, or even have in his possession without lawful excuse, any ware of gold or silver having thereon any forged or counterfeit mark. The penalty of 10*l.*, which may be sued for and recovered by any of the several companies, is given, if one of these offences is committed. Now what legal injury has either of these companies sustained by that?—what possible injury could occur to any one of the companies through a man having in his possession, and selling, gold or silver wares stamped with counterfeit marks? The person who buys from that man in the belief that he is buying articles stamped with a genuine mark is the party grieved—but no penalty is given to him; he is left to his action at common law for his remedy. In no sense can it be said that either of the companies are grieved by the act of selling, which is the act in respect of which this penalty is sought to be enforced. It seems to me that this Act of Parliament, and the whole scheme of legislation upon the subject, has been designed for the protection of the public. As early as the reign of Edward 1 Acts of Parliament were passed for the protection of the public against having gold and silver wares sold to them which were short of the mean standard, and subsequent Acts were passed which imposed, as I consider, a duty upon these goldsmiths' companies, who had obtained charters of incorporation, to protect the public by assaying all gold and silver plate (except certain articles) and by putting the companies' stamp upon the plate in order to authenticate the quality of the metal. I think a public duty is cast upon them in this respect: it is not by way of profit to themselves. The 7 & 8 Vict. c. 32 makes it a felony, for which a sentence of fourteen years' penal servitude may be inflicted, to forge, counterfeit or utter, knowing it to be forged or counterfeit, any die or other instrument used by the goldsmiths' companies for marking gold or silver wares, &c. In respect of criminal proceedings the Act is much more severe than the earlier Acts, and is clearly passed for the protection of the public. The section in question (section 3 of 7 & 8 Vict. c. 22) imposes a penalty of 10*l.* upon every dealer in gold and silver wares who shall sell or exchange plate not having the company's mark upon it. The penalty is very much like the various summary inflictions to be found in our statutes given to sanitary and other public bodies with the object of enforcing the law for the benefit of the public. The fair and true meaning of the Act is, I think, that the companies are charged with a duty towards the public, and in the performance of that duty the penalty is to be sued for by them. I do not think it is very material that the statute of Geo. 2 is not repealed, though it is true that a distinction is drawn in that Act between "parties grieved" and the companies. The whole legislation is for the better protection of the public, not in the interest of the companies. They have no interest except that of the public, and they are charged with the duty of protecting the public by enforcing this penalty.

I am, therefore, of opinion that the judgment of the learned Judges of the Queen's Bench Division is erroneous, and must be reversed.

Judgment reversed.

Solicitors—Prideaux & Sons, for plaintiff; J. Bannister Brown, for defendants.

THE QUEEN'S BENCH DIVISION.]

. } HUGHES (*appellant*) *v.* SUTHER-
12. } LAND (*respondent*).

*pping—Supply of Apprentice by un-
d Person—"Crimping"—Merchant
ing Act*, 1854 (17 & 18 *Vict. c.* 104),
*—Owner of Ship—Contract for Pur-
of Share in Ship—Equitable Part
of Ship—Merchant Shipping Amend-
Act*, 1862 (25 & 26 *Vict. c.* 63), *s.* 3.

*made a bona-fide contract for the
se of one sixty-fourth share in a
ship and paid a deposit thereon.
quently, and before any transfer of
re, he supplied an apprentice to the
not being licensed under section* 146
Merchant Shipping Act, 1854. *The
of Trade summoned him for a penalty
section* 147:—Held, *that he was not
as he was "owner" within the ex-
in sub-section* 1 *of section* 147,
by virtue of section 3 *of the Mer-
Shipping Amendment Act*, 1862, *was
read as including equitable owner.*

is was a Case stated under 20 & 21
c. 43, by Sir R. Carden, Alderman
Justice of the peace for the City of
on, upon his refusal to convict the
dant Sutherland in a penalty under
n 147 of the Merchant Shipping
1854 (17 & 18 Vict. c. 104).
ction 146 of that Act says that the
l of Trade may grant to such per-
as it thinks fit licences to engage or
y seamen or apprentices for mer-
ships in the United Kingdom.
ction 147, sub-section 1, provides, "If
erson not licensed as aforesaid other
the owner or master or a mate of
hip, or some person who is *bona fide*
rvant and in the constant employ of
wner, or a shipping master duly ap-
ed as aforesaid, engages or supplies
eaman or apprentice to be entered
oard any ship in the United King-
he shall for each seaman or appren-
o engaged or supplied incur a penalty
xceeding 20*l.*"
e facts were shortly as follows: In
quence of an advertisement inserted
e defendant on the 3rd of February,
, to the effect that owners of splendid
required respectable youths as ap-
prentices, a man named Axtell called with his son on the defendant on the 12th of February, with a view of having the boy entered as an apprentice. The defendant said that he had a ship sailing in a fortnight, and he sent them to the man who was engaging the crew, one William Price, with whom the premium was agreed and paid on the 19th of February, and to whom the boy Axtell was apprenticed by deed of that date.

Sutherland had no licence from the Board of Trade, but it was contended that he came within the exemption as "owner," by reason of the circumstances following:—

On the 23rd of September, 1879, the registered owner of the ship *Aphrodite* was Mc Intyre senior.

On the 3rd of October, 1879, Mc Intyre senior and Mc Intyre junior were registered as joint owners of 48 shares, and one Grimond of the remaining 16 shares. The register so continued unaltered till the 4th of March, 1881.

On the 8th of December, 1880, Oswald & Co. were in fact, as found in the case, owners of the ship, and on that day Oswald & Co. entered into a contract with Price to sell the ship to him.

On the 9th of December, Price agreed to sell one sixty-fourth share to the defendant, and on the 1st of January, 1881, the defendant paid Price 5*l.* on account of such share; and it was found in the case that defendant's purchase was *bona fide*.

Early in January, 1881, Price obtained possession of the ship, and on the 9th of January, Grimond transferred to Price by bill of sale his 16 shares.

On the 28th of February, Mc Intyre, senior and junior, by bill of sale, transferred their 48 shares to Price. On the 3rd of March Price, by bill of sale, transferred one share to Sutherland; and on the 4th of March Price registered himself as owner of the whole 64 shares, and on the 7th of March as managing owner.

A. L. Smith, for the appellant.—The magistrate ought to have convicted. Sutherland was evidently carrying on a business of supplying apprentices without a licence. He was not "owner" within the Act. On the 12th of February,

when the offence was committed, he had no property in the ship. "Owner" does not mean mere equitable owner, but one who had a legal property in the ship at the time when he supplied the apprentice. *The Liverpool Borough Bank* v. *Turner* (1), affirmed on appeal (2), shews that no equitable title can override the statute; and as by section 55 the sole way in which a British ship can be transferred is by bill of sale, equity will not decree specific performance of a contract to transfer if the statutory formalities have not been complied with.

The Union Bank of London v. *Lenanton* (3) confirms the proposition that a registered British ship must be transferred as directed by section 55.

[LORD COLERIDGE referred to *Stapleton* v. *Haymen* (4).]

That case was after the Amendment Act, but the Judges did not question the correctness of the previous decision in *The Liverpool Borough Bank* v. *Turner* (1). And in that case there was a transfer by bill of sale in the form prescribed and the plaintiff had a legal title.

The Amendment Act, 1862 (25 & 26 Vict. c. 63), does not really affect the meaning of "owner" in section 147 of the principal Act, part 3. It only declares "that 'beneficial interests,' where used in the second part of the principal Act, include interests arising under contracts and other equitable interests," and refers really to section 100. It therefore only enables a man to enforce equitable contracts, but does not while they are not enforced make him owner for the purpose of evading the provisions against crimping.

[LORD COLERIDGE, C.J.—Is not a man who has the beneficial interest in an enforceable contract as to the whole ship, outside the mischief of crimping?]

That might be so; but here there was only a 5*l.* deposit, and Price was afterwards registered as sole owner.

Meicklereid v. *West* (5), which may be cited, only shews that "owner" does not necessarily mean "registered owner." That is admitted, but it is contended that it must mean "legal owner."

Besley (*Gill* with him), for the defendant.—It being found as a fact that defendant bought *bona fide*, the quantity of his interest is immaterial. Then Price had the full control over the ship in January; he was owner within *Meicklereid* v. *West* (5), and if so could make a valid contract with the defendant. Price was engaging the master and crew in January and did engage this apprentice; he would be equally liable to a penalty if the prosecutor be right.

In *Batthyany* v. *Bouch* (6) this Court held that the Amendment Act, 1862, entirely got rid of the judgment in *The Liverpool Borough Bank* v. *Turner* (1), and so a person beneficially interested in a ship is now to be treated as an owner. If a ship is demised for a long time, as in *Meicklereid* v. *West* (5), can it be said that the charterer would incur penalties for engaging the crew?

A. L. Smith, in reply.

LORD COLERIDGE, C.J.—I am of opinion that the magistrate was right and that his judgment must be affirmed. The circumstances were these: The person summoned and whom it was desired to convict under section 147, if it were possible to do so, was a person who had undoubtedly supplied an apprentice to the ship *Aphrodite*, and the sole question is whether he was owner within the exception of the 1st sub-section.

The act of supplying the apprentice was on the 12th of February, 1881. In the December previous a contract had been entered into between the accused and Price for the purchase and sale of one sixty-fourth of the shares in the ship. Price, the vendor, was not then the registered owner; he had not the full legal property. He again had a contract for purchase with Oswald & Co., who were the owners at the time. The contract between Price and Sutherland (the defendant) was so far perfected that a deposit was paid in January, and if equity

(1) 29 Law J. Rep. Chanc. 827.
(2) 30 ibid. 379.
(3) 47 Law J. Rep. C.P. 409; Law Rep. 3 C.P. D. 243.
(4) 2 Hurl. & C. 918; 33 Law J. Rep. Exch. 170.
(5) 45 Law J. Rep. M.C. 91; Law Rep. 1 Q.B. D. 428.
(6) *Ante*, p. 421.

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[IN THE QUEEN'S BENCH DIVISION.]

1881. March 23. ERICHSEN (*representative of the London Agency of the Great Northern Telegraph Company of Copenhagen*) (*appellant*) *v.* LAST (*surveyor of taxes*) (*respondent*).

Income Tax—Foreign Corporation with English Agency — Telegraph Company transmitting Messages to Foreign Countries —16 & 17 Vict. c. 34. s. 2. sched. D— "Profits accruing from any trade exercised within the United Kingdom."

A foreign telegraph company had an agency in this country, and, besides cables and lines abroad, three marine cables with shore ends landed here, through which it despatched and received messages between this country and various parts of the world. The total charges for messages hence were paid by the senders, and the amount, after deduction by the Post Office, which received the charges in the first instance, of sums due to it on messages from or to this country, was paid to the agency, which in its turn retained the sum due to the company for the transmission of messages over the cables and lines of the company and paid over the residue to various foreign governments and companies entitled thereto. The agency was assessed to income tax upon the profits of the company from the sums so received by it. Upon appeal by the agency from a confirmation of such assessment,—Held, *that the company exercised a trade, employment or vocation in the United Kingdom, within the meaning of* 16 *&* 17 *Vict. c.* 34, *sched. D, and that income tax was payable by the agency upon the profits accruing to the company therefrom.*

CASE stated under 37 Vict. c. 16. s. 9, by the Commissioners for the general purposes of the Income Tax Acts for the city of London.

1. The Great Northern Telegraph Company of Copenhagen is a foreign corporation, having its seat at Copenhagen, and resident there.

2. The company has three marine cables in connection with the United Kingdom—one at Peterhead, in Scotland, and two at Newbiggin, near Newcastle. These cables are in connection with telegraph lines under the control of Her Majesty's Postmaster-General at Aberdeen and Newcastle; and, under agreements set forth in the schedule to this case (1), separate wires from Aberdeen to Newcastle, and from Newcastle to London, have been provided by the Post Office for the traffic passing over the company's said cables to and from the Continent.

3. In accordance with the said agreements, these separate wires are worked by the company's staff, and the company has workrooms with a staff of servants at Aberdeen and Newcastle, and workrooms in Winchester Street, in the city of London; and the rents of the workrooms and salaries of the staff, consisting of about forty clerks and electricians, are paid by the company.

4. Messages sent from this country to, say, Japan, pass over—first, the lines of the Post Office in this country; secondly, over the said marine cables of the company; thirdly, over land lines in Denmark belonging to the Danish Government; fourthly, cables in the Baltic belonging to the company; fifthly, land lines in Russia belonging to the Russian Government; sixthly, cables east and south of Russia belonging to the company. Similarly, messages from this country to various parts of the world pass over the said three marine cables of the company, and, subsequently, over cables and lines belonging to foreign governments or to other companies, or over cables or lines belonging to the company but having their commencement by attachment to cables or lines not owned by the company.

5. Under the international telegraph convention, to which the British Government has adhered, the total charges from the handing-in station in the United Kingdom to the place of destination abroad are, except as hereinafter stated, collected and received by the Post Office telegraph department, which retains out of such total charges the sums due to it under the said agreements in respect of messages sent from the United Kingdom to abroad and received in the United Kingdom from abroad, and hands over

(1) The schedule is omitted as immaterial.

alance to the company, which in its retains out of such balance the sum to the company in respect of the missions of messages over the cables lines of the company, and pays over esidue to the various governments ompanies respectively entitled to the

By special arrangement with the Office, the company receives payment t from a few firms who desire to hand eir messages direct to the company, ccounts out of such receipts to the Office.

The expenses incurred by the com- in the transmission of messages the said separate wires in the United dom exceed the earnings received by ompany in respect of the same, and ofits are made by the company from se of the land lines in the United dom.

At a meeting of the said Income Tax nissioners held on the 23rd of May, for hearing appeals, the above- d appellant appealed against an as- ent of 40,000*l.* for the year ending h of April, 1877, under schedule D Income Tax Acts, in respect of the s of the business alleged to be car- n in the United Kingdom by the y of the company.

It was contended for the appellant as no profits were derived from the nission of the messages over the lines used by the company in the d Kingdom, there were no profits by the company within the United lom, and in these circumstances no ty to income tax attached to the ny. It was further contended for pellant, that, if liable at all, the com- (through its agent) was only liable assessed in respect of the profits l by the company in the United lom from the transmission of mes- over the said three marine cables, ot further or otherwise.

The respondent (the surveyor of admitted that the Great Northern aph Company was a foreign com- domiciled in Copenhagen; but he ded that, as its agency in this y despatched messages to the com- offices in Aberdeen and Newcastle, and thence by its own cables from those places to Norway, Denmark and Sweden, and from thence by the company's own wires and the wires of foreign governments to Russia, China, Japan and India, and as the entire charges of transmitting such messages from this country were paid by the senders and were received by the agency in London, the amount so received being 70,000*l.* per annum (on the average of the three preceding years), the company, through its agent, was chargeable to income tax on the balance of profits or gains arising from the total sums received in this country from the transmission of messages.

11. The commissioners, taking this view of the case, confirmed the assessment in respect of the entire profits of the agency, calculated on the total sums received by the company in this country, subject to the production of accounts shewing the total receipts and expenditure in each year; whereupon the appellant expressed his dissatisfaction with the decision, as erroneous in point of law.

The question for the opinion of the Court is, whether, under the circumstances herein stated, the company is (through its agent) bound to make a return and is chargeable to income tax; and, if yea, upon what principle the annual profits of which the company is bound to make a return, and on which it is chargeable to income tax, are to be ascertained; or whether, as was contended for the company, the company is not bound to make a return and is not chargeable to income tax.

Bremner (*Sir H. S. Giffard* with him), for the appellant.—The company, being a foreign corporation resident abroad, is, if liable at all, liable only under that clause of 16 & 17 Vict. c. 34, sched. D, which makes income tax payable "in respect of the annual profits . . . . accruing to any person, . . . whether a subject of Her Majesty or not, although not resident within the United Kingdom, from any . . . . trade, employment or vocation exercised within the United Kingdom." And that clause does not support the assessment appealed from or any assessment whatever upon the

company. First, as to the assessment appealed from, and, in particular, as to so much of it as assesses not merely profits divisible among the shareholders of the company, but the total sum handed over (as stated in paragraph 5 of the case) by the Post Office to the company, including what the company is bound to hand over and does hand over to foreign governments and companies.

[*Sir H. James* (*Attorney-General*).—Income tax is not claimed upon anything but the profits divisible among the shareholders of the company.]

Secondly, as to so much of the company's receipts in this country as may be attributable to the transmission of messages by cables and lines of the company abroad, not connected with this country save through cables or lines not belonging to the company. That part of the company's receipts clearly cannot be said to be earned here, and the company is not taxable thereon—*Sully* v. *The Attorney-General* (2). Thirdly, as to the only remaining part of the company's profits, namely, such profits as it may derive from its three marine cables touching this country. Such profits, likewise, cannot be said to be earned here—to be "profits accruing from any trade, employment or vocation exercised within the United Kingdom." Railway companies are held to carry on their business where their business is controlled—*Brown* v. *The London and North Western Railway Company* (3). This company carries on business at Copenhagen, not here.

Sir H. James (*Attorney-General*) (*Sir F. Herschell* (*Solicitor-General*) and *Dicey* with him), for the respondent.—The company exercises a trade in this country, and must accordingly be assessed on the profits accruing to it from the trade so exercised. The company by its agents in this country makes contracts for the transmission of messages from this country, receives money for transmitting the messages and transmits the messages. Though part of what is done in relation to the messages may be done elsewhere, still the trade is exercised here. The facts in *Sully* v. *The Attorney-General* (2) were very different from those of the present case; and so far as that case is an authority in the present one it makes in favour of the Crown, for the profits in question in this case "come home" to the company here. The severableness of the business carried on here from the business carried on by the company elsewhere is shewn, if authority be needed, by *The Attorney-General* v. *Alexander* (4) and *Gilbertson* v. *Ferguson* (5).

Bremner, in reply.—The trade is exercised at Copenhagen. The profits "come home" to the company there.

LINDLEY, J.—I am of opinion that the contention on the part of the appellant is not sustainable; that is to say, I am of opinion that the company is liable to income tax upon the profits accruing to it from the business which it carries on in this country.

The company is resident in Denmark, and in a sense carries on its business there. It has three marine cables with shore ends landed in this country, and therefore has property in this country which is essential to its business. It has also other cables and lines: thus, messages from this country to Japan, according to paragraph 4 of the case, pass, first, over the Post Office lines in this country; secondly, over one or other of the company's three marine cables landed in this country; thirdly, over land lines belonging to Denmark, again over cables belonging to the company, afterwards over land lines belonging to Russia, and then again over cables belonging to the company. The business is carried on thus: The total charges for the transmission of messages to the destination abroad are (in general) received by the Post Office, which retains thereout the sums due to it and hands over the balance to the company, which in its turn retains what is due to it, and hands over the residue to the various governments and companies entitled thereto. No question arises as to the

(2) 5 Hurl. & N. 711; 29 Law J. Rep. Exch. 464.

(3) 4 Best & S. 326; 32 Law J. Rep. Q.B. 318.

(4) 44 Law J. Rep. Exch. 3; Law Rep. 10 Exch. 20.

(5) 49 Law J. Rep. Exch. 536; Law Rep. 5 Ex. D. 57.

so handed over by the company, the
i making no claim against the com-
:o income tax thereon. The ques-
slates to the moneys remaining in
nds of the company, and is, whether
ompany is liable to income tax as
ng on business in the United
lom or having property in the United
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ather think that in a general sense
mpany carries on business at Copen-
, not in the United Kingdom. But
s not follow that for the purposes of
ct of Parliament the company does
arry on business here, or, in the
of the Act, exercise a trade, em-
ent or vocation within the United
lom. And it seems to me that it
be a strong thing to say the com-
does not receive profits from a trade
sed within the United Kingdom.
cases do not help us much. The
ttoman Bank cases—*The Attorney-
al* v. *Alexander* (4) and *Gilbertson
rguson* (5)—are unlike the present
n the questions which were there
sed. Again, *Sully* v. *The Attorney-
al* (2) was a very different case from
The claim made by the Crown in
case was an attempt to make a
er, resident in this country, of an
ican firm pay income tax upon the
profits of the firm, though none
d here.

hink this company is liable to pay
e tax on the profits accruing to it
the trade which it exercises within
nited Kingdom. How to ascertain
profits is a matter which we are not
sent called upon to determine.

LLIAMS, J. — I am of the same
n. This company, though not resi-
in the United Kingdom, but at
hagen, and carrying on business at
hagen, exercises (within the mean-
f the Act of Parliament) a trade
n the United Kingdom, consisting
eiving and transmitting messages.
ownership of the cables is, I think,
terial; whether the company owns
or hires them or pays toll for the
f them is, I think, of no importance.
only question for us is whether the
any exercises a trade here.

THEW, J.—I am of the same opinion. And I cannot think there can be any difficulty in ascertaining the profits accruing to the company from the business carried on here.

Judgment for the respondent (6).

Solicitors—Ashurst, Morris, Crisp & Co., for appellant; Solicitor of Inland Revenue, for respondent.

[IN THE QUEEN'S BENCH DIVISION.]

1881. June 1. THE ATTORNEY-GENERAL *v.* THE METROPOLITAN RAILWAY COMPANY.

Railway Passenger Duty—Cheap Trains Act (7 & 8 *Vict. c.* 85. *ss.* 6 *and* 9)—*Exemption from Duty — Third-Class Passenger.*

To constitute a train complying in other respects with the statutory requirements a cheap train within section 6 *of* 7 & 8 *Vict. c.* 85, *entitling the railway company to exemption from passenger duty under section* 9, *no third-class passenger must be charged more than the parliamentary fare.*

This was an information by the Crown against the Metropolitan Railway Company under section 4 of 5 & 6 Vict. c. 79 (1), in respect of passenger duty, from which the latter had claimed exemption, alleging that the fares were those of third-class passengers carried on their line by cheap trains within the meaning of 7 & 8

(6) The order entered was (formal parts omitted) as follows: "The Court decide that the company, through its agent, is bound to make a return, and is chargeable to income tax on the balance of profits or gains arising from the total sums received in this country from the transmission of messages, and confirm the determination of the said commissioners."

(1) By 5 & 6 Vict. c. 79. s. 2, duties on passengers conveyed upon railways were directed to be levied as set forth in the schedule, namely, "for and in respect of all passengers conveyed for hire upon or along any railway a duty at and after the rate of 5*l.* for every 100*l.* upon all sums received or charged for the hire, fare or conveyance of all such passengers."

Vict. c. 85. s. 9 (2), at a rate not exceeding one penny per mile.

The facts appearing on the information and answer were shortly these: Before 1873 the railway company ran one cheap train each way in the early morning in compliance with section 6 of 7 & 8 Vict. c. 85 (3), as was admitted by the Crown, who made no complaint.

From 1873 to 1878 the morning cheap train was discontinued, and the company then issued one ticket, and after a time two tickets, at the prescribed parliamentary fare from each station to every other station by each train throughout the day. They then claimed exemption from the passenger duty in respect of all passengers travelling by all their trains at less than one penny per mile. After 1878 they abandoned this restriction, and issued any number of tickets at the parliamentary rates by every train to persons asking for them; but having provided two sorts of tickets called third-class and parliamentary respectively, the practice was, if a passenger asked for a third-class ticket to give him the former, the price of which was in some cases at the rate of 3*d.* a mile, and only if he asked for a "parliamentary ticket," *eo nomine*, to give him the latter at the one penny a mile rate. The carriages for persons holding either sort of ticket were the same. Thus all their trains being alleged to be cheap trains within the Act, the company had obtained exemption from duty in respect of all fares under one penny a mile.

It appeared that although the parliamentary fare was less than the third-class fare for short distances, as between Aldgate and Edgware Road and intermediate stations, the two were equal at Praed Street or Bishop's Road, and beyond, the parliamentary fare exceeded the third-class.

The company would thus obtain exemption in respect of the third-class long distance fares.

The Attorney-General (*Sir H. James*) (*The Solicitor-General* and *A. V. Dicey* with him), for the Crown, argued that the company did not by any of the above modes comply with the Act; and that if the exemption was to be claimed the train must be "such cheap train" within the Act—that is, no third-class passengers must be charged more than one penny a mile.

Benjamin and *Henry Fellows*, for the company.—The public have had full accommodation, and the preamble shews that the object was to provide for the travelling of the poorer classes cheaply. The sections must be construed in that spirit, and the words "third-class passengers" in section 6 must be read as meaning the poorer class who travel at one penny a mile. In section 9 (2), the word is simply "passenger." In *The Attorney-General* v. *The North London Railway Company* (4), Amphlett, B., says there is no definition of "third-class passenger" in the Act, and we think it would be unreasonable to hold that the question

(2) 7 & 8 Vict. c. 85. s. 9: "That no tax shall be levied upon the receipts of any railway company from the conveyance of passengers at fares not exceeding one penny for each mile by any such cheap train as aforesaid."

21 & 22 Vict. c. 75, enacts: "That for fractions under one mile a third-class passenger in the cheap trains may be charged a penny."

(3) By 7 & 8 Vict. c. 85. s. 6, it was enacted: "That all passenger railway companies shall, by means of one train at the least to travel along their railway from one end to the other of each trunk, branch or junction line belonging to or leased by them, so long as they shall continue to carry other passengers over such trunk, branch or junction line, once at the least each way on every week day provide for the conveyance of third-class passengers to and from the terminal and other ordinary passenger stations of the railway under the obligations contained in their several Acts of Parliament, and with the immunities applicable by law to carriers of passengers by railway, and also under the following conditions; that is to say:—

"The fare or charge for each third-class passenger by such train shall not exceed one penny for each mile travelled."

Section 7: "That if any railway company shall refuse or wilfully neglect to comply with the provisions of this Act as to the said cheap trains within a reasonable time, or shall attempt to evade the operation of such order, such company shall forfeit to Her Majesty a sum not exceeding 20*l.* for every day during which such refusal, neglect or evasion shall continue."

(4) 43 Law J. Rep. Exch. 223; Law Rep. 9 Exch. at p. 334.

ıer a person is a third-class pas-
r should depend on the number
l to his carriage or ticket." Again,
words are construed strictly the
ıny would not be able to have any
ır second-class carriages or fares by
ıp trains."
ı *Attorney-General* was not heard in

DDLESTON, B.—It seems to me that
ct 5 & 6 Vict. c. 79 provides that
n duties should be levied upon pas-
rs conveyed upon a railway at a rate
ioned in the schedule. Then 7 & 8
c. 85, by section 9 (2), exempts from
ion the receipts of railway companies
e conveyance of passengers at fares
xceeding one penny per mile by any
cheap train as aforesaid. What is
lass of train which is exempted?
which comes within the 6th section.
ounsel for the railway company here
been bound to admit that the trains
estion do not in terms come within
th section, for the fare for each third-
passenger cannot be said not to ex-
one penny per mile, but they con-
that they come within the spirit of
Act. We have, however, to decide
ding to what is enacted not accord-
ı what might have been, and looking
ə words of the 5th clause of the 6th
ɔn I find that one of the principal
ituents of cheap trains is that the
'or each third-class passenger shall
xceed one penny a mile. As these
s are not within the 6th section it
vs that they are not entitled to ex-
ion within the 9th. I have already
ated that I do not think section 7 (3)
es in any way so as to relieve the rail-
company from payment of this duty,
if under that section they are liable
nalties.

WKINS, J.—I am of the same opinion.
quite clear that the railway company
iable to duty unless they can bring
selves within the exemption. The
argument that could be addressed to
as really to the effect that although
ompany had not complied with the
te, they had given the public a good
more accommodation than if they had done so. But we have to look at the Act of Parliament as it is before us, and by its provisions the exemption only applies to such cheap trains as are pointed out by section 6, and which these are not.

Judgment for the Crown.

Solicitors — The Solicitor to Inland Revenue, for the Crown; Burchells, for the railway company.

[IN THE QUEEN'S BENCH DIVISION.]

1881.
May 23, 24.
June 3.

CAVE *v.* HASTINGS.

Contract—Writing—Statute of Frauds (29 Car. 2. c. 3), s. 4—Parol Identification of "Arrangement" with Agreement in Writing.

In an action for breach of an agreement for the hire, at a monthly payment, of a carriage of the plaintiff for more than a year from the agreement, in which the Statute of Frauds, s. 4, was relied on as a defence, it appeared that an agreement, such as the one sued on, was made, the terms of which were contained in a memorandum signed by the plaintiff but not by the defendant; that in a letter to the plaintiff, signed by the defendant, the defendant referred to "our arrangement for the hire of your carriage," and to "my monthly payment," and that the only arrangement which he could mean was the agreement contained in the memorandum signed by the plaintiff:—Held, *that there was a sufficient memorandum in writing signed by the defendant.*

This was an action for damages for breach of an agreement alleged to have been made on or about the 1st of December, 1879, for the hiring by the defendant from the plaintiff of a carriage for a year, from the 1st of January, 1880. The statement of defence, so far as material, alleged that if any agreement was

made between the plaintiff and the defendant there was no written and signed memorandum or note thereof, such as was required by the 4th section of the Statute of Frauds.

At the trial before Lopes, J., it appeared that an agreement such as the agreement sued on was in fact made, and that the terms of it were contained in a memorandum dated the 1st of December, 1879, and signed by the plaintiff (but not by the defendant), which was as follows:—

"I hereby agree to provide you with a Victoria (selected), horse, harness and coachman, to your satisfaction, for one year, from the 1st of January, 1880, for the sum of 18*l.* 10*s.* a month; occasionally, in wet weather, the use of a brougham."

The only document signed by the defendant was a letter written by him to the plaintiff on the 11th of February, 1880, which was as follows:—

"You no doubt remember that it was agreed at our interview on the 28th of January that our arrangement as to the hiring of your carriage was at an end, and that you were not to send to me after the end of this month. I now find that I can dispense with your services after this week, and shall be glad to know what deduction you feel inclined to make from my monthly payment if I agree to give you your carriage on Saturday next."

The defendant admitted that in that letter he intended to refer to the agreement of which the terms were contained in the memorandum of the 1st of December; and it was proved that there was no other arrangement between the plaintiff and the defendant with reference to the hire of a carriage to which he could have intended to refer. The jury found that the agreement was not rescinded, and they assessed the damages at 25*l.* The learned Judge did not give judgment.

C. C. Scott, for the plaintiff (on May 23 and 24), moved for judgment.—The memorandum of the 1st of December, 1879, signed by the plaintiff, and the letter of the 11th of February, 1880, signed by the defendant, constitute together a sufficient writing within the 4th section of the Statute of Frauds. Parol evidence, if necessary, was admissible to identify the "arrangement" referred to in the letter of the 11th of February with the memorandum of the 1st of December—*Bidgway* v. *Wharton* (1), *Baumann* v. *James* (2), *Long* v. *Millar* (3).

He referred also to *Boydell* v. *Drummond* (4), *Buxton* v. *Rust* (5) and *Crane* v. *Powell* (6).

Gully and *Frith*, for the defendant.—The two documents being connected only by parol evidence there was no sufficient writing within the statute. The reference in the letter to "our arrangement" might be to some different arrangement by parol.

They referred to *Sykes* v. *Dixon* (7).

The judgment of the Court (8) was (on June 3) delivered by

FIELD, J.—In this action, tried before Mr. Justice Lopes, who did not give judgment, the question argued before us, on motion for judgment, was whether there was a sufficient memorandum in writing, signed by the defendant, of the agreement sued upon to satisfy the 4th section of the Statute of Frauds. It is clear that an agreement was in fact made between the plaintiff and the defendant on the 1st of December, 1879, for the hire by the defendant of a carriage for a year, from the 1st of January, 1880, upon the terms contained in the memorandum of the 1st of December, 1879, signed by the plaintiff. And the defendant, in consequence of something which took place at an interview on the 28th of January between him and the plaintiff, wrote the letter of the 11th of February, which refers to "our arrangement as to the hiring of your carriage," and to "my monthly pay-

(1) 6 H.L. Cas. 238; 27 Law J. Rep. Chanc. 46.
(2) Law Rep. 3 Ch. App. 508.
(3) Ibid. 4 C.P. D. 450.
(4) 11 East, 142.
(5) 41 Law J. Rep. Exch. 173; Law Rep. 7 Exch. 279.
(6) 38 Law J. Rep. M.C. 132; Law Rep. 4 C.P. 123.
(7) 9 Ad. & E. 693.
(8) Field, J., and Bowen, J.

ment." But it was contended on the part of the defendant that there was, nevertheless, no sufficient memorandum in writing signed by the defendant.

Now, it has long been settled that the whole of the agreement sued on need not appear on one document, but the agreement may be made out from several documents. The law on this subject is well stated in *Dobell* v. *Hutchinson* (9), where Lord Denman says, "The cases on this subject are not, at first sight, uniform; but on examination it will be found that they establish this principle, that when a contract in writing or note exists which binds one party, any subsequent note in writing signed by the other is sufficient to bind him, provided it either contains in itself the terms of the contract, or refers to any writing which contains them." It was, however, argued in this case that the reference to "our arrangement" might be to some different parol arrangement; but it seems to us that this reference to the former document is sufficient, in accordance with the principle laid down in *Ridgway* v. *Wharton* (1), where "instructions" were referred to, and it was considered that parol evidence might be given to identify the instructions referred to with certain instructions in writing. That principle was applied in *Baumann* v. *James* (2); and further, in *Long* v. *Millar* (3), where Lord Justice Bramwell says, "I may further illustrate my view by putting the following case: Suppose that A writes to B, saying that he will give 1,000*l.* for B's estate, and at the same time states the terms in detail, and suppose that B simply writes back in return, 'I accept your offer.' In that case there may be an identification of the documents by parol evidence, and it may be shewn that the offer alluded to by B is that made by A, without infringing the Statute of Frauds, s. 4, which requires a note or memorandum in writing." Apart from the admission of the defendant that he did intend to refer to the agreement of which the terms were contained in that memorandum, it was shewn conclusively that there was no other arrangement to which he could have intended to refer. Under these circumstances, having regard to the principle laid down in the cases to which I have referred, our judgment must be for the plaintiff.

Judgment for plaintiff.

Solicitors—C. J. C. Pridham, for plaintiff; Foss & Legg, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1881. May 10, 11. July 4. } SAXBY *v.* THE GLOUCESTER WAGGON COMPANY (LIMITED).

Patent—Infringement of Patent Rights—Combination of Prior Inventions—Novelty.

The plaintiffs brought an action to recover damages for the infringement by the defendants of letters patent granted to the plaintiffs in 1874, *for an invention of improvements in interlocking apparatus for railway points and signals. The invention in respect of which the patent had been granted was the combination of two prior inventions, which the defendants proved any person of ordinary knowledge on the subject would be able to effect by only placing the two inventions side by side, without making any further experiments or gaining any further information:*—Held, *that the plaintiff's invention was not of sufficient novelty, and did not require such an amount of skill and ingenuity as to render it the proper subject of a patent.*

This was an action brought by the plaintiffs for the infringement of a patent. The facts and arguments appear from the judgment.

Sir John Holker, *Theodore Aston* and *Macrory*, for the plaintiffs.

Webster, *Lawson* and *R. S. Wright*, for the defendants.

Our. adv. vult.

The judgment of the Court (1) was (on July 4) delivered by

FIELD, J.—This is an action brought

(1) Lord Coleridge, C.J.; Field, J.; and Bowen, J.

(9) 3 Ad. & E. 355.

to recover damages for the infringement by the defendants of letters patent granted to the plaintiff, John Saxby, on the 23rd day of January, 1874, and at the trial before Mr. Justice Hawkins, that learned Judge made an order under the Judicature Act of 1873 that all the issues of fact in it should be tried before one of the official referees.

Mr. Anderson accordingly tried those issues, and after a long and careful hearing of the evidence and examination of the models and drawings, made his report on the 26th day of November, 1880.

The invention claimed was described in the specification as capable of being performed in two ways, the second being a modification of the first; and the defendants admitted that they had in fact infringed the invention as firstly described.

They alleged, however, as to it, and also as to the modification—first, that the inventions claimed were not inventions of improvement; secondly, that John Saxby was not the true and first inventor; and thirdly, that the inventions claimed were not new.

The objection of want of novelty extended to both branches of the specification, and if well founded is irremediably fatal to the whole of the patent.

The other objection—that John Saxby was not the true and first inventor—was applicable to the first invention only, and if well founded may possibly be cured, as against any subsequent infringements, by disclaimer.

Mr. Anderson, by his report, sustained both objections, and the case was then brought before us upon motion by the plaintiff to set aside or remit to him his report, or to enter judgment for the plaintiff; and by the defendants to enter judgment in their favour.

On the argument of the motion we intimated the inclination of our opinion to be that the finding of the learned official referee upon the question of novelty was correct and ought not to be disturbed, and in that view any further argument upon the second point became irrelevant and was not proceeded with; and as, after consideration and comparison of the models and evidence, we have arrived, upon the question of novelty, at the same conclusion as the official referee, we now proceed to give our judgment for the defendants.

The letters patent in respect of which the action was brought were granted to the plaintiff Saxby in 1874, and were for an alleged invention of "improvements in interlocking apparatus for railway points and signals," and the defendants' case was that the invention claimed had been anticipated by prior patentees, and in particular by the inventor himself in 1871, by William Smith in 1870, and John Imray in 1872.

It was admitted by both parties that the question to be decided was one of fact whether or not the invention specified was such a substantial improvement on what had already been known and published as to render it the proper subject of a patent within the rule stated by Lord Westbury in *Spencer* v. *Jack* (2).

In order to see how this question ought to be answered, it should be observed that the inventions brought under discussion, as well those of 1870, 1871 and 1872 as that upon which the present case was founded, were all designed to effect, and did in point of fact, as far as any mechanical contrivance can do so, effect the same substantial object, namely, the prevention of accidents on railways arising from "conflicting signals or improperly arranged switches and points."

This prevention of accidents is sought to be brought about by an apparatus by which the signal or pointsman, for the purpose of making some necessary change in the position of the points or signals, puts in motion a lever (or its catch rod), and by one and the selfsame operation not only effects the alteration which is required to be effected, but also "locks" or renders immovable some other lever or levers, without the use of which any "conflicting" change in road or signals cannot be effected, and sets free all other levers which after that alteration is effected may be required to be used, and which, when the alteration is effected, become what may be called "consistent" levers.

(2) 11 Law Times, N.S. 242.

Saxby v. *Gloucester Waggon Co.*, *Q.B.*

In considering the mode in which this is effected, it must be borne in mind that the normal condition of a railway, with its main and branch lines, is that the points are so set as that the main line forms a continuous way for the train to pass over, and that the branch line is so disconnected from the main as that no branch train shall be able to come upon the main road.

The connection or disconnection of the road is (as is well known) effected by movable points, which must be moved or set free when any change is required.

The points and the main and branch-line signals are also each actuated or set free by means of a separate signal lever for each signal.

In the normal condition all these levers are set in a frame side by side so as to be conveniently under the control of the pointsman.

At the time that all these levers are so in their normal position, the "road" is "main," and all signals, whether "main" or "branch," are at "danger," so that no train from any direction is at liberty to come into the station until invited to do so by some alteration of the signals.

It is of course, however, essential that the signals which are consistent with the safe use of the road should be free to move to "safety," so that such use may be invited, and all the other signals which, in the then state of the road are conflicting signals, should be immovable at "danger."

It is also further necessary that the "point" lever itself should be immovable or "locked" in the position in which it may happen to be when the road is being used, whether for "main" or "branch," and should continue so locked until any necessary change of operations is required, in which case it can only be set free by altering the position of the signal to "danger," and thus rendering the operation of altering the points safe. In other words, the "road" and "signals" must be in harmony with each other, and no change should be capable of being effected in the road except by the very act of setting the "danger" signal against the use of it in its altered state.

All these necessary conditions are complied with by the apparatus described in John Saxby's patent of 1874, and are effected by the operation of nine separate parts, which may be roughly divided into such as are part of the "actuating process," and such as form what is (with sufficient accuracy) called the "locking gear."

It was admitted by the plaintiffs that all these nine parts were in 1874 in themselves "old," and that no new result was obtained by their combination in the patent of 1874 different from that which had been obtained by some one or more previous inventor.

The mode in which these parts were brought into play and used was this: by grasping the "catch spring" of any one "lever," a "rocker" is actuated so as to communicate motion by means of a jointed "rod" and "link and crank" to a "rocking shaft," and to cause the latter partially to rotate on its axis, and by that mere grasp all conflicting levers are at once locked. This is effected by the "rotatory" movement of the rocking shaft having caused a "horizontal sliding bar" (to which a projection on the rocking shaft is connected) to move just so far as to cause a projection in it to come into contact with a solid part of an arm on the "rocking shaft" of the lever to be locked.

This last rocking shaft is thus rendered incapable of motion, and as it has a metallic connection to the catch rod of the conflicting lever, a rigid bar is as it were formed between the two levers, rendering of course the conflicting lever itself immovable.

The operating lever is then pulled over, and at the termination of its movement a further precisely similar operation is effected, by which the obstacle is still further carried over in the way of the rocking shaft, and the locking is complete, and the conflicting lever must remain so locked until, if the conflicting lever itself is required to be used, the obstacle is removed, or, in other words, the lever freed.

By the same movement by which this locking of the conflicting lever is effected, other projections on the sliding bar, which

are obstacles to the movement of the rocking shafts of "consistent" levers, in their then position, have been moved away from the solid part of the rocking shaft opposite holes or hollow spaces in the arms of it, so that the rocking shaft in question has become capable of movement and its lever is free.

By these means any lever, whether point or signal, can be locked by the same operation which renders its use dangerous, and any signal can be freed by the same operation which renders its invitation safe.

The two operations effected are, first, the formation of this "lever" in use in its then necessary condition, and the "conflicting" lever into one solid bar; and, second, the dissolution of a similar rigid connection between any lever and its "consistent" lever, which it is necessary to have free.

Now, the question raised being whether this "apparatus" was new at the date of Saxby's patent of 1874, it was first of all urged by the defendants that so much of it as consisted of the "actuating process" was substantially identical in parts, principle and result with a previous patent of John Saxby of 1871, and it was in effect admitted on the part of the plaintiff that, with the exception of a "link and crank," by means of which the motion was communicated from the rocker to the rocking shaft, all the elements of this part of the process were to be found in that patent.

It was, however, truly said in answer that the "link and crank" were not to be found in the specifications of 1871, and indeed the official referee found as a fact that it did not appear that there had been any prior combination or union of the parts specified by that means; but it is clear the use of a link and crank for the purpose of transmitting and changing the direction of motion was a thing well known, and the official referee found, as it seems to us quite rightly, that the combination in this respect in the patent of 1874 "might have been executed by any intelligent mechanical workman with no other instructions given to him than those described in the specification of Saxby, 1871, which are as follows: "It may be readily understood that the action of the rocker could be applied to locking gear of other kinds, the movement of the rocker being communicated by bell cranks, rocking shafts or other known means to the various parts of the apparatus which it is intended to set in motion or arrest, the leading principle embodied in my invention being nevertheless maintained in such apparatus."

It was also contended on the part of the plaintiff that a hole which Mr. Saxby pointed out in his evidence in the rocking shaft of Saxby, 1874, was an addition which constituted a novelty; but the referee considered that to be a mistake, as both in Smith, 1870, and in Imray, 1872, there was a corresponding hole in the rocking shaft.

Taking, therefore, the "actuating process" by itself, we can see no ground for differing with the official referee in his view that there was no novelty in that combination sufficient to constitute a patent.

Now with regard to the residue or passive part of the process it was urged on the part of the defendants that this portion of the invention had been anticipated by Smith in 1870.

By the apparatus specified by Smith, as in Saxby's first invention of 1871, the operation of "locking" was effected by the motion of the "lever" itself instead of the mere grasping of the spring catch of the rod attached to and carried by it, and the mode by which the locking was effected by Smith was shortly this: To the lower portion of the actuating lever was attached a projecting rod, all motion of which in the then position of the apparatus was prevented by the end of it impinging against the solid portion of a "rocking shaft," in principle similar to that of 1874, whereby a rigid connection was formed between the actuating lever and the rocking shaft which rendered the lever immovable so long as the rocking shaft was so also.

But the rocking shaft in its upper portion had a hole or hollow space of a size corresponding to the size of the projecting end of the rod, and by the action

of the operator by pressing with the foot upon the surface of the rocking shaft, the latter was made to rotate partially upon its axis, and thus to depress one arm of the rocking shaft and bring this hollow space opposite the end of the projecting rod, thus giving the rod free passage and destroying the rigid connection with the lever and enabling the operator to pull that forward—in other words, to render it free.

This "rocking shaft" also took into a horizontal sliding bar, identical in principle with that of Saxby of 1874, and the rotation of the rocking shaft actuated this sliding bar horizontally, so as to bring a projection on it into contact with a solid part of the rocking shaft of the conflicting lever, so as to prevent any downward motion of it setting free the rod attached to the lever, and thus established a rigid communication with the latter lever so that it could not be moved. The actuating lever being then pulled over (first description of 1874) caused the rod to pass through the hole in the rocking shaft, thus fixing that down until the completion of the operation. The lever thus being completely pulled over rendered that position permanent, and the operation of locking that lever was completely performed. But as it is also wanted to lock the actuating lever itself, Smith effected this by the depression of the rocking shaft of any "consistent lever," on which an arm was fixed, connected to an arm upon the rocking shaft of the conflicting lever. The depression of the consistent rocking shaft brought that arm of the conflicting rocking shaft into a hollow space in the projecting rod of that lever, thereby creating a rigid connection between the consistent and conflicting levers which effectually prevented any motion of the latter, and this was rendered permanent by bringing over the consistent lever and fixing the rocking shaft and its arm, so that the latter could not be moved.

The mere comparison of these two "locking gears" seems to us to establish a substantial identity between them; and indeed it was not denied by the witnesses who were called for the plaintiffs that, taking the two inventions of 1870 and 1871 together, and discarding all superfluous parts, every element of the patent of 1874 was to be found in one or other of those inventions.

The plaintiff's case was, therefore, reduced to this, that if the patent of 1874 is capable of being supported, it must be upon the ground that the combination in it of the two inventions of 1870 and 1871 required an exercise of such an amount of skill and ingenuity as to entitle it to the protection of an exclusive grant, and it was to establish this position that the plaintiff's evidence was in the main directed.

But there was also a very large body of evidence to the effect that any person of ordinary knowledge of the subject would, by placing the two inventions side by side, be able to effect the desired combination without making any further experiment or gaining any further information. Indeed, it was proved to the satisfaction of the official referee that this had in fact been done by a Mr. Harmer, a clerk of Mr. Edwards, who was in the employment of the London and North Western Railway Company, and who, in the autumn of 1873, had, with ordinary mechanical knowledge and merely by placing the two inventions side by side, made a drawing known as No. 13, which it was admitted shewed the combination of Smith of 1870 and Saxby of 1871, substantially like Saxby's modification of the inventions. Taking all these matters into consideration, we are unable to come to the conclusion that the official referee in thus giving effect to his own views and judgment upon the comparison of the inventions themselves, and having regard to the weight of evidence adduced before him, has erred in coming to the conclusion that he has reported to us.

Indeed, we think that we should have arrived at the same result, and we cannot, therefore, see any sufficient ground for setting aside or remitting his report, and on the contrary we feel ourselves obliged to act upon it by giving judgment for the defendants.

We have not thought it necessary to

state the effect and results of a comparison of Saxby's invention of 1874 with that of Imray of 1872, which we have carefully made, but we see no reason to doubt but that the learned official referee also arrived at a right result in reference to that invention.

Judgment for the defendants.

Solicitors—Faithfull & Owen, for plaintiff; J. H. Johnson, for defendants.

[IN THE COURT OF APPEAL.]

1881. March 1, 3. April 1.

BRADFORD *v.* SYMONDSON.*

Marine Insurance—Risk—Attachment of Policy—Re-insurance—Effect of, where Voyage covered by Previous Policy is completed.

The defendant underwrote a policy of insurance of goods on a voyage from Philadelphia to Rochfort, "lost or not lost," and he subsequently re-insured the same goods under a policy, "lost or not lost," made with the plaintiff, and describing the same voyage. When the second policy was made the ship had already arrived in safety, and her cargo had been landed undamaged, though these facts were unknown to the plaintiff and defendant. In an action to recover a premium from the defendant as assured under the second policy, it was,— Held (*affirming the judgment of* LORD COLERIDGE, C.J.), *that when the second policy was made the defendant had an insurable interest in the subject-matter; that the policy attached to the risk of the voyage insured by the first policy, and therefore that the plaintiff was entitled to recover.*

Appeal from a judgment of Lord Coleridge, C.J., after trial without a jury.

The action was to recover a premium of 75 guineas alleged to be due upon a policy of marine insurance effected by the defendant, an insurance broker, with the plaintiff, an underwriter at Lloyd's.

The statement of claim alleged that on the 23rd day of December, 1879, the defendant effected a policy of marine insurance, in the ordinary form, for 1,500*l.*, at a premium of 75 guineas per cent., which the plaintiff executed in consideration of the premium aforesaid, and thereby became and was an insurer to the defendant for the said sum of 1,500*l.* on cargo by the vessel *Alata*, lost or not lost, at and from Philadelphia to Rochfort, against risks and perils of the seas, and all other perils, losses or misfortunes that had or should come to the hurt, detriment or damage of the said subject-matter of re-insurance or any part thereof, and the said policy was therein declared to be a re-insurance.

The following (so far as is material) was the statement of defence:—

3. In effecting the policy mentioned in the statement of claim, the defendant acted as the agent for the Phœnix Insurance Company.

4. On the 3rd of October, 1879 (by a policy of that date to which the defendant craves leave to refer), the Phœnix Insurance Company insured the cargo of the vessel *Alata*, lost or not lost, from Philadelphia to Rochfort.

5. On the 14th of November, 1879, the *Alata* arrived at Rochfort, and the said insured voyage was at an end, and the risk under the said policy had run off, and there was no longer any risk or liability of any kind under the said policy, and neither the defendant nor the Phœnix Insurance Company had any interest at risk or was under any liability of any kind in respect of the *Alata* or under the said policy.

6. On the 23rd of December, 1879, no intelligence had been received of the arrival of the *Alata*, and the defendant and the Phœnix Insurance Company and the plaintiff believed that the risk of the Phœnix Insurance Company under their policy was still in existence, and (all parties acting in ignorance of the facts mentioned in the previous paragraph and through mutual mistake) the re-insurance of the 23rd of December, 1879, mentioned in the statement of claim, was effected.

* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Brett, L.J.

7. At the time of the said re-insurance neither the defendant nor the Phœnix Insurance Company had anything to insure, and the plaintiff in fact insured nothing and ran no risk of any kind, and is not entitled to recover the premium sued for in this action.

The following admissions were agreed upon between the parties:—

1. That on the 3rd of October, 1879, the Phœnix Insurance Company of New York executed the policy of insurance of that date, marked "A," on cargo by the *Alata*, from Philadelphia to Rochfort, and became liable to the assured in respect of the risks covered thereby.

2. That on the 23rd of December the defendant, a broker at Lloyd's, effected with the plaintiff the policy marked "B," which was executed by the plaintiff.

3. That the said policy marked "B" was effected by the defendant, as agent for the said Phœnix Insurance Company of New York, for their use and benefit, and on their account, as a re-insurance on the said cargo which they had so insured by the policy marked "A."

4. That the *Alata* sailed from Philadelphia to Rochfort on the 1st of October, 1879, with the said cargo on board, and that after she had sailed nothing had been heard of her by any of the said parties until after the policy marked "B" was effected.

5. That the ordinary course of a voyage from Philadelphia to Rochfort is six weeks.

6. That the said vessel arrived safely at Rochfort on the 14th of November, 1879, discharged her cargo, and sailed thence on the 18th of December, 1879, no claim of liability having arisen on the said policy marked "A," and that at the time of effecting the said policy marked "B" the plaintiff and the Phœnix Insurance Company did not know of the arrival and of the safety of the said vessel and her cargo.

7. That the defendant has not paid to the plaintiff the premium of 75 guineas per cent.

Lord Coleridge, C.J., gave judgment for the plaintiff.

The defendant appealed.

Benjamin and *French*, for the defendant. —The plaintiff is not entitled to recover. The subject-matter insured under policy B was never at risk. Insurance depends upon the actual state of facts. Where there is no risk in fact, but a risk which exists only in the minds of the parties, there can be no insurance. The question is the same as if when policy B was effected the ship had been lost or the voyage had never commenced. It was impossible from the nature of things that the underwriter could ever have had a liability under the policy. Both parties were under a mistake of fact in thinking there was any subject-matter of insurance —*Tyrie* v. *Fletcher* (1), where Lord Mansfield (at p. 668) states the general rule that "where the risk has not been run, whether its not having been run was owing to the fault, pleasure or will of the insured, or to any other cause, the premium shall be returned; because a policy of insurance is a contract of indemnity." As illustrating the rule there are also *Oom* v. *Bruce* (2), *Hentig* v. *Staniforth* (3) and *Sutherland* v. *Pratt* (4).

[BRETT, L.J.—*Oom* v. *Bruce* (2) is different from the present case, because there was never any risk during the whole voyage, which was illegal—the insured being an alien enemy.]

Here the policy never could attach, though it is admitted that if a loss had occurred during the voyage the policy would have attached. The words "lost or not lost" mean only that the insurer consents to a liability in the case of the ship having been lost which he would not otherwise incur—2 *Parsons on Insurance*, p. 44.

The general rule of law is stated in 1 *Parsons on Insurance*, p. 105; *Arnould's Marine Insurance* (5th ed.), vol. ii. p. 1066; *Park on Insurance* (8th ed.), vol. ii. p. 768. It is admitted that that one passage in Park (8th ed. vol. ii. p. 866) is against the defendant's contention. He says, "But if both parties be ignorant of the

(1) 2 Cowp. 666.
(2) 12 East. 225.
(3) 5 M. & S. 122; 4 Campb. 270.
(4) 11 Mee. & W. 296.

arrival, and the policy be (as it usually is) lost or not lost, I think in that case the underwriter should retain, because under such a policy, if the ship had been lost at the time of subscribing, he would have been liable to pay the amount of his subscription." This proposition is adopted in 3 *Kent's Commentaries* (12th ed.), p. 259, and 2 *Phillips on Insurance*, s. 1826; and *Emerigon on Insurance* (by *Meredith*), c. 15, s. 2, states a similar proposition, but his reasoning is founded on the fanciful doctrines of the civil law.

It is submitted that the English authorities already cited negative these propositions, and that the true rule is stated by Arnould (at p. 1066) thus: "The rule in fact is that if, through mistake, misinformation or any other innocent cause, an insurance be made without any interest whatsoever, the assured is entitled to recover back the whole premium."

Secondly, the assured in this case had no insurable interest. It is like the case where goods are insured and sold during the voyage, and a loss occurs after the sale—there a return of premiums can be had. A policy cannot attach to the subject-matter before the policy is made, and here, when the policy was made, the ship had arrived, the goods had been safely landed undamaged, and there was nothing which the defendant could insure.

Cohen and *Hollams*, for the plaintiff. —A contract of marine insurance is a contract to pay, for good consideration, for loss to the thing insured which has happened before, or may happen after, the making of the contract. If the policy is void, a return of the premiums (in the absence of fraud on the part of the person seeking to recover them back) can be had. Thus in *Oom* v. *Bruce* (2), relied on for the defendant, the policy was void in its inception. So also in *Hentig* v. *Staniforth* (3). In *Tyrie* v. *Fletcher* (1) the policy did attach to the subject-matter and the premium was retained.

A policy of marine insurance is only a wager—it is the sale of a risk; and in giving effect to it everything depends upon what was in the minds of the parties. Thus it has always been held that concealment, or an innocent representation by one of the parties which is not true, avoids the policy. If the argument for the defendant is good it would apply as well to a case where, at the time the policy was made, the ship was at the bottom of the sea. In such a case the policy is certainly good when it contains the words "lost or not lost," and it is at least doubtful whether those words are necessary to make the assured liable for premiums when, unknown to both parties, a loss has occurred before the making of the policy—*Sutherland* v. *Pratt* (judgment of Parke, B., at p. 311) (4).

All writers on insurance law are in favour of the view contended for by the plaintiff. *Emerigon on Insurance* (by *Meredith*), pp. 635, 636, states it; and in *Arnould's Marine Insurance* (5th ed.), p. 1057, it is implied. In *Carter* v. *Boehm* (5) the judgment of Lord Mansfield shows that, in his opinion, if the ship had arrived when the policy was made, but the underwriter did not know of its arrival, there could be no return of premiums. There is also an unreported case of *Natusch* v. *Henderson*, argued before Willes, J., in 1869; who held, in an action for return of premiums, where the policy had been made when the voyage was at an end, although both parties were ignorant that it was at an end, that the policy attached, and the assured was not entitled to a return of premiums. It is submitted that, there having been no mistake of fact in the present case, and no total failure of consideration, the plaintiff is entitled to recover his premium. As to the second point, the defendant had an insurable interest when the re-insurance was effected. He insured the risk he stood at under the previous policy, and his policy of re-insurance attached from the moment when the first policy attached, and he was in exactly the same position, with respect to his policy of re-insurance, as if he had been owner of the goods. All that the objection on the second point really comes to is that, in fact, a loss had occurred when the re-insurance was made. They also referred to articles 366 and

(5) 1 Smith's L.C. (8th ed.) p. 550; 3 Burr. 1905.

of the *Code de Commerce*, and
e 789 of the German Mercantile

jamin, in reply.

Cur. adv. vult.

following judgments were delivered
e 1st of April :—

ETT, L.J.—I am asked to deliver
ent first in this case. The action
recover the amount of a premium
d to be due under a policy of marine
nce, and payment is resisted on the
d that the policy never attached.
efendant had underwritten a policy
ods from Philadelphia to Rochfort.
-insured the same goods with the
iff when the ship had sailed from
delphia to Rochfort with the goods
ard. In truth and in fact, when the
urance was effected, the voyage was
leted in safety; the cargo had been
d, and landed undamaged, but that
as not known either to the plaintiff
e defendant. It was supposed by
parties, when the contract was
d into, that the ship was overdue,
he policy was made on a very large
nm, though I think these facts are
y immaterial. The question would
ecisely the same if they had not
sed the ship was overdue. The
question argued here was whether
econd policy ever attached at all.
s said that it did not, because, when
olicy was made, the risk had deter-
l. If one examines that proposition
ally, it comes to this, that, at the
he second policy was entered into,
uestion whether or not there had
or could be a loss had been deter-
l in fact, and to this extent, that
could be no loss whatever. Now
olicy in terms covers the risk which
efendant was supposed to be under
e first policy made by him as in-
Therefore the risk incurred by the
d policy is in terms the risk at which
sured under the second policy stood
e policy made by him as insurer
g the voyage described in that policy.
during the whole time of the voyage
ibed in the first policy, which the
dant had underwritten, it is obvious
he did stand at risk. The voyage
was made, the goods were at risk, and
the risk extended during the whole time
of the voyage. Therefore the description
of the plaintiff's risk in the second policy,
which is the risk at which the defendant
stood during the voyage described in the
first policy, is the plaintiff's risk during
the whole of that voyage; and that risk
did exist. But then the objection is, that
when the second policy was in fact made
the question of whether any loss could or
could not be, or had or had not been,
sustained by the plaintiff under his policy
was in fact determined. Is that a good
objection to the attachment of a policy?
It seems to me that it is not, because, if
you raise the objection in those terms, it
applies to a policy of "lost or not lost."
In a policy of "lost or not lost," if at
the time the policy is made the subject-
matter insured is lost, the question of
whether there will or will not be a loss
under that policy is absolutely determined.
It is true, supposing the goods not to be
lost, the risk still continues—they may
still be lost where the policy is made
before the voyage is concluded. That is
true; but still the objection raised here,
when put into its proper terms, and
given its proper effect, is shown not to
be a good objection, because, if good, the
fact of the ship or goods having been
lost at the time the policy was made
would be destructive of the attachment
of the policy. That is not a true proposi-
tion, as everyone knows. Indeed, the
dicta of Lord Mansfield, and other great
Judges in England, have gone so far as
to say that the policy was good if both
parties knew the risk had been in fact
determined—in the sense that they knew
the subject-matter was lost at the time
when they entered into the policy, and
they did enter into the policy in terms
which covered that loss. As, for instance,
if the parties have verbally agreed to the
insurance, or have passed a slip (at the
time when the passing of the slip was
supposed to have had no effect except as
an undertaking of honour), then if under-
writers, having made such an agreement
or given such a slip, enter into the policy
after both parties know that a loss has
occurred and that the event has been
determined, the policy would be a good

one. It seems to me, therefore, upon principle, that it is not a good objection to the policy to say that the question whether there could, or could not, be a loss, had been determined in fact before the making of the policy. With regard to the authorities, Mr. Benjamin was bound, I think, to admit that although, except in one instance, there had been no decided case on the point, yet all writers on insurance law were against the view proposed by him. Emerigon was against him. Then he objected to the authority of Emerigon. That Emerigon is not an authority to be always followed in everything he says is perfectly true, yet he is nevertheless always quoted as an authority on insurance law, and his language is certainly to be carefully considered before it is rejected. But *Park on Insurance* was against him in terms, and that work has always been cited by Judges in England and America as a book of considerable authority. *Phillips on Insurance* was against him, and I venture to say that Phillips is of the highest authority. Arnould also is against him. Therefore all the text books, so far as I can see, are in favour of the view which seems to me to be the view in accordance with true principle. In addition, there is the higher authority of Mr. Justice Willes in *Natusch* v. *Henderson*. I have now seen the note of his decision in that case, which is distinctly and clearly in point. The question raised was whether the fact of a voyage being at an end before the policy was made, neither party knowing that the voyage was at an end, prevented the policy from attaching. The action was for a return of premiums. Mr. Justice Willes held that the fact of the voyage being ended, if unknown to both parties, did not prevent the attachment of the policy to the risk.

I am, therefore, of opinion, both on principle and authority, that the mere fact of the voyage in this case, as to which the defendant was an insurer under the first policy, being at an end when the second policy was made, did not prevent the attachment of the second policy, in which the defendant was the assured. The re-insurance policy attached, and, if so, the premium is due. It was further said that there was no insurable interest on the part of the defendant under this second policy. His insurable interest was the risk which he ran under the former policy. If this policy, therefore, attached, it attached in respect of the voyage insured under the first policy, and during the whole of the voyage the risk of the defendant under the first policy did exist; and I think, therefore, that the question of insurable interest in this case comes to be the same question precisely as the question whether the risk ever attached. If the risk attached, and as long as it attached, under the first policy or under this policy, the defendant's interest attached for the same time, and during the whole of the same period. Therefore there was an insurable interest. This decision seems to me to come to this, that where the subject-matter insured has been, or is, or will be at risk, the policy attaches to and covers it, whether the policy be made before, or during, or after the time when the subject-matter was at risk, if that risk is properly described in the policy. I think, therefore, that the decision was right.

BAGGALLAY, L.J.—I am of the same opinion, and I have nothing to add.

BRAMWELL, L.J.—I wish to add a few words in confirmation of what my brother Brett has said. On the question whether the policy attached, I think it did. The fallacy in the defendant's argument arises from the double meaning of the word "risk." That means both the voyage or the adventure commenced with the necessary conditions to make the underwriters liable, and the chance of loss during its performance. In the latter sense here there was no risk at the time of re-insurance. But that is not the sense in which that word in the authorities is used. It is used in the first sense I have mentioned, and in that sense clearly existed in this case. There was, therefore, a risk such that if the premium had been paid the defendant could not have recovered it back. Suppose it had been known to both parties that the ship had arrived for twenty-four hours, and still the defendant had been minded to re-

e, and had re-insured at a low pre-
ı, it cannot be doubted but that the
ium would have to be paid. But if
is true of twenty-four hours, it is
ly true of twenty-four or any other
ber of days. And if it is true when
parties know, it is equally true when
do not. I think, therefore, this
y attached.

to the other question, I confess I am
o clear. It is said that the interest
ıe defendant was in his possible
ity, and that, the existence of a loss
uncertain to his knowledge, he
t insure against it. I am not
ether satisfied with this. Suppose
surance warranted free from capture,
suppose a re-insurance on the same
s on the same voyage, but that the
was captured before re-insurance,
d the re-insurer have an insurable
est? I doubt, but my brethren do
and therefore on this point also I
ır.

Judgment affirmed.

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ors—Field, Roscoe & Co., agents for Bate-
& Co., Liverpool, for appellant; Waltons,
b & Co., for respondent.

THE QUEEN'S BENCH DIVISION.]

31.
26.
il 9.

THE CORPORATION AND THE CHAMBER OF COMMERCE OF HUDDERSFIELD *v.* THE GREAT NORTHERN RAILWAY COMPANY, AND THE MANCHESTER, SHEFFIELD AND LINCOLNSHIRE RAILWAY COMPANY.

ilway Clauses Act, 1863 (26 & 27 *c.* 92), *s.* 27—*Revision of Working ement*—*Regulation of Railways Act*, , *s.* 10—*Jurisdiction of Railway Com-oners*—*Prohibition.*

1858 *two railway companies entered a working agreement under a special which enabled them so to do, with this so, "That no such agreement shall be until the same has been approved, both the period of its continuance and in respects, by the Board of Trade." The clause of the agreement empowered the Board of Trade once in every ten years "to cause this agreement to be revised, but in the interest of the public only." In* 1873 *the powers and duties of the Board of Trade "under any special Act with respect to the approval of working agreements between railway companies" were transferred to the Railway Commissioners:*—Held, *that the power given under clause* 17 *of the agreement to the Board of Trade was a power with respect to the approval of a working agreement, and was also a power under a special Act, so that the Railway Commissioners had power to revise the agreement, and to consider it in the interest of the public.*

This was an application by the Great Northern Railway Company, and the Manchester, Sheffield and Lincolnshire Railway Company, for a writ of prohibition to issue to the Railway Commissioners. The facts and arguments are fully referred to in the judgment of the Court.

Webster and *Rowland Williams* shewed cause against the rule *nisi* for a prohibition.

The Attorney-General, *The Solicitor-General* and *Balfour Browne*, for the Railway Commissioners.

Pope, *Littler*, *Dugdale* and *Worsley* supported the rule.

Cur. adv. vult.

The following judgments were delivered on April 9:—

FIELD, J.—This is an application by the associated companies—the Great Northern Railway Company, and the Manchester, Sheffield and Lincolnshire Railway Company—for a writ of prohibition to issue to the Railway Commissioners, prohibiting them from proceeding upon a certain application made to them by the Mayor and Corporation and the Incorporated Chamber of Commerce of Huddersfield, in the West Riding.

The law and facts applicable to the matter are these: It appears that in the year 1858, the two railway companies were desirous of entering into a working agreement between each other; and they applied to Parliament for, amongst other things, a bill for the purpose of enabling them to

enter into such an agreement. Accordingly, by the private Act of 21 & 22 Vict., they were authorised by section 1 to enter into a working agreement for the purposes specified in that section; but then, in order that the monopoly which would thereby be created should not be prejudicial to the interests of the public at large, the Legislature interposed a proviso that that agreement should not be valid, and that no such agreement should be valid until the same had been approved, both as to its period of continuance and in other respects, by the Board of Trade as well as by the shareholders. The Legislature seems to have thought that the parties themselves might have come to an agreement, but still that should not be valid unless the Board of Trade approved of it; and the approval was to be both as to the period of its continuance and in other respects. The reason why those words as to the period of its continuance were put in was this: by the empowering clause, the two companies might from time to time during fifty years enter into agreements; and it was thought that that was a very long time, and that it was desirable, therefore, that the Board of Trade should exercise the power of approving both as to the period of its continuance and in other respects. Upon that the two companies came to the agreement which they thought most conducive to their own interests. They provided for their traffic in various ways; but in clause 14 of the agreement they put in a clause for their own—if I may use the word with regard to a railway—personal protection. Of course, no partnership is of any value, or can be of any value to anyone, if either of the partners may at any time, by negotiating or contracting with somebody else, prejudice the other. Therefore, naturally enough, as it seems to me, the companies put in this clause: "Neither company shall make any bargain, treaty or agreement or arrangement with any other company, or do any other act directly or indirectly to affect injuriously the traffic of the other company, or to prejudice this agreement without the consent of such other company." That clause being in, the agreement went to the Board of Trade. Then no doubt the Board of Trade, very properly indeed, required, if they were to approve of this agreement for fifty years, that there should be some mode of providing for an alteration in the agreement if, in the course of those fifty years, circumstances should alter and render it desirable that the agreement should in some way be modified or altered. Accordingly, clauses 17 and 18 are provided for the purpose of meeting that difficulty. Clause 17 begins by giving a general power to the Board of Trade. I apprehend that they might exercise this power by their own movement, if they thought right, without any notice, as in clause 18. At all events, the words are, "It shall be lawful for them, if they think fit, on the expiration of every ten years from the date of this agreement, and then other ten years," to do what? "To cause this agreement to be revised, but in the interests of the public only." That is the first thing they may do. It means—look into it and revise it; go through it again, and see whether, in the interests of the public, there is or is not anything in it which they would rather decline to approve, or which in their judgment required modification. The next branch of the clause goes on to shew that that is the meaning of the first, because it says, "And the Board of Trade shall have power to declare that if any modification required by the Board of Trade in such interest" (that is, in the interest of the public) "be not agreed to, then, at the expiration of three calendar months after notice, the agreement shall determine." Therefore, in effect, clause 17 says that the Board of Trade may cause the agreement to be revised: they may not modify it; they may not alter it; they may not strike out one clause and add another. Clause 17 only gives a very limited power, and that is this: "The Board of Trade shall revise it; they shall see whether they think a modification in the interests of the public is necessary; they shall then tell the parties, and they shall give notice. Here is the modification we require; if you do not like it, agreement at an end." Clause 18 is based upon the same principle. Clause 18 gives them a mode of initiation—that is, a mode of bringing people before them;

and by clause 18 they may say to the companies, "Issue a notice calling everybody before us, to tell them that this is going to be revised. If you do not do that, we cannot alter the agreement." Therefore, the agreement was approved by the Board of Trade in that way; and that approval seems to me to have been the approval referred to in the Act of Parliament—that is, the agreement was approved of in every respect, such as it was. It is true it contained within it a germ of dissolution. It may not, by reason of these clauses, go on for the fifty years; but still, such as it was, it was approved of by the Board of Trade.

That was in the years 1858 and 1860. In the year 1863, the Legislature by the Act of 1863, Part III., headed, "Working Agreements," said, "Wherever two or more companies are authorised to agree among themselves with respect to any of the following purposes—namely, the maintenance, the use and the working of the railway"—then, in such a case, the Act says, "The agreement shall not affect in any matter so and so." Then it says that the agreement shall not take effect unless the shareholders approve. Then section 24 provides for notice to the public beforehand, and section 25 is the counterpart to some extent of section 2 of the private Act of 1858, because it says that the agreement shall not have any operation until it is approved by the Board of Trade. Then later on comes the decennial period of alteration, and that is this—which is the counterpart, or not exactly the counterpart but the substitution, not of the Act of Parliament but of clauses 17 and 18 of the particular agreement, "at the expiration of ten years after the making of the agreement the Board of Trade may cause the same to be revised"—exactly the words of the first part of clause 17—and the Board of Trade may require them to publish a notice; that again is clause 18, and the Board of Trade (here comes a very important difference, because it departs from the mode of agreement in the 17th and 18th clauses, and says) may modify the agreement in such manner as may seem expedient, and may declare the modification part of the agreement; and then, if that is so, the same shall be read and take effect accordingly. That is a very much larger power—one to be exercised (as I have no doubt, if the power exists, it will be exercised) with the most careful consideration of the interests of all the parties concerned. It is a power which the parties to the agreement of 1860 gave to nobody. They did not say to anyone, "You shall impose upon us a clause which we do not like;" they did not say, "You shall strike out a clause which we do like and yet the agreement shall go on." What they said was this: "If in the interest of the public you do not like a clause you may modify it, and you may tell us of that modification, and if we do not like it then no agreement." Whereas here this power would have enabled the Board of Trade—and if the commissioners have that power in this particular case (as to which I entertain very great doubt) it would enable them to force upon these two companies a contract which they never assented to, and which I am satisfied neither of them would have assented to, if that clause was either expressed or understood in it. Up to the present time, with this Act of Parliament, the only language which we have got is "approve." They may "approve" of the agreement. Then they may revise. The revising, therefore, takes place at the end of that particular period.

That was in 1863. Then in 1873 the Legislature said, "The following powers and duties of the Board of Trade shall be transferred to the commissioners, namely, the power of the Board of Trade under Part III. of the Railways Clauses Act, 1863, or under any special Act." The powers are not all their powers under any special Act, but they are only the powers with respect to the approval of working agreements, not the power of approving, not the power of withholding approval, but all the powers with respect to the subject-matter of approval of working agreements; and it is only of course under section 10 of the Act of 1873 that the Corporation of Huddersfield and the Incorporated Chambers of Commerce have a right to call upon the commissioners to act in reference to their application.

Their application is this—they set out

the statistics of the borough of Huddersfield, they set out the agreement of 1860, and then they allege this: They say that that agreement was submitted to the Board of Trade, and was approved by the Board of Trade. They recite the Acts of 1863 and 1873, and then they say this: "The said applicants have by experience found that the 14th clause of the said agreement has operated very prejudicially to the public interests of the borough of Huddersfield." They pray, first, that the agreement of the 1st of October, 1860, may be revised in the interests of the public. They use there the very same language as the first part of clause 17 of the agreement of 1860, declaring that the Board of Trade may revise; and then they ask the Railway Commissioners to do that thing which the Board of Trade might have done under the agreement. But then they go further. Their second prayer is that the 14th clause may be declared invalid and void, and that the same may be expunged from the said agreement, or be so modified as to enable them to make any agreement with any other company as may serve and promote the public interests of Huddersfield, whether that bargain be injurious to the companies or not. Then they make that valuable prayer which has been frequently said to be only equalled by one other prayer in the world, and that is the prayer for general relief—"such other relief as the justice of the case may require."

Now upon that the railway companies put in their answer, and by their answer they take objection to the jurisdiction of the Railway Commissioners. The objections were, first of all, that the commissioners had no jurisdiction whatever to do anything in the matter, or to grant any portion of this prayer at all, because they said, first, that the Board of Trade's power of approval had been exhausted entirely when the agreement was approved; but in any view of the case, it had not been transferred from the Board of Trade to the Railway Commissioners. Upon that the Railway Commissioners gave a judgment, in which they went very fully into the arguments both on the one side and on the other. They deal with both those views which I have just now suggested. First of all they deal with the general question, if I may shortly put it, whether the powers of the Act of 1863 in this particular case were powers which were transferred to them under the Act of 1873, as being powers of the Board of Trade under Part III. or under any special Act; and secondly, they deal with the more limited question. But they have made no order in the matter at all. They have merely given a judgment upon the construction of the Act of Parliament, and of the agreement and of their powers; the only thing they appear to have done in the matter is with reference to some application for particulars which they were going to give, and which I assume would be quite consistent with their intention to revise and propose a modification so as to comply with the second prayer, namely, expunge and alter. Before, of course, we can grant a prohibition to a tribunal, we must ascertain whether the tribunal is, in the course of the proceedings, doing something beyond their powers. In the very recent case which was argued in the Court of Appeal of *The South Eastern Railway Company* v. *The Corporation of Hastings* (1), that was the principle which the Court of Appeal acted upon, if I understand it rightly. They said, "There are some things here in the judgment of the commissioners as to which we entertain doubt whether they have got the power; there are some things as to which we think they have got the power." We do not know at present exactly what they are going to do, because they have not drafted any order or told us what order they are going to make, and therefore we cannot grant a prohibition, because, as the Lord Chancellor said, "there are some things which they propose to do which they may lawfully do; there are other things which we think they may not lawfully do." Therefore, following that principle, we must look before we grant that prohibition, and see whether we can satisfy ourselves that the Railway Commissioners propose to do anything beyond their jurisdiction.

There are two things which the appli-

(1) *Ante*, p. 201; Law Rep. 6 Q.B. D. 586.

cants ask for—first, a revision and the proposition of a modification; and secondly, they ask for a power which only exists provided the word "approval" in the agreement can be held to mean revising, or provided the powers in Part III. are all of them transferred. If it had been necessary to decide that question, as I have just said, I should have entertained very considerable doubt whether the Railway Commissioners had any such power at all, namely, a power to force upon the parties an agreement to which they have not assented. They might or might not. I cannot say how that may be. But inasmuch as I am unable to see that the Railway Commissioners propose, until they have enquired into the matter, to act in any way upon that, I do not feel that it is necessary for me to say now what my views upon it would be until I see what order it is (if any) that the Railway Commissioners propose to make in the matter. If they were to propose to make an order in the matter by which they comply with the second prayer of the petitioners, namely, by expunging clause 14, and forcing the agreement upon the parties for the remainder of the fifty years without that clause, I should then have considerable doubt in saying that we might not think it right to prohibit them from that as being beyond the power which the Legislature has conferred upon them. But when I come to consider what they are about to do, I must see whether they have any power to do what they propose to do at present. What I understand they propose to do at present is, to revise the agreement, and consider it in the interest of the public. Have they got that power?

Now it is conceded that they can only have that power provided it comes within the language and meaning of the 10th section of the Railways Regulation Act, 1873. Therefore we must consider what the words are, and what the meaning of those words is. Now the words are these: "The following powers and duties of the Board of Trade shall be transferred to the commissioners; the powers of the Board of Trade under any special Act with respect to the approval of working agreements between railway companies." Now, then, had the Board of Trade in 1873 any power or duty under any special Act with respect to the approval of working agreements? That they had a power, leaving out the words "under any special Act," is clear. That they had a duty is equally clear; because, they having a power to approve or prevent the existence of an agreement without their approval, this is an agreement created and entered into under the power of the Act of 1858, and in accordance with those powers by which a power and duty have been reserved to the Board of Trade. I cannot think it can be held that that power and duty were *ultra vires* of the Board of Trade at that time. It might have been perhaps a question to be argued. There does not appear to me sufficient ground for saying, looking at the meaning of the Act of Parliament and the agreement itself, that the Board of Trade should not have power to say, "Now this is a very long time to look forward to; we do not mind your agreement. It would do very well as it is, but we cannot say that for fifty years it is a good thing. Therefore, in the interests of the public, you really must reserve to us the power to revise it at the end of every ten years." I think it cannot be said that that would be *ultra vires* of the parties and the Board of Trade under the provisions of the Act of 1858. Then, if so, there is a power and duty, or there was in 1873, in the Board of Trade to do something. What was it? Was it a power and duty with respect to the approval of working agreements? Considering the meaning of the words "with respect to," not the power of approval, but a power with respect to approval, I think it cannot be reasonably doubted, giving a fair construction to clauses 17 and 18, that those powers and duties were powers and duties with respect to the approval of working agreements. They may say, "We will approve it now, we will approve it for ten years, we may approve it for all the time unless in the meantime we think there is reason to disapprove of it." If in the meantime you satisfy us that there is reason for our disapproving of it—by reason of anything occurring between that time and then—then we may say, This modification, we

think, is required; have the goodness to say whether you approve of it or not. If the companies do not, then they have a further power. They have power to declare the agreement void. It becomes void *ipso facto*. They have a duty, therefore, to revise. They have the duty and the power to propose a modification. Then they have a further duty, if the companies do not assent to that, to declare the agreement at an end. I think those are powers and duties with respect to the approval of working agreements within the meaning of this Act of 1873.

Then are they powers and duties under any special Act? I think they are. The argument before us was very strong. It was said, these are not powers under the special Act, because they are not contained in the Act of 1858. No doubt they are not. You have got the word "approval." If that Act had stood there, I might not have come to the same conclusion as I have now. But the Act does not stop there. The Act gives a power—it is not merely ministerial—it is not mere machinery on the part of a Government department, which is disinterested, and which represents the public at large, railway companies on the one hand, and chambers of commerce and corporations on the other—to consider what the fair terms as regards the parties are, and what the fair terms as regards the public are. Only in the interests of the public are they to interpose. Under those circumstances it seems to me that, giving the legislation a fair construction, this power and duty which clearly exists, and which, I think, is a power and duty with respect to the approval of working agreements, is also a power and duty under the Act of 1858, being a special Act. Therefore, for those reasons, it seems to me that we cannot issue a prohibition at present, or in the form in which it is asked; because it seems to me that there is a portion of the relief prayed for by the applicants which it is competent in the Railway Commissioners to give; and it will not be until we see that they propose to go beyond that limit that we shall feel it any part of our duty to forbid them. Under those circumstances, I have come to the conclusion that the rule must be refused; and the ordinary consequences will follow.

MANISTY, J.—I agree entirely with the result at which my learned brother has arrived; and my judgment is founded on these very short grounds.

In the year 1858 a special Act was passed which enabled these two companies to enter into working agreements, with this proviso, "that no such agreement shall be valid until the same has been approved, both as to the period of its continuance and in other respects, by the Board of Trade." In pursuance of that Act, the agreement which has been referred to was entered into. The companies came to the agreement which is set out; and it is only necessary to refer to the 17th clause of that agreement, which says, "It shall be lawful for the Board of Trade, if they think fit, on the expiration of every ten years from the date of this agreement, or on the expiration of every ten years from the period when any revision thereof shall be made by them, to cause this agreement to be revised (but in the interest of the public only), and the Board of Trade shall have power to declare that if any modification required by that board in such interest be not agreed to by the companies parties hereto, then at the expiration of three calendar months after notice given to the companies of such modification being required, this agreement shall determine, and it is hereby declared that the same shall determine accordingly." The Board of Trade, therefore, reserved to themselves, when this agreement was entered into, the power of revising every ten years. In that state of things the Act of 1863 was passed, before the first ten years had expired. By that Act of 1863, agreements between the companies may be modified by the Board of Trade, and so on, and they shall not have any operation until they are approved. That is by section 27, and by that section, that being the state of things, they cannot revise, but they may impose in fact a new agreement on the parties, because they may modify it and declare the modification part of the agreement. But then that Act of 1863 only applied to agreements entered into after the passing of that Act—"where two o[illegible]

more companies are authorised by the special Act passed to enter into an agreement;" so that the Act of 1863, which gave the power to the Board of Trade to revise, and so on, only applied to the cases where the special Act had been passed after the Act of 1863. Therefore that would not have enabled the Board of Trade to exercise those powers with respect to an agreement entered into prior to that time; in other words, it did not apply to the agreement in question. But then, in 1873, the "powers and duties of the Board of Trade under Part III. of the Railway Clauses Act, 1863," which is the Act I have just referred to, "or under any special Act with respect to the approval of working agreements between railway companies, are transferred to the Railway Commissioners;" so that all powers of the Board of Trade under Part III. of the Act of 1863 were transferred. But not only so, but all the powers of the Board of Trade "under any special Act." As my learned brother has pointed out, the words are very large—"with respect to the approval of working agreements."

Let us turn back to the Act of 1858, which is the special Act, and which gave the power to the Board of Trade to approve of all agreements entered into, and which prohibited agreements that were not approved of by the Board of Trade. In the agreement in question there is an important clause, reserving power to the Board of Trade, to which I have referred, and it was said that that is the only power; and the argument was that that power is given to the Board of Trade specially, and can only be exercised by the Board of Trade and not by the Railway Commissioners, and for this reason —the Commissioners only have the power which the board have under any special Act; and the argument was that the Board of Trade derive this power of approval of agreements, and with respect to the approval of agreements, only under the agreement in question, and not under the special Act. It may be that directly and immediately, so to speak, the power is derived from the agreement; but then the agreement is based upon the Act, and it is the Act of 1858 and the agreement together which give the power, and the power, therefore, given by the Act in 1858 is the foundation of the whole matter. The Board of Trade would have no power in the matter but for the Act of 1858, and the agreement, which reserves the power to the Board of Trade, is only reserving to them the power under the Act of 1858.

In my opinion, the words of the 10th section of the Act of 1873 are quite sufficient to transfer to the Railway Commissioners that power which is the foundation of the whole matter, because that transfers to the Railway Commissioners all powers and duties of the Board of Trade under any special Act with respect to approval of agreements. But for that Act, the Board of Trade would have no power; they cannot reserve to themselves the right by the agreement to exercise that power under that Act; and therefore I think it is a power with respect to the approval of working agreements. What order the commissioners may make—whether they will confine themselves to the power which is reserved by the agreement in these words, that they may revise it (there is no particular technical interpretation to be put upon that; that is to say, they are to look into the matter again, and they are to reconsider the matter, and if they think it is necessary, they may propose a modification), I cannot say. It is unnecessary for them to go on to say that if that modification is not adopted, they will declare the agreement at an end; because by the very terms of the 17th clause of the agreement it is to be at an end the moment they declare that it ought to be modified and give a certain notice; then *ipso facto* the agreement is at an end. So that, after all, really there is not much substance in the contention now before this Court, and for this simple reason. Ultimately, if the commissioners were to make an order that the modification should be made, if it is not adopted, the agreement comes to an end; then the two companies would have to resort to the power given by the Act in 1858, and make a new agreement. We cannot suppose that these two great companies will go on without some agreement. Then the result would be that if they did not

accept that modification, the original agreement of the 1st of October, 1860, would come to an end; the two companies would then have to make a new agreement, and they would have to submit that to whom? Not to the Board of Trade, because all the powers of the Board of Trade with respect to the approval of working agreements are in terms transferred to the commissioners. Really this litigation seems to me to be more matter of form than matter of substance; because, if the Railway Commissioners confine themselves to that and the agreement comes to an end, then a new agreement probably will have to be entered into and submitted, not to the Board of Trade, but to the commissioners.

I do not wish to express any decided opinion with respect to the power of the commissioners as to directing more than a modification, which if not accepted would put an end to the agreement. But I confess that, as at present advised, I think that if they were to attempt to do more than that, and to direct the modification to take place—in other words, a new agreement to be entered into—and seek to impose that agreement upon the companies, there is strong ground for contending that they have no such power; I mean, if they act under the 27th section of the Act of 1863, and declare the modification to be part of the agreement. As as present advised, I entertain the strongest doubt as to whether they have any such jurisdiction to make any such order.

For these reasons and the reasons which have been given by my learned brother, I think this rule ought to be discharged, and, of course, with costs.

Rule discharged.

Solicitors—The Solicitor to the Board of Trade, for the Railway Commissioners; Van Sandau & Cumming, agents for J. Batley & C. Mills, Huddersfield, for the Mayor and Corporation of Huddersfield, and the Chamber of Commerce of Huddersfield; Nelson, Barr & Nelson, for the Great Northern Railway Company; R. B. M. Lingard-Monk, for the Manchester, Sheffield and Lincolnshire Railway Company.

[IN THE HOUSE OF LORDS.]

1881. March 24, 25, 29, 31. April 1. THE MAYOR AND ALDERMEN OF THE CITY OF LONDON v. THE LONDON JOINT-STOCK BANK.

Prohibition—Mayor's Court of London—Foreign Attachment—Corporation Garnishee.

Process of foreign attachment cannot be enforced by distress against the garnishee, but only by arrest of his person.

It cannot, therefore, be enforced at all against a corporation aggregate, which is by its nature incapable of being arrested.

This was an appeal from a decision of the Court of Appeal, affirming one of the Common Pleas Division, by which a prohibition had been granted against the Lord Mayor's Court of London. The case is reported in the Courts below, 45 Law J. Rep. C.P. 213; Law Rep. 1 C.P. D. 1; 5 ibid. 494.

Process of foreign attachment had been issued against the respondents in a suit in which Sarah Griesiell was plaintiff and Thomas Griesiell was defendant. The plaintiff proceeded to enforce the order of attachment by distress, and the respondents thereupon applied in the Common Pleas Division for a prohibition. This was granted upon the ground that foreign attachment could only be enforced according to the custom by seizing the person of the garnishee, and was therefore inapplicable to a corporation aggregate.

The Mayor and Aldermen appealed, and it was agreed that the facts should be found by a Special Case. It then appeared that a number of preliminary proceedings which by the custom ought to be gone through before the order to attach was issued had, in fact, been omitted, in accordance with the practice for at least 200 years, though the record when made up contained fictitious allegations, setting out the due performance of all such proceedings. The Court of Appeal held the order bad, and affirmed the prohibition, on the ground that the custom had not been followed.

The Mayor and Aldermen appealed.

It was admitted by the appellants' counsel that the order was bad, upon the

...ds taken by the Court of Appeal; ...ey did not contend for the conclu... ...s of the Recorder's certificate as to ...stom (which had been disputed), ...nfined their arguments to the ques... ...hether the custom, if proved, was

Attorney-General (*Sir H. James*) ...*ebster* (*R. S. Wright* with them), for ...ellants.—Corporations are persons, ...bject generally to the same law as ...uals—*The King* v. *Gardner* (1), 722. The custom may be wide ...a to apply to a class of persons ...existence beyond legal memory— ...*g's Case* (2). If, therefore, the ...ason why the custom here was not ...d to corporations aggregate in early ...is that there were none to apply it ...seems to have been the case), then ...in legal memory such corporations ...nto existence the custom might be ...d enough to extend to them—*The* ...*London* v. *Vanacker* (3). ...certificate of the Recorder has been ...ed in cases of prohibition—*e.g.* in *The Mayor of London* (4), *Westoby* ...*y* (5), *Crosby* v. *Hetherington* (6). ...ere is no case of refusal to accept ...ertificate where the Mayor and ...men have no real interest, as they ...ot here; for the prohibition need ...ve been asked against them; it ... have been sufficient if obtained ...t the party. ...mode of executing the orders forms ...t of the custom of foreign attach... The Mayor's Court, as an inferior ... would have inherent in it all usual ...s of enforcing its orders; and *dis*... is the regular common law pro... inferior Courts—*Gilbert on Distress*, *Viner's Abridgment*, "Execution,"

... proceedings are, in fact, against the property of the defendant, to compel his appearance. He is to be attached by his goods in the hands of the garnishee. The judgment and execution are not properly against the garnishee. The term "attachment" is equivalent to distress. The records shew that the process was to take the goods, and personal process against the garnishee was only intended to enforce delivery of the goods. *Magrath* v. *Hardy* (7) and *Wetter* v. *Rucker* (8) do not shew that the order could not be enforced by *distringas*, but only that if it was not enforced by some means payment under it would be voluntary. In *Gascoyne* v. *Penyke* (A.D. 1374) (9) an order was made for a distress against a garnishee.

Benjamin and *W. G. Harrison* (*Kempe* with them), for the respondents.—The certificate given is not the Recorder's certificate but that of the Mayor and Aldermen, and it is to their interest to extend the jurisdiction, because the fees received exceed the expenses of the Court. The rule is that trial by certificate is not allowed where the city has an interest—*Day* v. *Savadge* (10), 7 *Viner's Abridgment*, "Custom," 246 (referring to *Jenkins*, 40th pl. 21 and 22), *Appleton* v. *Stoughton* (11). In *Smith* v. *Hancock* (12) the Court refused to allow trial by certificate, and ordered trial by jury out of London. In *Cox* v. *The Mayor of London* (4) it was unnecessary to object to the certificate, because it was contended that if correctly certified the custom was unreasonable and bad.

The custom of foreign attachment is inapplicable to corporations aggregate. Wager of law forms part of it, which involves the taking of an oath, and clearly a corporation cannot take an oath. It is contended that the true custom of the City of London has fallen into desuetude for five or six hundred years and is gone; that which is now in use is a corrupt custom and bad.

Cowp. 79.
Rep. 82*b*.
Ld. Raym. 496; 12 Mod. 269.
Hurl. & C. 338; 2 ibid. 401; 32 Law J. ...xch. 64, 282; 36 ibid. 225; Law Rep. 2 ...s. 239.
E. & B. 605; 22 Law J. Rep. Q.B. 418.
Man. & G. 933; 12 Law J. Rep. C.P.

(7) 4 Bing. N.C. 782; 7 Law J. Rep. C.P. 299.
(8) 1 B. & B. 491.
(9) City Archives. Rolls of Pleas and Memoranda, A. 19, Roll 19.
(10) Hob. 85.
(11) Cro. Car. 516.
(12) Rolls of Q.B. Roll 1772.

[LORD BLACKBURN.—Is it clear that desuetude for that time would destroy the custom?]

No case has been found earlier than that of the *East India Company* (13), in 1796, of attachment against a corporation. There is but one case—*Gascoyne* v. *Penyke* (9)—in which there is supposed to have been a process against the goods of the garnishee; and that is probably a case of bill of proof, not of attachment against the goods. Probably security had been given in 1373, the year before, to pay the money when due. The object is to get the goods of the defendant. How is this attained by seizing the goods of the garnishee generally? The garnishee might have a diamond of the defendant's worth 1,000*l.* and be attached for a debt of 20*l.*; the garnishee's pearls might be taken in distress, and he would still be liable to restore the diamond to the defendant.

Again, how is a corporation to prove that it has no goods of the defendant? This can be done by an individual garnishee by means of the plea of *nil habet*. But the custom required him, on doing so, to find sureties to be present from Court to Court until the matter was ended. In default of finding sureties he was committed to prison. But a corporation could not be present in Court or go to prison.

Webster, in reply.—The same difficulty would arise in case of personal arrest. The garnishee would probably have a lien on the defendant's property for that which he had paid.

The object of the attachment is to make the defendant put in an appearance, and upon his surrendering himself or giving bail to appear the attachment is dissolved—*Andrews* v. *Clerke* (14), *Loveridge* v. *Whitrow* (15), *Day* v. *Panpierre* (16). Assuming that it is good law that the goods of a corporation may be attached in the hands of a garnishee, is not the objection that has been taken equally applicable there, because a corporation cannot surrender itself and so dissolve the attachment? In *Panel* v. *Moor and The Mercer's Company* (17) it was held that since a corporation could not appear in any other way they might appear by attorney. Why should not the same rule apply to a corporation garnishee?

[LORD BLACKBURN.—At quarter sessions no one could appear by attorney; consequently, when a corporation was defendant, the case was removed by *certiorari* to the Queen's Bench.]

There no one could appear by attorney; here individuals might.

April 1.—THE LORD CHANCELLOR (LORD SELBORNE).—This question arises upon a prohibition obtained by the respondents against the appellants, the Corporation of London, to prohibit certain proceedings against the respondents (who are a corporation aggregate) by way of foreign attachment according to the custom of the City. The case in the first instance came before the Common Pleas Division of the High Court of Justice upon demurrer; the demurrer of course assuming the facts, as pleaded by the corporation, to be true. According to those facts, as they were then pleaded, the custom appeared in all respects to have been followed in point of fact; that is to say, the different steps and proceedings appeared to have been taken according to the custom as anciently certified, subject to this question only, whether the custom so followed was applicable to a corporation aggregate. The Common Pleas Division held that it was not; and the substantial point to be now determined is, whether that decision, upon those pleadings, was right; for which purpose we must leave out of sight all variance between the facts as they really were, and the facts as pleaded.

When the case was brought before the Court of Appeal, both sides agreed that it would be convenient to have the facts before the Court, as well as the pleadings, in order that the question of sub-

(13) City Archives. Lord Mayor's Court Records. Extract from burnt fragments of entry, "Book of Attachments," A.D. 1796.

(14) Carth. 25.

(15) 12 Mod. 213.

(16) 13 Q.B. Rep. 802; 18 Law J. Rep. Q.B. 270.

(17) Plowden, 91.

stance might be determined upon the true materials in that stage, instead of being postponed, to be determined afterwards in some other way. A Special Case was accordingly stated, by which it appeared that all the preliminary and introductory proceedings pleaded as having taken place were merely fictitious, and had never taken place at all. Other facts of importance with regard to the practice under the custom at different times were also found by the Special Case, and it was agreed that, for the purposes of the decision of the demurrer upon appeal, the Court should take judicial notice of all the facts so found by the Special Case.

I pause to observe that, under those circumstances, there was really no question whether the custom itself, such as it was certified to be in ancient times, if followed in fact, in a case properly falling within it, was good or bad; and nothing which has taken place in the case, nothing which may now take place in your Lordships' House, will, in my opinion, throw any doubt upon the validity of that custom, if duly and properly followed in cases which really fall within it.

Upon the facts, as stated in the Special Case, the Court of Appeal held, first, that the custom had not been followed in divers necessary points, as to which fictitious statements had been introduced upon the City record; and, secondly, that the demurrer, taking into account both the original pleading and all the new matter—of which, according to the agreement, the Court was to take notice—had been properly disposed of by the Common Pleas Division. In this state of things there is now only one question really before your Lordships, and that is, whether a corporation aggregate is within the custom. It was not seriously disputed at the bar that the custom as it had been anciently certified, which alone could be binding, required that there should be a real defendant, and real proceedings taken with a view to summon him, and to put him in default, before a foreign attachment could issue against his goods or his debts, in the hands of or due from a third person in the City. It was admitted that there had been, in this case, no such proceedings; and it was felt, therefore, that the judgment of the Court of Appeal, upon the whole facts, was one which it would not be possible to disturb. The argument was in substance confined to the question upon the demurrer, into which, of course, these facts, contradicting the matters pleaded, could not enter, although the other facts as to the custom, and the practice under it, found by the Special Case, can now be taken judicial notice of, as they were in the Court of Appeal.

Addressing myself to that question, which I consider the only one before your Lordships' House—namely, whether a corporation aggregate is within this custom or not—the first matter which it is proper to consider is the nature of the custom itself. Foreign attachment is an incidental process against a defendant to a suit, who has not appeared, having been summoned according to the course of the Court, to compel his appearance. The only thing which makes such a custom reasonable at all, and capable of being sustained in law, is, that the Court which has jurisdiction over the defendant is, in substance, by this custom, acting against the defendant alone, to compel his submission to that jurisdiction. For this purpose it arrests or attaches his goods within the jurisdiction, or the debts owing to him within the jurisdiction (which are equivalent to his goods), by way of security to enforce his appearance, in whatever hands they may happen to be found. The stakeholder, the person in whose hands these goods of the defendant may be, or from whom the debt is due to the defendant, has no interest in the matter, and does not suffer in any interest of his own, so long as he is properly indemnified; and the custom, if duly followed, indemnifies him.

As against the garnishee—that is, the third party, the stakeholder—the whole proceeding is *res inter alios acta*. He is no party to the suit; no judgment, in any proper sense of that word, can pass against him in that suit, or be executed against him on any principle which is applicable to a defendant before a competent Court. In order to bind him, and in order also to indemnify him, the

custom must be strictly applicable to the case, and it must be followed in all material points. The effect of the custom, when so followed, when the goods in his hands are delivered over, or when the debt due from him is paid (or security given by him for its payment, if it is not payable at the time), is to discharge him, not by virtue of the terms of his contract, but against that contract, and without the consent of the bailor or creditor, from all further liability for the goods or money to which the bailor or creditor was entitled. That is the peculiar effect of the custom; and upon what principle is it possible that such an effect can be produced? On one principle only—that of a delivery or payment by compulsion of law. If that element were absent, it would be impossible that he could be absolved, as against his creditor, from a debt which he has paid, without the creditor's authority, to a person to whom it was not payable by the contract. But if it be by compulsion of law, then he is discharged. It may be by compulsion of law if the custom is reasonable; and the custom, being long established, is not in law unreasonable, so long as its operation and effect is strictly limited to its proper object—that of compelling the submission of a defendant, in an action duly instituted against him before a competent Court, to the jurisdiction of that Court in that action—and so long as it is pursued only against that which is ascertained to be the property or the debt of that person, the defendant in the action, in the hands of the garnishee.

Therefore, execution, by some process of law which amounts to compulsion, is indispensable for this purpose, indispensable for the indemnity of the garnishee, and therefore indispensable in order that the garnishee should be bound. And so it appears to be, according to the certificate given by Starkey in the year 1481, in the case of *Bourgchier* v. *Colyns* (18): "After such security found, and execution of that sum, so in the hands and custody of that other person attached and defended, had by the plaintiff in the same plaint, such other person should be discharged of the same sum against the defendant named in the plaint aforesaid, and the same defendant should likewise be discharged of so great a sum of the debt specified in the same plaint against the plaintiff named in the said plaint." When the certificate says, "after such security found," that means, security which is to be given for restitution within a year and a day, if the defendant appears and gives bail as the custom requires. That having been the essential condition of the discharge of the garnishee according to this ancient certificate, the modern cases of *Wetter* v. *Rucker* (8) (which was not indeed the first case of the kind, for earlier authorities are referred to in it) and *Magrath* v. *Hardy* (7) shew emphatically, that the whole effect of the custom against the garnishee depends upon the fulfilment of that condition. Without execution, it is nothing; without execution the payment is voluntary; and all the other proceedings leave him, although he hands over the goods or pays the money, still liable to his original creditor.

Now what is execution, within the meaning of that principle? I apprehend it is that process of the Court against a garnishee, which, if disobeyed, the Court can and will enforce against him. It is not necessary to refer to the form of that process; I rather think, from the statement in the 29th paragraph of the Special Case, that it must be what is there set out—an authority from the Court to its officer to receive the debt, if it be money, or the goods, if it be goods.

In that state of the case, that being the principle by which it must be governed, we have nothing to do here with the question whether the mere terms of the custom, as certified by Starkey, and stated in other ancient books (such as the "Liber Albus," and the "City Law"), would by themselves shew that a corporation is excluded. It may be assumed that they do not. Starkey in his certificate states the custom thus: "It shall have been testified and alleged, by the plaintiff, that any other person, for whatever reason, should be indebted to the defendant in any sum of debt." No doubt, as far as

(18) Law Rep. 2 H.L. 242*n*; Thorpe's *Saxon Laws*, 35; Bohun's *Privilegia Londini* (ed. 1723), p. 253, *et seq.*

words go, there is nothing to prevent oration from coming within the cus- because the word "person" might pplicable to a corporation, unless were something in the context to le it; and in the mere reason of the if in all other material and neces- espects the custom could be pursued t a corporation, there would not ap- o be any objection to understanding rd "person," there, in as large a sense capable of in law. The same remark s to the "Liber Albus," and the Law," which is a translation from a the "City Law," the words are, ere it is alleged that the defendant goods and chattels or debts in hands, or in others' keeping, within id City." These words are certainly enough to include a corporation, if, other necessary respects, the custom be applied to it.

the question is, whether that which he essence of the custom, in order id the garnishee and to discharge an be done in the case of a cor- on: whether the custom provides eans of enforcing the delivery of or the payment of a debt against a ation garnishee. If it does not, according to principle, and accord- the authorities, a payment by the ation would be voluntary, as was d in *Wetter* v. *Rucker* (8). Though hing else may have been done the custom would authorise, yet, as not been brought to the point of lsion in law (which it cannot be if are no means of compulsion in law), yment is voluntary, and the gar- is not discharged.

not think we have here anything with the question whether a cor- on can or cannot be a defendant to in the Lord Mayor's Court. That, derstand the matter, does not de- pon custom. The City Courts are under the city charters; and, if be nothing to prevent a corporation eing sued, I am not at all satisfied here are not processes of the City by which a judgment of that Court e executed, either in favour of a ation plaintiff, or against a corpo- defendant. When, in a Court of competent jurisdiction, final judgment passes against a defendant upon a matter in dispute, execution follows by all the ordinary legal means, and, to use language which was used at the bar, the Court will employ all its inherent powers to enforce its judgments. The City Court, in that respect, would be like any other of the Courts of the realm. Of those inherent powers to enforce judgments the writ of *fieri facias* is one, and there are other writs analogous to it; and against a corporation, there is also sequestration or *distringas*. There is therefore, according to the ordinary law, and having regard to the inherent powers of Courts to enforce their judgments, no apparent difficulty in using against a corporation those means, which are as effectual against a corporation as against anybody else, and one of which is specially adapted to the particular case.

These considerations, however, are inapplicable to the case of a person who is not a defendant sued by any plaintiff in a Court of competent jurisdiction, who is not amenable as such to the ordinary process of that Court, but who is affected only by a collateral process against another person, the defendant in a suit. There are no ordinary means, there are no inherent powers of the Court, when the Court is dealing, not with a defendant who has had final judgment against him, but with a mere stakeholder who is not a party. As to such a person, everything must depend on the custom alone; nothing can be done which the custom cannot be shewn to authorise. *Fieri facias* is clearly inapplicable in such a case, because there is no judgment against the garnishee in any true sense of the word; certainly there is no final judgment to be executed. With regard to *distringas* or sequestration, those are processes which might perhaps have been available, if there had been a custom to use them; but, if there is not such a custom shewn, I know no principle of law from which you can infer or imply that they are to be used merely for the purpose of bringing within the custom a legal person, who, otherwise, could not be put in the position of having to pay a debt by compulsion of law.

The only customary mode of execution

against a garnishee, of which any proof has been offered, is a process *in personam* to compel obedience to the attachment—on the principle, I suppose, that the Court having authority, founded on its jurisdiction against the defendant in the action, to attach that defendant's goods, or a debt due to him, when it exercises that jurisdiction, and gives notice of it in the customary manner to a third party (the garnishee), he is bound to render obedience to that lawful order. It is upon the footing of personal disobedience to an order binding on him in a case where there is no jurisdiction against his property, but only against his person, that by personal process his obedience to that order is secured.

It is admitted that *Gascoyne* v. *Penyke* (9), a very ancient case of the fourteenth century (decided in the year 1374), is the only authority which can be discovered in which anything else than personal process clearly appears to have been used. I say "clearly appears," because it was contended at the bar, that you might infer from one other case that there had been some other process; I will presently mention that case. But it is stated in the Special Case that there is no authority discoverable for the use of any but personal process, except *Gascoyne* v. *Penyke* (9), and that statement was not otherwise disputed at the bar than by suggesting that you might infer something of the same kind to have taken place in one or two other instances, in which it did not expressly appear.

Now, *Gascoyne* v. *Penyke* (9) has really been given up at the bar. I do not think that it can possibly be reconciled with what appears upon the whole course of the practice under the custom, from Starkey's certificate downwards; because in that case the process *fieri facias* against the garnishee's goods was ordered to be issued and executed in the first instance, and if nothing could be taken under that, then the personal process of *capias* was to be resorted to. It is admitted, on all hands, that the practice under the custom has been to issue at once the personal process of *capias* against a person subject to that process; and therefore to interpose, as something to come before it, the very different process of *fieri facias*, is wholly inconsistent with the practice which is proved to have been followed.

An ingenious (and, if the record would admit of it, a not improbable) explanation of that case of *Gascoyne* v. *Penyke* (9) was suggested in the able argument of Mr. Harrison at your Lordships' bar. It was this, that there had been, in that case, a prior proceeding in which the garnishee had appeared, and in which, admitting the justice of the plaintiff's claim as against the defendant as he had made it in the action or suit, he admitted also that he was himself authorised to receive, but had not at that time received, from two particular debtors, moneys which were due from them to the defendant. The suggestion was, that if the custom under these circumstances was duly followed, the Court, when he made that admission, would have adjudicated against him, that, when he received those moneys from those persons, he should pay them over, according to the custom, to the officer of the Court for the purposes of the suit; and not only so, but that he should then and there give security (his own and that of sureties, or perhaps his own alone) that he would make that payment; and that the *fieri facias* ultimately issued would have been founded upon the security which he was assumed to have given upon the former occasion. The difficulty I felt in accepting that as a satisfactory explanation was this, that I cannot understand how, if that had been the foundation of the proceeding, the record could have been drawn up in a form which took no notice of the fact that any such security had been given; and that difficulty the learned counsel was not able to remove.

But all which it can be necessary to say about that case is, that either that is the true explanation (which, if accepted, makes it inapplicable to the present case), or, if that be not the true explanation, then it stands alone, and is in contradiction not only to the custom as certified and stated in the books, but to the custom as it has since been uniformly followed. Your Lordships cannot possibly take it as an authority, that according to the custom *fieri facias* can be issued

t a garnishee; and I greatly doubt
er, if such a custom had been set
could have been maintained as
able, the jurisdiction of the Court,
t the garnishee, being simply and
against him as a stakeholder of
fendant's goods. To issue a *fieri*
against the goods of the garnishee
not before the Court to answer for
f at all, but who has only to answer
ecific property of another in his
would seem to be inconsistent
hat principle.

h regard to the other case, as to
it was said that we ought to read
n the lines something implying
rocess against goods different from
al process, the case of *Huet* v. *Mas-Locke*, garnishee) (19), in 1446, I can
ay that I am unable to read that as
put by the learned counsel at the
I cannot see in it any indication
rer of a departure from the ordinary
s. The words "arrest" and "at-
ent" are used, but solely with re-
e to the goods of the defendant.
whole record, if examined from
ning to end, appears to me to be
tly consistent with the supposition,
othing else was done than to serve
the garnishee that final process, in
dinary course of attachment, which
nces the power of compulsion by
al process. The man against whom
as done (Locke) set up a claim of
ge, because he was going on legal
ss to one of the Courts at West-
r. He said that there was a
ge, not only that a man should not
lested himself in respect of his own
but also that he should not be
ed in respect of the goods of any-
lse in his hands. It is unnecessary
how far such a notion of privilege
have been entertained; however,
as his ground, and what he com-
l of was that the goods of another
in his hands were attached—
attached, as I assume from the
the record, by that which may be
ed as the final process of attach-
which would be equivalent to exe-
(though not in this case actually
followed by *capias*), while he was so engaged. In my judgment, there is no evidence on that record of anything but the ordinary practice of attachment under the custom.

Well, then, precedents of corporations against which this process of attachment has actually been used, from the year 1796 downwards, have been referred to. It is not necessary to examine those precedents with any minuteness. It was admitted at the bar that it does not appear, as to the earlier of those precedents, that anything was done which would indicate submission on the part of the corporations to the process; much less that any form of compulsory process was issued against any of those corporations for disobedience. But there is an observation which tends to deprive that whole series of precedents, although going back for nearly a century, of the weight which perhaps in many cases might be due to recent practice as evidence of an older custom; and that is, that the present Special Case states that for a long time past, which I cannot but infer may reach farther back than 1796, practices inconsistent with the custom, fictions instead of facts, such as in this very case have been admitted to be departures from the custom, have prevailed in the City. When we have evidence of such irregularities in proceedings nominally under the custom, these modern instances of attempts to apply the custom to corporations cease to have the weight which possibly they might have had if it could have been shewn, first, that in all other respects during that period it had been the practice to pursue the custom with propriety and regularity; and, secondly, that in these cases against corporations, the attachments had been made effectual, either by submission of the corporations to the process, without it being ever questioned in any Court by their creditors, or by some means of compulsion having been actually used against them.

When we examine the matter a little farther, I think it becomes more and more apparent that the custom does essentially require personal process against a garnishee as the only means of enforcing

City Archives. Rolls of Pleas and Memo- A.D. 1446), A. 73, Roll 12.

his obedience. In the Special Case we are told that although from the year 1852 down to 1872—that is, within the last thirty years—there were numerous instances in which moneys in the hands of corporations aggregate had *de facto* been attached in the Mayor's Court and judgment signed against the garnishees; and although in many of those cases execution had been actually issued, and the money paid by the garnishee, under that process, yet we are also told that "the process issued has in every instance been in the form of a *capias*" (that is, personal process), "the direction to the serjeant-at-mace being to take the City Bank or the Peninsular and Oriental Steam Navigation Company, or whatever the corporation might be."

It does, therefore, appear from that paragraph, that, within a period of time so recent as to be of no weight in the case (to say nothing of the other irregularities which were customary during that period, to which I have already referred), this process has been used against corporations, and with effect, in this sense, that garnishee corporations have paid money, whatever risks they may have run by it. But, so far from any attempt being made to claim the right of enforcing that process against corporations, even during that period, by any other than personal process, the uniform practice has been to issue a *capias*, assuming that the body of the City Bank, or that the body of the Peninsular and Oriental Steam Navigation Company could be taken, and, I suppose, put into prison or detained in custody in some manner unexplained. Nothing can more strongly shew that no other mode of making this attachment compulsory upon any garnishee was known.

There is another statement which is material upon this subject; and that is, that whenever a garnishee chose to appear, upon his appearance he had a right (as of course) to say that he owed nothing to the defendant and had no goods of the defendant's in his hands. But if he chose, for this or any other purpose, to appear, then before he could be heard, or could plead at all, or make his defence, "he was obliged to find sureties to be present from Court to Court until the plea of foreign attachment should be ended; otherwise, he was committed to prison." Except on compliance with that condition, the garnishee would not be allowed to make his defence. How can a corporation be present from Court to Court? It is said, "By attorney." But if the object is to have the means of committing him to prison, if he does not obey the process, I apprehend that the presence of an attorney would be of exceedingly little value. Not only was he to give security to be present from Court to Court, but "otherwise he was committed to prison." How could a corporation be committed to prison? The sureties he gave (if he gave sureties) were not that he should pay the amount if the issues were found against him, but that he should be present in the body from Court to Court until the plea of foreign attachment was determined—not present by his attorney, but "present in the body;" that his body should be taken, if he was guilty of disobedience to the lawful orders of the Court.

That this is an accurate statement is clear from several of the ancient authorities set forth in the printed case. There is a case which arose on *habeas corpus* in 1443—*Wellys's Case* (20)—and by the return it appears, after stating the preliminary proceedings, that goods in the hands of Wellys belonging to the defendant in the action were adjudged to be delivered according to the custom of the City to the plaintiff in the action, and that "the said John Wellys" (the garnishee) "named in the same writ, for that he was summoned and came not according to the custom of the said City, by default was condemned by the foreign attachment aforesaid;" "whereupon, according to the custom of the City," at the instance of the plaintiff, one of the serjeants-at-mace was commanded to "attach by his body the said John Wellys, and cause him to be led to the prison of the Lord the King," "there to remain until the said John Wellys should satisfy the said plaintiff of the said sum." It was not to distrain his goods, not to levy anything

(20) City Archives. Rolls of Pleas and Memoranda (A.D. 1443), A. 70, M. 5.

them, but to attach him by his

have also examples of the form of ty given, when submission to the was not made. There is a pre- t of the year 1680—*Jennings* v. m (*Ayliffe*, garnishee) (21)—where m, the defendant, was attached by i the hands of Ayliffe, and Ayliffe, suit of the plaintiff, was warned to r. He appeared and found sureties re his body from Court to Court he end of the plea, "ad habendum i dicti Thomæ Ayliffe præmoniti achiamento prædicto . . . . et sic ps de curia in curiam, usque ad placiti illius." In the case of *Gooch veland* (22), the proceedings were r, and the party did not produce dy according to the engagement. is Haddon, the garnishee, had given reties persons named Edney and . The security was "to have, &c." o doubt that "&c." means "his ") "from Court to Court until the f that plea, &c., according to the a." Afterwards the garnishee, is Haddon, "by and at the instance mainpernours aforesaid" (that is ireties), "was committed to the of the said Lord the King in the r of the Poultry of London, under stody of us, the aforesaid sheriffs, to remain until the end of the plea attachment aforesaid."

se examples shew that the custom the garnishee did not appear, to t him to prison; and, if he did , and time was given for further dings, to take security for his per- appearance from Court to Court, he made any subsequent default, lso to commit him to prison. Com- nt to prison is the only way in which, ing to the whole course of these ents, and the findings in the pre- pecial Case, the garnishee could be lled to obey; and that, as I have y said, rests upon an intelligible le. Nothing more need be said to shew that such a custom cannot be applied to a corporation, because it fails in this essential and indispensable point, that it cannot, as against a corporation, have the force of compulsion in law.

Upon these grounds, I think that the judgments under appeal are right, and must be affirmed, and I so move your Lordships.

LORD BLACKBURN.—I have come to the same conclusion.

I think it necessary to observe, in the first place, upon the way in which the point is raised, in order that it may be seen what the House has really to decide. The declaration in prohibition is on this ground: the plaintiffs in prohibition allege, and truly allege, that they are a body corporate, a corporation aggregate, and they assert that, "according to the law of this kingdom of England, the plaintiffs as such corporation as aforesaid are not liable to any process of foreign attachment issuing out of the said Lord Mayor's Court," yet the proceedings are taken to enforce a foreign attachment against them, being a body corporate, which the other party threatens to do "by *fieri facias* and otherwise against the goods of the plaintiffs." Such is the declaration in prohibition.

That is met by these pleas: the first plea, denying that they are a corporation, is, of course, a mere idle plea; the second says that "the plaintiffs, as such corporation, were and are liable to the said process, and the said Court had, and has, power and authority to attach moneys, goods and effects of the defendant in the said suit." That is a traverse, raising the question whether the custom does apply to a corporation or not, and that will be, of course, the main question in the case as raised here. But besides that, the defendants pleaded a special plea, which would be perfectly good if it had been applied to an ordinary garnishee. They plead this custom of foreign attachment in the City, setting it out, as it has been certified often enough, the words of the old certificate being, "If any person found in the City is indebted," and so on. The word "person" might include a corporation, or it might not;

City Archives. Returns to Writs, vol. iii.

City Archives. Returns to Writs, vol. i.

that is not expressed, and I shall have to say a word or two about that by-and-by.

But then they proceed to state the facts, and there is this material averment: "At the petition of the said Sarah Griessiell, then and there made to such Court by her said attorney, and by virtue of such plaint, it is then and there commanded by the said Court to one of the serjeants-at-mace of the said Mayor, and a minister of such Court, that he, according to such custom, should summon the said Thomas Griessiell to appear at the same Court, so holden before the Mayor and Aldermen in the said City, to answer the said Sarah Griessiell in the plea in such plaint specified; and that the said serjeant-at-mace should return and certify what he should do by virtue of the said precept; that afterwards at the same Court the said serjeant-at-mace, according to such custom, returned and certified to the same Court that the said Thomas Griessiell had nothing within the said City or the liberties thereof whereby he could be summoned, nor was he to be found within the same; and thereupon the said Thomas Griessiell was then and there at the same Court solemnly called, and did not appear." That is the form of the averment which has been, I think, in all the pleas of foreign attachment since foreign attachment was first pleaded (which is now for 500 years and more); and imperfect as is the security, that the defendant should know of the foreign attachment, and that his moneys in the hands of his debtor should not be taken away without notice, there is some security there given, namely, that the serjeant-at-mace, a responsible officer, should have tried to find the defendant, that he should not have been able to find him, and that he should not have been able to find anything by which he could summon him. It gives an imperfect security, perhaps, but it gives some security that his goods shall not be taken behind his back; and that security it is, and I apprehend that security alone, which has prevented the custom of foreign attachment from being held to be utterly unreasonable and void as against a defendant; the reason being that this does give some security, that, except in cases where the defendant having been within the City has absconded, leaving nobody to look out for him, and has moreover left no property within the City—that is, not in the hands of another—except in such cases he shall have an opportunity of appearing before the plaintiffs come upon his debtor at all. That is clearly material, and, indeed, a necessary averment in the plea.

There was a demurrer to that plea, and upon demurrer the averment must be taken to be true. The object of the demurrer, no doubt, was to raise the question for the Judges of the Common Pleas Division to determine upon what they took judicial notice of, namely, the custom of foreign attachment—whether or no the custom of foreign attachment did apply to a corporation aggregate as garnishee. There is considerable difficulty in saying how that question could be properly raised as the case then stood. I do not say that it might not be, but I say there is very considerable difficulty about it; for, although the Courts do know and take judicial notice of a great many of the customs of the City of London, and of the custom of foreign attachment in particular, there might be a good deal of dispute as to whether it was not possible that some customs might exist of which the Courts had not yet taken judicial notice; and when the case went up to the Court of Appeal on the demurrer at first, I understand (it does not appear very distinctly on the papers before us how it was) that the late Lord Justice Mellish pointed that out, and said that to raise the real question before the Court, it was necessary that the issue of fact, particularly the issue of the second plea, should be ascertained; or, if not necessary, at all events highly desirable that that should be done before they decided the questions, and I think he was perfectly right in that. Accordingly it was arranged and agreed that that should be done, and that then the argument should be resumed; and there was an order of reference made to have the matter settled upon the terms which are there mentioned by an arbitrator. That has been done, and a Special Case has been stated. Now it is not expressly stated upon that

order what arrangement was made, but it is obvious enough, I think, that the spirit of what was then agreed to was this, that if there should be any difficulty upon the demurrer to the plea and upon the plea, both should be amended. They would have been amended, of course, in every particular that was requisite in order to raise the real question, and if there should be any difficulty as to that, we have to look to the facts as found upon the Special Case to see what the custom really was, and accordingly, without any attempt to shrink from it, it has been so argued before us. I do not enter into the enquiry of what amendments precisely might have been required upon the demurrer to the plea, or whether the question was rightly raised upon the demurrer to the plea, or not. I think that is all put aside by this arrangement, and, in fact, the point for your Lordships really to decide, taking the whole matter together, is this: Is the custom really established or not? The issue of law would follow the issue of fact, if I may use that phrase. Then are the issues of fact to be found for the defendants or not?

Now, when the Special Case comes to be examined, it appears that upon that particular part of the plea which alleged, what certainly is an essential part of the custom, and was an essential part of the plea, namely, that there had been that kind of notice given to the defendant, or rather that security that the defendant should hear of the proceedings, unless he had run away, or absconded, which would be implied by the sergeant-at-mace trying to find him, and returning *non est inventus* (and if the sergeant-at-mace returned *non est inventus*, unless it was true, he would be responsible for having made a false return), upon this essential part of the custom and of the plea it turned out that that had never taken place at all. It appears that a very improper practice has existed for a long while in the City of London. They have been content to write down that these things have been done when they have not been done at all. I will not enquire with what object that was done, or how it came to be done, farther than to say this: whatever may be the case, if a garnishee is defending himself, I cannot doubt at all that the Court of Appeal was perfectly right in saying that that question being raised here, there was no technical estoppel or objection of any sort, and that the point being raised by the garnishee it is conclusive. The plea as pleaded is not proved in an essential part, and consequently the defendant is entitled to judgment. But then that turns solely upon the particular instance in which it has happened. It does not decide the general question as to the custom.

Now, upon the general question there was an attempt made to argue thus: Mr. Benjamin, if I understood him rightly, said, as it is shewn that in the City of London the authorities have for a long while been abusing this process (for that is what it comes to), therefore the custom must be considered as forfeited and at an end. No authority was cited for such a proposition, and I know of none. There are some authorities for saying that when a body corporate has abused its franchises, those franchises may at the instance of the Crown be seized and treated as forfeited for the abuse; but I have never heard, nor am I aware of any authority for saying, that the fact that many people have abused and made an ill-use of this custom of foreign attachment, and have used it for purposes for which it was not intended, and have probably done a good deal of mischief in so doing—that that fact is to prevent others, innocent persons, from using the custom, if they use it properly afterwards. I do not think there is any ground for saying that.

Then we come to the real question which was intended to be raised, namely, Does this custom apply to a corporation aggregate as garnishee? The Judges of the Common Pleas Division, in giving their judgment, render reasons which are not to my mind satisfactory, that led them to the conclusion that a corporation aggregate could not be a defendant in a Court. I do not think it necessary to enquire into that farther than to say that I do not see any reason why a corporation aggregate cannot be a defendant in a Court. I think the decision of the Court of Error in the case of ——— v. *The Hamburgh*

Company (23), in the reign of Charles 2, was a decision that a corporation aggregate could be a defendant. I do not see why it should not. However, it is not necessary now to decide that.

Assuming it to be convenient and desirable that a natural person, being a debtor to another, should be capable of being treated as a garnishee, and having the other's goods attached in his hands, I do not see that there is anything in the reason or sense of the thing why a corporation aggregate, being a debtor, should not be treated in the same way. If it be convenient and desirable, for instance, that Messrs. Smith, Payne & Smith, the bankers, being natural persons, should have balances in their hands attachable, in order to force their customers to come in, it is equally natural and equally reasonable that the London Joint-Stock Banking Company, although a corporation, should also be subject to the same liability. But that is not the question. Customs must be immemorial customs; we must see whether the custom has existed from time immemorial. Be it that we are satisfied that the custom would be as good when applied to another subject as to one in which it has existed, we cannot establish that. The Legislature might do so if it pleased, but nobody else can.

Therefore the question comes to be, Is the custom here applicable to a corporation aggregate? Two objections are made to that; they are real and substantial objections, upon which I think the whole turns. The garnishee, if he is to be obliged to pay the money, must be discharged from paying it to his creditor. Now the garnishee cannot, according to the authorities, or to reason, set himself free towards his creditor by making any voluntary payment: it must be a compulsory payment—a payment under compulsion of law—or else he is not discharged. That brings us to the question, Can a corporation aggregate be compelled to pay money in this way? The other way of putting it (the way in which Mr. Harrison put it, which did not strike me at first) really involves the same question. It is of the essence of justice that the garnishee who is called upon to pay for a person money which is alleged to be due from himself to that person, should have an opportunity of saying, "I do not owe the money at all," and should be allowed to plead *nil habet*. A garnishee who is a natural person, can, according to the custom of the City of London, come in and, giving special bail or rendering himself, plead *nil habet*. He is allowed to plead that, and to say, "I owe nothing." Can a corporation aggregate do that? That comes round to nearly the same question as this: Are the customary processes of the Court of the City such as to allow a corporation aggregate, being a garnishee, to come in and plead *nil habet*? If not, any custom which attached to a corporation would be in itself utterly unreasonable and void, and could not be enforced.

Now, upon that, the two questions which come before us are really nearly the same in point of fact. I can hardly call it fact—it is a mixture of law which the Courts take notice of, and matters proved by old records, and one thing and another; it is therefore a mixture of law and fact; still it comes to be a question, Is the process of the appellants by which they enforce obedience to their orders upon foreign attachment one which is applicable to a corporation? It was argued, or endeavoured to be argued, that there was something inherent in a Court which enabled it when it made an order to enforce that order. Where it is a common law order, you can enforce the order by the common law processes. Where it is a thing which would not be done at common law, but owes its validity to custom, the rule is that it can only be enforced by customary processes. Now, if it were established as a fact (if it could be) that corporations aggregate had been treated as garnishees from early times, so as to establish that they had been from time immemorial treated as garnishees, according to this custom I should not hesitate to draw the inference that there must have been a process by which they were forced to obey. The custom could not have been applied to them, and they could not have been treated as garnishees from

(23) 1 Mod. 212.

to which the memory of man runs he contrary, unless there had been rocess or other by which corpora- ggregate could be compelled to warning given to them, or an nade upon them as garnishees. If been established that that had been should draw at once the conclusion ere was such a process. Or if, on the and, it was shewn as a matter of rian knowledge, or in one way or nade out, that there was some pro- pplicable to a natural person—an nal—who was a garnishee, by he could be compelled to pay, other y taking his person; if it could be that there was some means by which ld be compelled to obey an order, or is goods taken, other than a *fi. fa.* t him, it would go very far. I do not at it would go the whole way, but it go very far indeed to make me that corporations aggregate which have it enforced against them by ind of process, might also be gar- s. But when one comes to look at ecial Case, and at all the authori- nich have been cited, one finds that r of those propositions has been out at all. In the case itself it is and truly stated, "the garnishee," desired to dispute the debt alleged due from him to the defendant, l to appear. His appearance, how- vas merely for his own protection. of appearance on his part did not, want of appearance by the defen- in the original action, prevent the ff from getting any further. From rliest period, if the garnishee did pear, final judgment went against y default, with the same conse- es as ensued upon judgment after rance and verdict. Accordingly, is no trace of any process, whether nature of *distringas* or *capias*, or vise, for the purpose of compelling rnishee to appear. If he chose to r, he was obliged to find sureties to sent from Court to Court until the of foreign attachment should be , otherwise he was committed to ." Could a corporation aggregate t? Could a corporation aggregate sureties to be present from Court to Court"? Or could a corporation aggregate, if it did not find the sureties, be "committed to prison"? Upon the face of the thing the statement is enough to shew that it could not be so; and consequently it seems to be very plain upon that statement that a corporation aggregate could not come in and plead *nil habet*, because it could neither give the sureties nor go to prison, nor give special bail to render the person to prison which the custom required, and that would seem to go very far to shew that the custom could not be applicable to a corporation aggregate.

Then the Special Case proceeds to say that, "in the great majority of instances the garnishee, when judgment was given against him, handed over the money or goods attached to the serjeant-at-mace without actual compulsion, and the serjeant-at-mace thereupon handed the same to the plaintiff. If the money or goods were not forthcoming, the garnishee might be and ordinarily was arrested and committed to prison. Whether a process in the nature of a *fi. fa.* was also available" (it proceeds to say) "is a matter in dispute," and which, of course, the Court has to determine. But I pause to say that that shews that in the ordinary course, at least, the customary process to compel obedience was one which was not applicable to a corporation aggregate, and such a corporation, therefore, one might say, could not be within the custom, because if it made the payment it would be a payment not made under compulsion of law, and which therefore would not be good as against its creditor, the defendant.

Now, the first thing one naturally enquires is, what I mentioned before, namely, whether there is any ground for saying that corporations were in fact treated as garnishees from early times. If so, I should infer that there must have been some process against them. No corporation seems ever to have been treated as a garnishee, as far as can be found, until, I think, the year 1796, and then for a considerable period there are entries from which it appears that foreign attachments had been commenced against corporations aggregate as garnishees;

but there are no instances of their having been acted upon or obeyed until comparatively recent times. I think the earliest was 1817; it may be as early as that, but most of them were after 1830. Now we know perfectly well that before 1830 the petitioners in the City of London, or I may say the City of London, had been endeavouring to extend the custom of foreign attachment to a degree which went outrageously beyond what was justified. Their efforts so to do were hardly put an end to finally until the decision in *Cox* v. *The Mayor of London* (4). In that case they boldly contended, and the Recorder certified, that it was the custom of the City to sue any person, whether he was in the City or out of the City, for any debt, whether it had accrued within the City or out of the City, and for that purpose to attach any garnishee, whether resident in the City or not resident in the City, if they could catch him within the City, so that the serjeant-at-mace could give him a warning. This House held—and even if it were not the decision of this House, I should say no one could read the elaborate opinion given by the late Mr. Justice Willes, which I myself concurred in, as one of the summoned Judges, without being convinced, that this was a complete usurpation. What I have now to deal with is only the point that the system of usurpation which was stopped then had begun as early as 1830, or earlier. There are very clear traces of an attempt of the kind having been made in that case which was referred to—*Wetter* v. *Rucker* (8)—where it appears that a Swiss merchant sued an Italian merchant in the City Court of London, and, by what looks extremely like collusion, attached a debt in the hands of a common factor. The decision which was then come to, at least the only decision which is material to the present case, was, that payment under that attachment, under the circumstances in which it was made, was not payment by compulsion, and that no other payment would discharge the garnishee. It is therefore a very important authority for the proposition with which I first started—that to make the custom good, it must be shewn that there is some process by which the garnishee could be compelled to pay.

I think, therefore, that corporations are not shewn to be garnishees, so as to lead to the inference that there must have been some process against them. Has there been, in fact, shewn to have been any process against individuals—that is to say, natural persons—who are garnishees which could be applicable to a corporation aggregate? I have already said that I think it is essential to shew that there is a customary process to enforce an order which only rests upon the custom itself—a process according to the custom. Has there been anything of the kind? I need not mention all the cases that were referred to, because, as they went on, they were all distinguished from this. The only case which is applicable, if that is applicable, is the case of *Gascoyne* v. *Penyke* (9). That was a peculiar case undoubtedly, in which it is difficult to say exactly what the suit was; but the important part of it as regards this case was, that after the garnishee had made final default, judgment was given against him. "Whereupon," says the Recorder, "it is considered that 50*l.* of the moneys aforesaid defended in the hands of the aforesaid John Marian" (John Marian was the garnishee) "be levied of the goods and chattels of the same John Marian if he have whereof, &c., and be delivered to the same Torellus by security, according to the custom of the City aforesaid, &c.; and if the same John Marian have nothing whereof the moneys aforesaid can be levied, that then the same John Marian be taken and committed to prison until he shall have delivered here in Court the moneys aforesaid;" so that in that case no doubt the Court of the City did take upon itself to order a *fi. fa.*, and in the event of no goods being found a *ca. sa.*, in the same breath, and if such a thing as was then done had been done since, and that practice had been followed, so that you could consider whether it was good and reasonable in itself or not, it would be another matter; but to say that such an anomalous and peculiar thing as that should be considered as established, as being part of the custom, because once, and once only, rather more than 500 years ago, it was done and has never been acted upon since, seems to me impossible. We are to find the matters-

t as to the custom of the City by rms of the order of reference upon pecial Case. I do not see how one find as a fact that it was part of the n of the City to pursue this very alous course, which once, and once appears to have been pursued 500 ago. As I said before, the question to me to come round to this: Can poration aggregate be allowed to r and plead *nil habet*? If it be so, a corporation aggregate can only do on the terms of giving special bail he corporation aggregate shall come rson and attend the Court, and if hall be kept in custody in person; orporation aggregate cannot come in lead *nil habet*, and the custom, if it ed to such a corporation, would be y unreasonable and void. If the ration aggregate is to make a pay-, that payment will not be good as st the debtor unless the payment is by compulsion of law, and that s round to be, unless there can be n to be some customary process ap-ble to a corporation aggregate, by a it could be compelled to pay. I already stated that, in my opinion, er of these things is made out, and quently I think the judgment should it was given in the Court of Appeal—udgment of the Common Pleas Di-a should be affirmed, and this appeal issed with costs, without deciding particular questions as to the special irrers or causes of demurrer upon plea, because, as I apprehend, it is a by arrangement between the parties the plea demurred to is to be taken nended so as to raise the question, hat the real question is to be decided the facts as found in the Special Taking that view of the case, I ot at all doubt that we ought to with the judgment proposed by my and learned friend on the woolsack.

RD WATSON.—The details of this what complicated case—I mean plicated as presented to the House ne Bar—have been so fully criticised ny noble and learned friend on the sack that I shall content myself stating very shortly the reasons for which I concur in the judgment which his Lordship proposed.

The only point, as I take it, that the House intends to decide is that raised by the contention of the appellants to the effect that this custom of the City of London with reference to foreign attachment extends to corporations aggregate as garnishees. In considering the merits of that part of the case it is very necessary to keep in view that which has been already referred to by both my noble and learned friends—namely, that it is of the essence of this custom that execution may follow upon the order directed to the garnishee, in the event of his not obeying that order and failing to hand over the goods of the defendant, or to pay the money of the defendant to the plaintiff. That is necessary, because the Courts of law have held that, unless he so deliver or pay under compulsion, he is not discharged. The custom would not be a reasonable one unless it went the length of affording protection to the garnishee when he obeys the order of the Court.

Now, the older certificates and the treatises upon City Law certainly leave the question open whether corporations are "persons" within the meaning of these laws and those certificates. The word "person" may be extended to legal persons created by statute or by charter, as well as to individuals, and the terms of these documents are not upon the face of them conclusive against the custom or the practice contended for by the appellants. But an examination of these and the older evidence which we have in the present case, I think, clearly shews, in the absence of proof to the contrary, to which I shall shortly refer, that the custom therein set forth was not applicable to corporations aggregate. It is quite sufficient for that purpose to refer to the two points which have been already noticed: in the first place, if a garnishee desires to deny his liability as to goods or debt, or, in other words, to plead *nil habet*, the only course of procedure open to him for the purpose of vindicating his rights, was a course of proceeding entirely inapplicable to the case of a corporation. In the second

place, I do not think it necessary to go further than the finding of the case, to the effect that if the garnishee did not pay the money or hand over the goods, the old practice was that the serjeant-at-mace arrested him without any writ of *capias* or warrant. It is not necessary to go farther than that in order to shew that the process of compulsion, under which alone a garnishee could safely pay, was a process of compulsion which was quite inappropriate in the case of a corporation aggregate.

It might, no doubt, notwithstanding the inferences that are derived from these facts, be open to the appellants to shew that in point of fact corporations were brought within the custom, and that in point of fact execution proceeded against them, appropriate to their personal character as legal persons only. But, on referring to the evidence, I think it fails, not only in point of time, but in point of substance. You have certainly the instances between 1796 and 1817; and, again, a large practice and more extended custom in recent times, owing to the passing of an Act which enabled corporations to create themselves in the year 1844. But the earlier records shew a defective practice; there was no compulsion. If payments were made, which is not very satisfactorily shewn, by the garnishee, or goods delivered, in those cases it was not under compulsion. A great many of them were withdrawn. And when we come down to more recent times, the only attempt at compulsion which was made by the Court of the Lord Mayor was by issuing a writ, equivalent to a writ of *capias*—a proceeding which, as against a corporation garnishee, could obviously have no compulsory force. It therefore appears to me that the attempt to set up this custom as against a corporation aggregate has entirely failed.

But then it was pressed upon your Lordships that this custom might be extended to corporations aggregate, and that, as it was put by Mr. Webster in his argument for the appellants, execution appropriate to corporations might be found within the Court. I do not doubt that it may be so, but we are here determining not what may be done, but what has been done; not how this process could be extended to corporations, but whether a custom has existed which does include corporations aggregate.

It is not a case, as it was put in argument by the learned Attorney-General, of the creation by law of some new "person" somewhat similar in character to "persons" formerly existing. I offer no opinion as to whether such "persons" would or would not fall within it, but that is not the position of the argument in the present case. Corporations aggregate have existed from a very early period—at least from 1587 downwards. We have in the case before us materials shewing that, from that date, individual officers of corporations were made garnishees. Therefore the very same evidence in this case which goes to prove that a custom existed by which individuals were made garnishees, also goes to establish that corporations aggregate in ancient times, and down to a very recent time, enjoyed an immunity from any attempt to bring them within the custom. And it appears to me that to give effect to the argument which was pressed upon us on this point of the case would be simply to repeal that exemption, and for the first time legally to subject corporations to the operation of this custom by introducing a mode of enforcing the custom which has never been practised from the earliest times, and not even down to the present time.

Therefore I entirely concur in the views of this case which have already been expressed.

Order under appeal affirmed, and appeal dismissed with costs.

Solicitors—Sir T. J. Nelson, for appellants; Clarke, Rawlins & Clarke, for respondents.

[IN THE HOUSE OF LORDS.]

1881.
Feb. 18, 24, 25, 28.
March 1, 8.
April 7.

MACKONOCHIE *v.* LORD PENZANCE AND ANOTHER.

Ecclesiastical Court—Power to Append a Monition to a Definitive Sentence—Mode of Enforcing—Suspension ab officio et a beneficio for Contumacy in disobeying such a Monition—Prohibition—53 *Geo.* 3. *c.* 127—3 *&* 4 *Vict. c.* 86.

A beneficed clerk was found guilty in the Arches Court of ecclesiastical offences, and suspended ab officio for a certain time, and a monition was appended to the sentence requiring him not to offend again in like manner. He disobeyed the monition, and a second monition was thereupon issued by the Dean of the Arches, which he also disobeyed. An application was then made to the Court by motion for his suspension. He was served with notice of the motion but did not appear, and the Court suspended him ab officio et a beneficio for three years.

The clerk applied for a prohibition:—

Held (*affirming the judgment of the Court of Appeal*), *that a monition could be appended to a definitive sentence; that disobedience to such a monition could be punished as contumacy by suspension ab officio et a beneficio; that in order so to punish such disobedience it was not necessary to institute a fresh suit, but that suspension was properly awarded upon motion in the original suit.*

This was an appeal from a judgment of the Court of Appeal which had reversed an order for prohibition issued by the Queen's Bench Division against Lord Penzance, as Official Principal of the Court of Arches, and John Martin, the promoter of an ecclesiastical suit against the appellant. The case is reported in the Courts below, 49 Law J. Rep. Q.B. 9; Law Rep. 3 Q.B. D. 730; 4 ibid. 697.

The facts and arguments are fully stated in the judgments.

Charles and *Phillimore*, for the appellant.

Sir H. Giffard, *Blakesley* and *A. L. Smith*, for Lord Penzance, were not called upon.

Martin did not appear.

Cur. adv. vult.

THE LORD CHANCELLOR (LORD SELBORNE).—The appellant in this case is a clergyman of the Church of England, beneficed in the diocese of London, who, in a suit duly instituted in 1874, in the Arches Court of Canterbury, by letters of request from the Bishop of London, according to the Church Discipline Act (3 & 4 Vict. c. 86), was charged with certain offences against the law ecclesiastical, consisting in the introduction of unauthorised ceremonies during the performance of divine service in his church. At the hearing on the 7th of December, 1874, Sir Robert Phillimore, then Dean of the Arches, held certain of these charges to be proved, and by an interlocutory decree, having the force of a definitive sentence, ordered the appellant to be suspended *ab officio* for six weeks, and admonished him to abstain for the future from the practices set forth in the articles which were held to have been established. Notice of appeal was given, but was afterwards abandoned; and on its abandonment, a formal instrument of suspension, to be published in the appellant's church, was drawn up and issued under the seal of the Court on the 12th of June, 1875, by which it was notified that the appellant had been suspended for six weeks from the discharge and execution of all the functions of his clerical office within the province of Canterbury, "under pain of the law and contempt thereof." At the same time (by a separate instrument) a formal monition, also under the seal of the Court, was issued and served upon the appellant, by which he was admonished to abstain for the future from the practices set forth in the articles pronounced to have been proved, also "under pain of the law and contempt thereof."

Down to this point the proceedings are now admitted to have been regular and proper according to the course of the Ecclesiastical Courts. In the Queen's Bench Division of the High Court of Justice this was not admitted; on the contrary, it was then contended that it was not competent for the Court of Arches to superadd monition to suspen-

sion; and this view, being adopted by the late Lord Chief Justice of England, formed part of his reasons for granting a prohibition.

After a lapse of nearly three years, on the 18th of March, 1878, a notice of motion in the same cause was filed and served upon the appellant, charging him with disobedience to the monition of the 12th of June, 1875, in the particulars therein set forth, on certain days in each of the years 1875, 1876, 1877 and 1878; and intimating that the Court would be asked on the next Court day to enforce the monition and to condemn the appellant in costs. A motion pursuant to that notice was made, the appellant not appearing; and (the alleged instances of disobedience having been proved by affidavit) the Judge of the Arches Court, on the 23rd of March, 1878, pronounced and declared that the appellant "had failed to obey the said monition in not having abstained from the following practices, acts, matters and things" [specifying them], "and that he had continued the said practices, acts, matters and things;" and admonished him to abstain from them for the future and condemned him in costs. Pursuant to this sentence a further monition, "under pain of the law and contempt thereof," was issued on the 29th of March, 1878, and served on the appellant.

On the 18th of April, 1878, another notice of motion (similar to the former), was filed and served on the appellant, alleging further acts of disobedience since the service of the further monition, and, after motion made, pursuant to this notice (the facts being proved by affidavit, and the appellant again not appearing), the Court, on the 1st of June, 1878, "pronounced, decreed and declared" that certain acts alleged to have been done by the appellant on the 31st of March and the 7th of April, 1878, in the performance of divine service on those days, were sufficiently proved; "and that in so doing, he had repeated the offences which were alleged against him in certain of the articles exhibited against him in this suit, and declared by the Court to have been sufficiently proved, and further had therein and thereby disobeyed and contravened the monition served upon him on the 26th of July, 1875, and also the further monition served upon him on the 29th of March, 1878. For which disobedience the Judge did pronounce him to have been guilty of contumacy. And for the conduct aforesaid, the Judge did further decree and declare that he should be suspended *ab officio et beneficio* for three years.

It was contended that this was a sentence of suspension, not for contumacy only, but also for new and substantive offences against the ecclesiastical law. But I cannot hold the finding, that the appellant had "repeated" some of the offences with which he was originally charged, to be anything more than an introduction to a sentence for contumacy and disobedience to the monitions of the Court. The context of this sentence itself, the prior sentence of the 23rd of March, the further monition, and the notices of motion on which both those sentences were founded, make this, to my mind, clear.

Against publishing, proceeding with or enforcing this decree of suspension, a rule *nisi* for a prohibition was obtained by the appellant from the Queen's Bench Division of the High Court, on the 5th of June, 1878, which rule, after argument, was made absolute on the 8th of August, 1878—the late Lord Chief Justice and Mr. Justice Mellor thinking the case one proper for prohibition, Mr. Justice Lush thinking otherwise. The Court of Appeal, on the 28th of June, 1879 (by a majority consisting of Lord Coleridge and Lords Justices James and Thesiger, against Lords Justices Brett and Cotton), reversed this judgment of the Queen's Bench Division, and discharged the rule for a prohibition. Whether this reversal was right or not is the question now before your Lordships. After hearing an elaborate argument from the counsel for the appellant, for several days, your Lordships were (I believe) all under the impression that the judgment of the Court of Appeal was right, but, in a case in which there had been so much difference of opinion among very learned Judges, you desired to take time more fully to consider the arguments and the authorities cited. The

result (so far as I am concerned) has been to confirm my original impression.

It was contended that the sentence of suspension of the 1st of June, 1878, was contrary to two statutes of the realm (3 & 4 Vict. c. 86, and 53 Geo. 3. c. 127); and if this could be made out, the prohibition was rightly granted. But, if this is not so, the question resolves itself, simply and entirely, into one of the proper course, practice and procedure of an Ecclesiastical Court, in a cause of which that Court had proper cognisance, against a person and in a matter properly subject to its jurisdiction. Such a question ought, in my opinion, to be determined in the ecclesiastical, and not —by prohibition or otherwise—in any temporal *forum*, notwithstanding the fact that, by a sentence of suspension *a beneficio*—which the Ecclesiastical Courts, and those Courts only, have power to pronounce—temporal rights, held by an ecclesiastical tenure, in consideration and upon the condition of the performance of ecclesiastical duties, are necessarily affected. Supposing no statute to intervene, the Ecclesiastical Courts must have jurisdiction to determine questions of this nature; and, if they have jurisdiction, prohibition does not lie to them from the temporal Courts. The remedy —if there be any error in judgment—is by appeal. In point of fact, the Court of final appeal in ecclesiastical causes has already three times had before it the very same question which is raised by the appellant in this case, and has as often decided it adversely to the appellant's view. Whether those decisions might or might not be open to reconsideration, in any other case, by the Court which pronounced them, they ought, in my opinion, to be treated in the meantime, by this and every other temporal Court, as settling the ecclesiastical law upon the point in controversy, supposing there to be no other law or statute which they contravene.

The argument of the appellant's counsel from the Church Discipline Act (3 & 4 Vict. c. 86), was, that it prohibits, by section 23, the "institution" in any Ecclesiastical Court, of "any criminal suit or proceeding against a clerk in holy orders," otherwise than is thereinbefore enacted or provided; that, in this case, the suit against the appellant, which was instituted in the year 1874 in conformity with that statute, was terminated and exhausted by the interlocutory decree, having the force of a definitive sentence, of the 7th of December, 1874; that no subsequent proceeding to enforce obedience to the monition issued pursuant to that decree, or to punish disobedience thereto, could be taken in the same suit; that every such act of disobedience was a new and substantive ecclesiastical offence, which could only be punished in a new and distinct suit; that no such new suit was instituted in the manner required by the statute; and, consequently, that all the proceedings in 1878, down to and including the sentence of suspension of the 1st of June, 1878, were without jurisdiction.

The argument from 53 Geo. 3. c. 127, was, that it provided, instead of excommunication—which had previously been in use for the purpose of enforcing obedience to the citations and lawful orders, both interlocutory and final, of the Ecclesiastical Courts, and for punishment of contempts in the face of those Courts—a sentence of contumacy to be pronounced in the like cases, and to be signified after ten days to the King in Chancery, whereupon imprisonment was to follow; and that this statutory method thenceforth became and was the only way of enforcing obedience, or punishing disobedience, to such lawful citations or orders of any Ecclesiastical Court, in cases of contumacy or contempt.

In order to consider the validity of these arguments—and for that purpose only—it becomes necessary to ascertain, first, whether before the statute 3 & 4 Vict. c. 86 a proceeding to enforce obedience to a monition or other order, contained in or issued pursuant to a decree of an Ecclesiastical Court, having the force of a definitive sentence, could be taken in the same suit, without the commencement or institution of any new "criminal suit or proceeding;" and, secondly, whether, before the 53 Geo. 3. c. 127, obedience to the lawful citations

or orders—interlocutory or final—of an Ecclesiastical Court could be enforced, or disobedience thereto punished, by any ecclesiastical censure other than excommunication, and particularly by suspension. If both these questions ought to be answered in the affirmative, the arguments of the appellants founded on these two statutes fall to the ground. It is certain that there is nothing in 3 & 4 Vict. c. 86 to prevent anything being done either before or after sentence in a suit duly instituted in conformity with that Act, which before the passing of that Act could have been lawfully and competently done in a similar suit, duly instituted. And the proceedings for contumacy prescribed by 53 Geo. 3. c. 127 are thereby substituted for excommunication only; there is nothing in that Act to take away any power which an Ecclesiastical Court might previously have possessed, to proceed in like cases by other modes of censure.

The ecclesiastical law, it must always be remembered, even in those proceedings which are called—and in some sense are—criminal and penal, has for its object not the punishment of individual offenders, but the correction of manners and the discipline of the Church. "Monition"—which is sometimes itself called an ecclesiastical censure—is described in the books as of a "preparatory" nature—*Oughton, Ordo judiciorum* (1)—that is, as I understand the term, as a warning or command, to be followed in case of disobedience by some coercive sanction. It appears to have been a general, though not an invariable, rule of the canon law, that monition ought to precede suspension or excommunication—*Gibson, Codex* (2). It might be, and in practice it often was, issued, for various purposes, at the beginning or during the progress of an ecclesiastical cause. It also might be, and sometimes was, as in the present case, the sentence or part of a sentence upon the merits, pronounced at the end of such a cause.

It was not disputed at the bar that, if issued at the beginning or during the progress of a cause, such a monition might be enforced—by excommunication, at all events, or since 53 Geo. 3. c. 127, by the procedure thereby substituted for excommunication—in the same suit, though it might be necessary to cite the party for his contumacy, and in some cases to exhibit articles as to disputed or disputable matters of fact—*Oughton* (3). I may refer, as an example of such a proceeding during the progress of a cause, to a monition for the payment of alimony *pendente lite*, issued in the case of *Hamerton* v. *Hamerton* (4), "under pain of the law and contempt thereof;" for non-compliance with which a sentence of contumacy—followed by *significavit*—was pronounced, and, in the opinion of Sir John Nicholl, would have been rightly pronounced if there had been such non-compliance in fact.

No reason *a priori* can be suggested why obedience to a monition, issued as part of a decree having the force of a definitive sentence, should not be enforced in the same suit, as well as a monition in any earlier stage. Both the suspension and the monition issued on the 12th of June, 1874, pursuant to Sir Robert Phillimore's sentence in the present case, conclude—like the interlocutory monition in *Hamerton* v. *Hamerton* (4)—with the words—admitted to be proper words of style—"under pain of the law and contempt thereof." Why should not this warning in case of disobedience, either to the suspension or to the monition, have the same meaning, and point to the same consequences, whether the sentence be interlocutory or definitive? Why should not the Court have the same power of dealing with disobedience and contumacy in the suit in which the contumacy takes place in the one case as in the other?

If authority on this point had been wanting, I should have thought that the burden of proof would rest upon the appellant. But there seems to me to be abundant authority. There is a case as early as 1602—*Astill* v. *Bickles* (5)—in which a clerk, against whom a final

(1) Vol. i. tit. 137, obs. 3.
(2) Pp. 1046-1048.
(3) Vol. i. tit. 31-35.
(4) 1 Hag. Ec. 23.
(5) Rothery's *Return*, 10.

sentence of deprivation had been pronounced on appeal by the Court of Delegates, continued, notwithstanding, to officiate in the church of which he had been deprived. The same Court of Delegates decreed him to be cited for contempt, and inhibited him from interfering in the premises. In *Trebeck* v. *Keith* (6)—1741-2, of which the facts are stated, from the registry of the Arches Court, in Lord Justice Thesiger's judgment in the present case—an interlocutory decree having the force of a definitive sentence was pronounced, finding the offence with which the defendant was charged—performing divine service without licence from the Bishop—proved against him, and admonishing him not to do so for the future. He disobeyed the monition; on which the Court, in the same suit, pronounced a sentence of excommunication against him for his contempt, which sentence was followed by *significavit*. Prohibition was then applied for before Lord Chancellor Hardwicke, who refused it, saying that "the case was of as great consequence to the good government and discipline of the Church as could possibly happen," and that "it was not necessary for the Ecclesiastical Court to shew that they had rightly proceeded, for, if they had not, there was a remedy by appealing to a higher ecclesiastical jurisdiction." In *Burgess* v. *Burgess* (7)—1804, a case of incest against a layman—Sir William Scott pronounced a decree having the force of a definitive sentence, by which he condemned the party in costs, and enjoined a cessation of intercourse, and added, "If obedience be not given to this order, excommunication and other consequences will necessarily follow." In *Austen* v. *Dugger* (8)—1822—a layman was, by a like sentence, suspended *ab ingressu ecclesiæ* for one week, and was condemned in costs. The costs were taxed, and a monition for their payment, duly issued and served, was not obeyed. The Court then pronounced the party in contempt for not having obeyed the monition, and directed a *significavit* to issue; which, having afterwards been discharged as irregular, a new monition was prayed for and granted, and, on this being disobeyed, there was a further sentence of contumacy, also followed by *significavit*. The Judge—Sir John Nicholl—said, "The Court is not *functus officio* till it has enforced the execution of its own decree." In *Barnes* v. *Shore* (9)—1846, a suit against a clergyman for officiating in a manner unauthorised by the Book of Common Prayer—the defendant was, by decree, having the force of a definitive sentence, admonished to abstain from offending again in like manner, and was condemned in costs. Sir Herbert Jenner Fust said, "Should he be guilty of a repetition of this offence, it will be one not only against his diocesan, but against the authority of this Court." In *The Bishop of Winchester* v. *Rugg* (10)—1868—Sir Robert Phillimore, by a like sentence, formally admonished Mr. Rugg to obey the direction of his Ordinary—by performing divine service in each of his two churches on every Sunday—and added, "It is right that I should call the serious attention of Mr. Rugg to the order of this Court. I am glad to perceive that he has the assistance of an experienced proctor, from whom he may learn—if not otherwise informed—that disobedience to the order of this Court will be attended with the grave penal consequences which the law attaches to the offence of contumacy." The last two cases were later than the Church Discipline Act, but they shew what two learned and experienced Judges understood to be familiar law in the Ecclesiastical Courts. No example has been alleged to be found in the books of the institution of a second suit for the sole purpose of punishing mere contumacy or disobedience to the orders of an Ecclesiastical Court, by a person who was a party to the suit in which such orders were pronounced.

The proposition, therefore, that before the Church Discipline Act nothing could

(6) 2 Atk. 498; Rothery's *Return*, 162.
(7) 1 Hag. Cons. 384.
(8) 1 Addams, 307.
(9) 1 Robert. 382, see p. 399; 15 Law J. Rep. Q.B. 296.
(10) 37 Law J. Rep. Eccles. 85; Law Rep. 2 A. & E. 247.

be done by any Ecclesiastical Court, without a new suit, to enforce a monition or other order—whether mandatory or prohibitory—forming part of, or issued pursuant to, a decree having the force of a definitive sentence, is disproved by these authorities, which make it evident that cases of disobedience to such monitions or orders might be, and were, dealt with on the footing of contumacy or contempt, in the same suit, by further monition or inhibition, and, if necessary, by excommunication. In five out of the six cases to which I have referred, every act of contumacy or disobedience would have been, as much as in the present case, a new and substantive ecclesiastical offence.

The only question which remains is, whether before 53 Geo. 3. c. 127 there was any law to prevent an Ecclesiastical Court, in the case of a clerk in holy orders, from the use, for similar purposes, of the minor censure or penalty of suspension—suspension (whether *ab officio* only, or also *a beneficio*) being certainly a less penalty, in the view of the ecclesiastical law, than excommunication. There is no reason or principle on which such a state of the law can be presumed, unless it is proved. All the authority which is to be found on the subject is in the opposite direction.

Oughton (11) enumerates, first, those ecclesiastical penalties and censures which are common to clergymen and laymen; and, next, those which are peculiar to the clergy. Among the former are monitions (of which he says (12), "Præparatoria est, plerumque præcedens ecclesiasticas censuras)," and excommunication; among the latter, suspension, of which he says (13), "Post monitionem debitè factam, ecclesiasticam personam ab officio seu beneficio, vel ab utroque, ad tempus excludit." As to contumacy (14), he says that its penalty is "excommunication or suspension," and "Crescente contumaciâ, crescere debet et pœna: sed pro primâ contumaciâ potest quis excommunicari."

(11) *Ordo judiciorum*, vol. i. tit. 137, obs.
(12) Ibid. obs. 3.
(13) Ibid. obs. 8.
(14) Vol. i. tit. 37, obs G. 1.

Gibson (15) distinguishes two sorts of suspension—the one (*ab officio aut beneficio*) relating to the clergy alone (as to which he says nothing about any disuse); the other (*ab ingressu ecclesiæ*, which he speaks of as disused in his time) relating "to the laity chiefly." Both of them, he says, "are inflicted for crimes of an inferior nature, namely, such as, in the first case, deserve not deprivation, nor, in the second case, excommunication. Both, in practice at least, are temporary; both are terminated, either at a certain time, when inflicted for such a time, or upon satisfaction given to the Judge, when they are inflicted till something he hath enjoined shall be performed). And, lastly, both (if unduly performed) are attended with further penalties: that of the clergy with irregularity, if they act in the meantime; and that of the laity with excommunication." The phrase, "if unduly performed," is clumsy; but I understand it to mean, if any injunction, which the Judge may have embodied in a decree or order by which any kind of suspension *quousque* has been inflicted, is not duly obeyed.

The author of the Appendix to *Godolphin's Repertory* speaks of suspension as "the proper punishment of an offending clergyman"—*ab officio*, "for contumacy in not appearing upon lawful summons;" *a beneficio*, "for higher crimes." He adds that, "If a clerk that is suspended *ab officio* shall continue the same by serving his cure, notwithstanding his suspension, then a severer sentence follows;" ... and, "If a clerk that is suspended *ab officio* shall continue so without submission or seeking to be restored, then he may be suspended *a beneficio* also." In the whole of this passage the author repeats and refers to corresponding statements of the law and practice, made by Lyndwood, who was Dean of the Arches in the reign of Henry 5, quoting from him two sentences, namely, "Pro suspenso publicè denuntiatus, si interim immisceat se divinis, secundum sententiam doctorum efficitur irregularis;" and "Subtrahi debet beneficium, quando sic suspensus est, in morâ petendi absolu-

(15) *Codex*, 1346, 1347.

n." The reference is to the gloss ge 12 of *Lyndwood's Provinciali*, that writer also says that suspen- *beneficio* should only be *ex causa* ; but that it is such a cause, "si nsus" (that is, *ab officio*) "contemnat nsionem."

the use of suspension to compel rance, in the case of a clerk in holy , there are examples in Mr. Rothery's n—*Hancock* v. *Bomer* (16), in 1691, *ones* v. *Curtis* (17), in 1705. In the ase of *Harrison* v. *The Archbishop of* (18), in 1707 (which was brought House of Lords, on prohibition, in and in which this House affirmed rders of the Courts below, refusing ibition), a prebendary of St. Pat- Cathedral, duly summoned to attend rchbishop's Court of Visitation, and ppearing, was declared contumaci- and the Archbishop, "in due form , by sentence, suspended him *ab et beneficio* for his contempt." At r Court of Visitation (1718) the prebendary was "monished by the ishop to extract, within a month, a e to serve cure of souls, and to , in the parish of Saint John" (a annexed to his prebend); and, on equent day, Harrison having neither ed the monition, nor then appear- ie Archbishop pronounced him con- ious, and sentenced him to be ided." This sentence, and another nced under similar circumstances t another clerk named Higgins were affirmed on appeal by the Court legates.

se are not authorities directly appli- o the particular case of suspension obedience to a final decree in a al suit, having the force of a definitive ce; but the statute 53 Geo. 3. c. 127 ot lay down one law as to con- y for the case of such a final decree, nother for cases of citations and cutory orders. These authorities, ore, are sufficient to reduce the on, whether there is any reason t the exercise, in the case of dis- obedience to a final decree, of the same powers which can be exercised in case of disobedience to a citation or an interlocutory order, to one not of jurisdiction, but of mere ecclesiastical procedure. And there is at least one distinct precedent on record (prior to the cases of *Martin* v. *Mackonochie* (20) and *Hebbert* v. *Purchas* (21) before the Judicial Committee of the Privy Council) of a sentence of suspension *ab officio* affirmed by the Court of Delegates, for disobedience to such a decree. This is *Jones* v. *Jones* (22) (1671), which was brought before the Delegates from the Consistory Court of Bangor. The clerk, who was defendant and appellant in that case, was articled for not reading the prayers of the Church in what was alleged to be the proper and accustomed place. Having been, by decree having the force of a definitive sentence, admonished to do so, he appeared in Court, and "peremptorily refused to obey the monition." For this the Bishop suspended him *ab ingressu ecclesiæ*, and ordered him to shew cause why he should not be suspended *ab officio*. On a later day, not having appeared to shew cause, he was suspended *ab officio*. These orders were affirmed on appeal, both by the Court of Arches and by the Delegates.

The result appears to me to be, that the appellant in the present case has failed to shew that the provisions of either of the statutes on which he relies are in any way contravened by the suspension of a clerk in holy orders *ab officio et beneficio*, for contumacy in disobeying a monition, forming part of a decree having the force of a definitive sentence, pronounced against him in a suit regularly instituted under the Church Discipline Act, the sentence of suspension being pronounced in the same suit; and that this is nothing more than a question of ecclesiastical procedure. Into any reasons of expediency, either for or against the existence of such a power in the Ecclesiastical Courts, or for or against the

Rothery's *Return*, 99.
Ibid. 119.
2 Bro. P.C. 199; Rothery's *Return*, 135.
Rothery's *Return*, 136.

(20) 40 Law J. Rep. Eccles. 1; Law Rep. 3 P.C. 409.
(21) 40 Law J. Rep. Eccles. 55; Law Rep. 4 P.C. 301.
(22) Rothery's *Return*, 63.

exercise of it under circumstances like those of the present case, I do not think it would be proper for your Lordships to enter. If the Ecclesiastical Court has not exceeded its jurisdiction, the judgment of the Court of Appeal ought to be affirmed; and, being of that opinion, I now move your Lordships to affirm that judgment, and to dismiss the present appeal with costs.

EARL CAIRNS.—At the close of the arguments—extremely full and able—for the appellant in this case, I was of opinion (as were all your Lordships) that it would be desirable that the case should be adjourned in order that we might have an opportunity of considering carefully the arguments and authorities on which the appellant rested his case. This opportunity your Lordships have now had; and the result has been, so far as I am concerned, that I am now prepared to say that I think the judgment of the Court of Appeal should be affirmed. I had proposed to myself to state in some detail the reasons which led me to this conclusion. Before, however, doing so, I read over again the judgment of the late Lord Justice Thesiger, delivered in the Court of Appeal, and I found there every consideration and ground of judgment which I desired to lay before your Lordships so fully and so felicitously stated, that I determined to refer your Lordships to his expression of them rather than weaken it by using words of my own.

There has not been an earlier opportunity, and there certainly could not be a more significant one, which I could take for recording my deep regret for the loss which this country has sustained in the untimely death of Lord Justice Thesiger—of a Judge who in his short tenure of office had given proofs of a rare excellence and ability, and from whose matured wisdom, had his life been prolonged, the highest advantage to the State might have been anticipated.

I agree with the Lord Chancellor that this appeal should be dismissed with costs.

LORD BLACKBURN.—This case has been so thoroughly and exhaustively discussed by the learned Judges below, that we cannot expect to have any new light thrown upon it by the counsel for the respondents; and, as I believe all your Lordships are of opinion that the judgment of the majority of the Court of Appeal below was right, I see no reason why that opinion should not be declared at once.

The Church Discipline Act (3 & 4 Vict. c. 86) provides that no proceedings against a clerk in holy orders for any offence against the laws ecclesiastical shall be instituted otherwise than is in that Act provided. A proceeding against Mr. Mackonochie was instituted in strict conformity with the provisions of that Act in 1874; and in strict conformity with the provisions of the 13th section of that Act the Bishop of London, in whose diocese Mr. Mackonochie's preferment lies, transmitted the case by letters of request to the Court of Arches, being the Court of Appeal of the province of Canterbury, to be there heard and determined according to the law and practice of that Court.

The Court of Arches in December, 1874, decreed that the defendant had been guilty of certain practices which were offences against the laws ecclesiastical, and pronounced sentence that the defendant should be suspended *ab officio* for six weeks, and admonished to abstain in future from the practices thereby condemned.

On the 12th of June, 1875, a formal suspension and a formal monition were issued in pursuance of this sentence, and published. The monition, after reciting the sentence of suspension for six weeks, proceeds thus: "We do therefore hereby authorise, empower and strictly enjoin and command you, jointly and severally, peremptorily to monish, or cause to be monished, the said Rev. Alexander Heriot Mackonochie (whom we do so monish by the tenor of these presents) to abstain for the future from the practices set forth in such of the said articles or parts thereof as we pronounced to have been proved as aforesaid—that is to say, in the 4th, 5th, 7th, 8th, 9th, 10th and 12th articles, and in the 11th article so far only as making the sign of the cross to the congregation is concerned, under pain of the law and contempt thereof; and what you shall do or cause to be done in and about the

ises you shall duly certify us, our gate or other competent Judge in behalf, together with these pre- ."

far it is not now disputed that the eding was all strictly in pursuance e law and practice of the Court of es. For, though the late Chief Jus- Cockburn was of opinion, as he says, "the monition of Sir Robert Phillimore was *ultra vires* and inoperative," ourse of precedents and authorities, a had not been brought to the Chief ce's notice when he pronounced that on, are so strong that it is now ad- d, or, as Lord Justice Brett says, at vents it is clearly established, that nonition in this form was, according clesiastical law and practice, pro- made part of a sentence imposing nsion, and was properly issued.

1878 application was made to the t of Arches, of which Lord Penzance ow become the Judge, alleging that efendant had, in disobedience to the tion, repeated the condemned prac-

After full notice to the defendant, ull proof by affidavits of the truth is complaint, and Lord Penzance g issued two fresh monitions, which also disobeyed, the defendant not aring, Lord Penzance, on the 1st of 1878, pronounced this order, which d at length, for a reason which I resently state: "The Judge having rely deliberated, did pronounce, de- and declare that the proctor for the oter had sufficiently proved that the Alexander Heriot Mackonochie did, nday, the 31st day of March, 1878, n Sunday, the 7th day of April, 1878, while officiating in the Communion ce, the following vestments or things t is to say: an alb, a chasuble, a stole maniple; and did on such days cause said or sung during the perform- of the service for the administra- f the Holy Communion, immediately the prayer of consecration, and be- and during the reception of the ele- s by the communicants, the words or or prayer commonly known as the —that is to say: 'O Lamb of God, takest away the sins of the world, mercy upon us;' and on both the lays did, when officiating in the performance of divine service and of the Communion Service, kiss the Prayer-Book or service-book; and that in so doing he had repeated the offences against the statute laws, constitutions and canons of the Established Church of England which were alleged against him in certain of the articles exhibited against him in this suit, and declared by the Court to have been sufficiently proved; and further, had therein and thereby disobeyed and contravened the monition of this Court served upon him on the 26th day of July, 1875, and also the further monition of this Court served upon him on the 29th day of March, 1878, for which disobedience the Judge did pronounce him to have been guilty of contumacy. And for the conduct aforesaid, the Judge did further decree and declare that the said Rev. Alexander Heriot Mackonochie be suspended for the space of three years from the time of publishing the suspension for that purpose in the church of the new parish of St. Alban's, Holborn, in the county of Middlesex, diocese of London, and province of Canterbury, from all discharge and function of his clerical office and the execution thereof—that is to say: from preaching the Word of God and administering the Sacraments, and celebrating all other duties and offices in the said new parish church and parish of St. Alban's, Holborn, and elsewhere within the province of Canterbury, and from receiving or taking any of the profits or benefits of the vicarage or benefice of the said new parish of St. Alban's, Holborn, or of the fruits, tithes, profits, rents, rentcharges, salaries, fees and other ecclesiastical dues and emoluments whatever belonging or appertaining to the said vicarage or benefice, and did suspend the said Rev. Alexander Heriot Mackonochie accordingly, and did condemn him in the costs of this application; and the said Judge did moreover direct that a copy of this decree duly certified be transmitted to the Consistorial Court of London, in order that such sequestration or sequestrations may there be issued, or such other steps be taken as the nature of the case and the exigency of the law may appear to require; and did further direct the said suspension to be published in the said new parish of St. Alban's,

Holborn, on Sunday, the 16th day of June instant;" and assigned Moore to certify the same in the registry of this Court, within ten days after the publication thereof.

The appellant obtained in the Queen's Bench Division, before this order was formally drawn up, a rule *nisi* for a prohibition against the carrying out the sentence, which resulted in this order.

Prohibition is the common-law proceeding by which any of the superior temporal Courts at Westminster (not the Queen's Bench only) are enabled to restrain, amongst others, the Courts Ecclesiastical from acting in excess of their jurisdiction; but it does not enable the temporal Court to act as a Court of Appeal from the Court Ecclesiastical, so as to correct any irregularity or even injustice which may have been done by the Ecclesiastical Court, if done in the exercise of their jurisdiction. The majority of the Queen's Bench Division—Chief Justice Cockburn and Mr. Justice Mellor (*dissentiente* Mr. Justice Lush)—thought that in making this order Lord Penzance exceeded his jurisdiction, and they made the rule absolute. Formerly, in order to take the opinion of a Court of Appeal, it would have been necessary to have the applicant declare in prohibition, to which declaration the other side could plead, and then the matter being put on the record and disposed of in the Court below, by judgment on the verdict, if the issues taken were issues in fact, or on demurrer, if the issues taken were issues in law, error would lie on that judgment. Now, there may be an appeal against the rule. Such an appeal was brought. The majority of the Court of Appeal—Lord Coleridge, Lord Justice James and Lord Justice Thesiger (*dissentientibus* Lord Justice Brett and Lord Justice Cotton)—discharged the rule. From this there is an appeal to this House.

The first question, as I think, is, What is the effect of the order? Does Lord Penzance there pass a sentence on Mr. Mackonochie for a new ecclesiastical offence committed in 1878, aggravated by his having been previously convicted, so that Lord Penzance acts in a new proceeding, instituted since the letters of request? In that case I should agree that he contravened the Church Discipline Act. Or does he pass a sentence of suspension *ab officio et beneficio* as a step in the proceeding which was regularly instituted in 1874, as a punishment for disobedience to the monition, which he considered contumacy? In the latter case he may or may not have exceeded his jurisdiction, but has not contravened the Church Discipline Act.

It was argued that at least it was doubtful whether he was not doing both; and it was argued that, as the first was in excess of jurisdiction, a prohibition should go against all, whether the rest was within his jurisdiction or not. But common sense and the course of precedents are alike against this contention. Where part is within the jurisdiction and part not, a prohibition is awarded against doing what is in excess of jurisdiction, and a consultation as to the rest. For this it is enough to cite *Townsend* v. *Thorpe* (24), *Middleton* v. *Crofts* (25) and *Free* v. *Burgoyne* (26).

It was argued that your Lordships ought to act in conformity with the principle of the decision of *The Queen* v. *O'Connell* (27), and some countenance is given to that argument by Lord Justice Cotton, where he says that it is impossible to divide the order or apportion the sentence. I do not think that principle is applicable to prohibition. But I do not think the question arises. For unless the judgment of an Ecclesiastical Court is, in prohibition, to be construed as it were on special demurrer, and almost *ut res magis pereat quam valeat*, for which I know of no authority, I think this order of Lord Penzance must be understood as shewing that he thought this suspension a proper sentence, and not too great as a sentence given for punishing the disobedience to the monition of 1875, and so enforcing the monition of the Court issued in the time of his predecessor. And that brings me to what is the only question in this prohibition on which I mean to express an opinion.

(24) 2 Ld. Raym. 1507.
(25) 2 Atk. 650.
(26) 5 B. & C. 400; 2 Bligh, 65.
(27) 11 Cl. & F. 155.

that sentence thus understood
ı the jurisdiction which, by the
of this country, is entrusted to the
of Appeal for the province of Can-
y?
ave come, for the reasons I shall
afterwards, to the opinion that the
of Arches did nothing which was
ess of its jurisdiction, and I do not
to express any opinion whatever on
uestion as to the limits between
would be properly matter for pro-
on and what would be matter of
l only. It is a very difficult ques-
-anyone who reads the case of *Gould*
pper (28), the doubt expressed by
Justice Patteson in *Blunt* v. *Har-*
(29), as to whether that case was
y decided, and his subsequent re-
tion of that doubt in *Burder* v.
(30), will see how difficult. I do
press any opinion on it one way or
ther, because, in the view I take of
natter, the question does not arise;
though it is hardly necessary, I
to say that it is not to be supposed
that I agree to any doctrine on that
t which has been laid down because
not expressly dissent from it, or that
ent from any such doctrine because
not expressly agree to it. I mean
lly to express no opinion.
e ecclesiastical law of England is not
ign law. It is a part of the general
f England—of the common law—in
wider sense which embraces all the
nt and approved customs of Eng-
which form law, including not only
law administered in the Courts of
n's Bench, Common Pleas and Ex-
ıer, to which the term common law
metimes in a narrower sense con-
but also that law administered in
cery and commonly called equity,
also that law administered in the
s Ecclesiastical, that last law con-
g of such canons and constitutions
nastical as have been allowed by
al consent and custom within the
, and form, as is laid down in
ey's Case (31), the King's ecclesi-

5 East, 345.
8 Ad. & E. 610; 7 Law J. Rep. M.C. 107.
12 Ad. & E. 233, 265.
5 Rep. 1a.

astical law. All these laws may be, and are, altered by statutes. When the question arises, What is the English ecclesiastical law? it is not ascertained by calling witnesses to prove it, as if it were a foreign law; but taking judicial notice of what the law is, it is ascertained, by argument founded on legal principles and authorities, what the law is on the particular point. Such was the course pursued by the Court of King's Bench, when Lord Hardwicke was Chief Justice, in *Middleton* v. *Crofts* (25). It was expressly approved of in this House, to cite no other authorities, in *The Queen* v. *Millis* (32) and *The Bishop of Exeter* v. *Marshall* (33).

In determining this question I think great weight should be given to the principles of the ecclesiastical law, laid down by those ancient writers on the ecclesiastical law of England whose treatises have been accepted by the Judges in the Ecclesiastical Courts as of authority. Some weight is to be given to foreign jurists who treat of the law ecclesiastical as practised in foreign countries, but much less weight, for it may well be that they are treating of ecclesiastical constitutions which have never been accepted and received in England. Very little weight should, in my opinion, be given to treatises so modern as not to have yet been sanctioned by the Judges of the Ecclesiastical Courts.

I think great weight is to be attributed to the practice of the Courts Ecclesiastical, and I think the forms of the writs in use are very strong evidence of what that practice is. I do not think these forms conclusive, for no doubt the forms of pleadings and writs sometimes only indicate what was, at a former time, the received law, but which may have now become antiquated and fallen into disuse, the law having in process of time insensibly changed. But most weight of all is, in my opinion—and here I only repeat what was said by Lord Stowell in *Dalrymple* v. *Dalrymple* (34)—to be attributed to judicial decisions. And I think this the proper time to

(32) 10 Cl. & F. 534.
(33) Law Rep. 3 H.L. Cas. 17.
(34) 2 Hag. Cons. 54.

consider what weight ought to be given to the decision of the Judicial Committee in *Martin* v. *Mackonochie* (20) and *Hebbert* v. *Purchas* (21). I think that there is authority for saying that the temporal Court, proceeding in prohibition to restrain excess of jurisdiction in the Court Ecclesiastical, is not bound by a decision of even the highest Court of Appeal in ecclesiastical matters. The temporal Courts had carried on a long struggle, first before the Reformation, with the Pope, and afterwards during the period subsequent to the Reformation, with the Church and the Crown, and many of their decisions may be attributed to a jealousy which they had thus acquired of the Ecclesiastical Courts. But I do not think that the doctrine now in question is open to observation as founded on that jealousy. I think the very nature of a restraining power involves in it a right to consider the decision of the Court which it is sought to restrain, and (if satisfied on sufficient grounds that the decision was a usurpation) a right, and consequently a duty, to declare that it was so. And though, when the appeal from the Ecclesiastical Courts was transferred to such a body as the Judicial Committee, it might have been thought that the restraining jurisdiction of the temporal Courts was no longer needed, the Legislature has not thought fit to take away the prohibition to the Ecclesiastical Courts. I see that in *Smith* v. *Brown* (35), decided in 1871, I said that, "In a case of prohibition, where we are called upon to restrain the Court of Admiralty, we are not bound by any decisions, either in the Court of Admiralty or in the Court of Privy Council, when sitting in an appeal from that Court, though their reasons are to be weighed with great respect." This, if sound, is equally applicable to prohibition to restrain an Ecclesiastical Court. I do not wish to decide what is not necessary; but I may say that, now that the ultimate Court of Appeal in the Admiralty is this House, the difficulty of applying what I then said to a decision of the House of Lords on appeal from the Court of Admiralty makes me less confident that what I then said is quite sound. I am, however, still inclined to think it was right; but, supposing it to be so, I still think that the majority in the Queen's Bench and the minority of the Judges in the Court of Appeal have given far too little weight to these judgments. They seemed to have overlooked this, that assuming that the arguments were sufficient to convince a Court, in prohibition, that it was not (independently of these decisions) made out affirmatively, that the course taken was within the jurisdiction of the Court of Arches, it would require much stronger argument to justify that Court in holding that it was affirmatively made out that the decisions of such a Court as the Privy Council were wrong.

I shall return to this when I say why I dissent from the reasons given by the majority of the Queen's Bench Division and the minority of the Court of Appeal.

I am not aware of any authorities in addition to those already cited, and shall not again go through them. I think it is sufficiently shewn that the course of the ecclesiastical law was to punish ecclesiastical offences, according to their gravity, by the lighter or graver punishments, and that in the case of a beneficed clerk suspension *ab officio*, and suspension *ab officio et beneficio* for a fixed period, and deprivation, were all proper ecclesiastical punishments, and all were lighter ecclesiastical punishments than excommunication, which, if it was effectual here and hereafter, was a very terrible sentence; and at the time when the ecclesiastical law was framed and adopted in England, it was believed to be effectual in this life and in the next. And the inference seems to me irresistible that wherever the offence was such that the Ecclesiastical Court could impose this terrible ultimate punishment, it could impose the lighter punishment of deprivation, or the still lighter sentence of suspension.

It was not disputed in the argument that though deprivation or suspension *a beneficio* has the effect of interfering with a freehold interest in the temporalities, yet it may, in a proper case, be inflicted by the Ecclesiastical Court. This is decided in *Free* v. *Burgoyne* (26), where the

(35) 40 Law J. Rep. Q.B. 214; Law Rep. 6 Q.B. 737.

es in the Ecclesiastical Court were st a beneficed clerk for incontinence ther matters, from which a clerk ccording to the articles, enjoined to n "under pain of deprivation of ecclesiastical benefices, suspension the exercise of their clerical func- or such other ecclesiastical punish- or censures as the exigency of the and the law thereupon, may require uthorise," and on prohibition a con- ion was awarded.

d the established form of the writ of ion shews that at the time when writ was first framed, commanding linquent to abstain in future, "under f the law and contempt thereof," it ontemplated that some sort of eccle- al censure could be passed for con- ious disobedience. It seems to me short of a *reductio ad absurdum* to at such a monition was not intended nforceable at all; and if it could be en- l by excommunication, it does seem trange if it could not be enforced by a punishment. But the commissioners were appointed in 1832 to report on ractice of the Ecclesiastical Courts t mention the punishment of con- y by anything else than the writ *de nace capiendo*, given by the 53 Geo. 127. I think that does not prove there could be no other mode of hing contumacy, though I agree it is very strong evidence that no mode was usually adopted; and the rch of the learned persons employed in ause has enabled them to supply but few instances, before the two recent in the Privy Council, in which any mode has been adopted, none of recent, and I think none of them satisfactory. Before these two re- lecisions I might have had scruples her it was right to use a mode of cing obedience to a monition, which, gh I think it made out that it was a that might originally be adopted, ne which had long been allowed to

I incline to think that I should come to the conclusion that it might one; but when the judicial com- e has twice decided the question, I am asked to say that they are g, the scruples which I might have had are quite immaterial. I cannot say that they are wrong.

I will now proceed, as I think respect to them requires, to examine the reasons of the Judges below, and explain why I dissent from them. Mr. Justice Mellor bases his judgment, I think, on the ground that he thinks Lord Penzance was proceeding in contravention of the Church Discipline Act. He says, "I consider that the offence upon which Lord Penzance adjudicated and passed the sentence now appealed against was a fresh and distinct offence against the law ecclesiastical; I mean new and distinct from the offence for which Mr. Mackonochie had been sentenced to suspension and payment of the costs by Sir Robert Phillimore when Dean of Arches. It appears to me Lord Penzance had no authority to adjudicate and condemn the defendant, Mr. Mackonochie, to a sentence of suspension, applicable only to a definite and specific offence, without fresh letters of request from the Bishop of London, in whose diocese the offence arose. All the offences charged against the defendant were committed within the diocese of London, and might have been dealt with in the Consistory Court of the Bishop of London; and without letters of request from the Bishop of London, the Arches Court of Canterbury had no jurisdiction to take proceedings in the matter. When, therefore, Mr. Mackonochie had been convicted and sentenced by a definitive sentence of the then Dean of Arches, and had suffered the punishment assigned to such offence, the suit was at an end. He might be liable in a summary proceeding by way of contempt, and punished in the course prescribed by the statute of Geo. 3 —namely, by *significavit* and imprisonment—but, as it appears to me, in order to proceed for a fresh specific offence, which might end in a sentence of suspension and deprivation, it was essential that a new suit should be instituted, and that fresh letters of request should be obtained from the Bishop of London. There is no analogy in the law in criminous matters by which, when a new offence has been committed by a defendant, he can be called upon to answer without the institution of a fresh suit,

and conducted with the formalities which the law prescribes. It might as well be said that a man who has committed a burglary and been sentenced, and suffered his punishment for such offence, and who had afterwards committed a fresh burglary in the same house, could be dealt with summarily, and tried and punished without any bill being preferred before a grand jury for such second offence. Possibly the monition given by Sir Robert Phillimore on the trial for the former offence might be used in aggravation of punishment on a second trial for a similar offence, but, as it appears to me, it could have no other effect." I have already stated my reasons for not agreeing with this. He also expresses a general concurrence in the judgment of the late Chief Justice Cockburn.

I have read that judgment of the late Lord Chief Justice more than once, with great attention, and it seems to me that it is all based upon one position, which he assumes, but does not prove, to be law. He says (Law Rep. 3 Q.B. D. 757), "It is familiar knowledge that the only coercive process or punishment for contumacy possessed by the Ecclesiastical Court was, prior to the 53 Geo. 3. c. 127, excommunication, which, when 'signified,' as it was termed, to the Court of Chancery, was followed by the writ *de excommunicato capiendo*, confirmed and regulated by the statute of the 5 Eliz. c. 23, under which the party was committed to prison till he made his submission and rendered obedience. For this process, by the Act of 53 Geo. 3, was substituted the writ *de contumace capiendo*, under which a party decreed to be contumacious might be imprisoned till submission and obedience; to which was added, by 2 & 3 Will. 4. c. 93, power to sequester the estates of contumacious persons privileged from arrest, and who were not, therefore, subject to the process in question. . . . The ecclesiastical commissioners say, 'The execution of the sentence, in case there be no appeal interposed, is either completed by the Court itself as by granting probate or administration, or signing a sentence of separation, or remains to be completed by the act of the party, as by exhibiting an inventory and account, by payment of the tithes sued for, and other similar matters, in which case execution is enforced by the compulsory process of contumacy, *significavit* and attachment.'" And afterwards (Law Rep. 3 Q.B. D. 768) he says, "The established and only penalty of contumacy was not suspension, but, as I have shewn, imprisonment, under 53 Geo. 3."

Neither Chief Justice Cockburn nor any other practitioner at that time alive can have had personal knowledge of the course of proceeding before 53 Geo. 3. And no authority is cited by him, and none has been found or produced by the learned counsel for the appellant, in support of this position, and I know of none. The only mode in which the Ecclesiastical Court could cause the delinquent to be imprisoned was by excommunicating him, and signifying at common law to the Court of Chancery that he was excommunicated and in contempt of the keys; whereupon a writ *de excommunicato capiendo* issued. And I quite agree that this was one mode of punishing contumacy, as is shewn by the form of the *significavit*, that the delinquent was an excommunicated person and a contemner of the keys, which I take from the recital in the writ of relaxation given in *Fitzherbert, Natura Brevium*, p. 63. But where is there any authority, except that of the Chief Justice himself, for saying it is the only mode? I think, if we can suppose such a thing, a sentence of the judicial committee imposing imprisonment or the pillory, would be such a novelty that the Court in prohibition would be justified in saying that it was wrong, and, disregarding its authority, to grant a prohibition. But thinking, as I have already said, that in the balance of legal argument I incline, though with some doubt, to think, that before the two decisions before referred to I should have said that there might be other modes of enforcing it, and now being called on to weigh on the one side the authority of the judicial committee, and on the other the authority of the Chief Justice, very confidently asserted, but supported by nothing but his authority, I do not hesitate.

Lord Justice Cotton, after citing the 23rd section of the Church Discipline Act, says, I think quite correctly, "The question in this appeal is, in my opinion, having regard to this section, whether the order of the 1st of June was a proceeding to enforce obedience to the decree of the 7th of December, 1874, or whether it is an adjudication upon acts done by Mr. Mackonochie since that decree and sentence upon him for those acts as offences against ecclesiastical law. If it is the latter it comes, in my opinion, within the prohibition of the enactment to which I have referred, and is also contrary to the general scope and intention of the Act. Even if the order of the 1st of June is partly a proceeding to enforce obedience to the decree of December, 1874, and partly such an adjudication and sentence on Mr. Mackonochie as above referred to, in my opinion the Queen's Bench Division was right in directing a prohibition to issue, because it is impossible to divide the order, or apportion the sentence." I have already given reasons for dissenting from this last position. He proceeds: "It was argued that to allow a prohibition in the present case would make the decree of the Ecclesiastical Court nugatory, as it would deprive this Court of the power of enforcing its decrees, at least where the act of disobedience is an offence against ecclesiastical law. In my opinion this is not well founded. I do not accede to the argument that a monition which forms part of a decree cannot be enforced. In my opinion, it may, in the mode authorised by the Act of 53 Geo. 3. c. 127, and an act of disobedience to an order of the Court may be dealt with as such, even though it may also be an offence against ecclesiastical law."

He does not expressly say that he thinks that it is established law that this was the only way. But I think it is implied; perhaps he took that for granted on the confident assertion of the Chief Justice. At all events he gives no further reason for it than this: "It is remarkable that the report of the Church Courts Commissioners made in 1832 (where, at pages 16 and 19, it deals with the mode of enforcing decrees of the Church Courts) makes no mention of suspension, though that part of the report must, in my opinion, be taken to refer to all suits in the Ecclesiastical Court, whether of a purely civil or of a criminal or corrective character, against the clerks, beneficed and unbeneficed, as well as against laymen. This absence of all mention of suspension as a mode of enforcing decrees is certainly, having regard to the learning and high authority of the commissioners who signed the report, very strongly in favour of the view that suspension is not an authorised means of enforcing decrees of the Ecclesiastical Court. Unless clear authority can be produced to shew that the Ecclesiastical Courts have enforced their decrees by suspension, the report of the commissioners is, to my mind, conclusive." I have already said that I think it strong evidence that it was not a common mode of enforcing their decrees, but not more.

Lord Justice Cotton goes on: "But the authorities quoted in support of the contrary proposition are, independently of two decisions of the Privy Council, very few in number, and moreover, with the exception of an order made by an Archdeacon's Court, they are not free from ambiguity." He then says, "But it is said, and correctly, that in *Hebbert* v. *Purchas* (21), and in the previous case of *Martin* v. *Mackonochie* (20), the Privy Council did make orders for suspension with a view to enforce obedience to decrees. Neither of these cases was argued by counsel for the defendant, who was suspended, and the attention of the members of the Judicial Committee who heard those cases was in neither of them directed to the question which we have to consider in this appeal. Though this Court is not bound by decisions of the Privy Council, yet I should not feel at liberty to decide that what the Privy Council—the ultimate Court of Appeal from the Ecclesiastical Court—had deliberately decided to be in accordance with the law and practice of that Court, was illegal and irregular. But I cannot look upon these cases as deliberate decisions that obedience to orders can be enforced by suspension."

Lord Justice Brett says, "The power is to be proved by the practice. On the

one side it is said that by the recognised practice this power is proved—that the Court may, on the repetition of the offence by a beneficed clergyman, order him to appear and sentence him to suspension *a beneficio*, or to deprivation; on the other side, it is said that no such practice can be shewn to have ever existed, that no such practice has ever been recognised, that no such power is therefore proved. The proposition in dispute is this, that it was the practice of the Ecclesiastical Courts, after a monition in a sentence admonishing the defendant to abstain from repeating the offence, and a subsequent alleged repetition of the offence, to summon the clerical delinquent to appear, and upon proof of the repetition to sentence him to suspension *a beneficio* or to deprivation. Whether this proposition is correct or not depends entirely on authority. They who assert that there was such a practice have an affirmative proposition to prove; they who deny it have a negative proposition to support. The one should be able to shew the practice, the others need only say that no such practice can be shewn. If no practice be shewn those who maintain the negative should succeed. It is no valid argument to my mind to say that there is no authority to the contrary of the alleged practice. Unless the practice is established affirmatively, those who maintain the negative should logically succeed. But if, in the sources in which one would naturally seek for proof of the affirmative proposition, one finds all kindred propositions affirmed, but this omitted, it seems to me that the conclusion is immensely strengthened that the negative of the proposition is proved. Now the first source to which one naturally resorts is that of the books of recognised authors on the practice of the Ecclesiastical Courts." I pass by what he says on that. He then goes on: "One would wish to find instances clearly in point—that is to say, where, upon such an application as was made in this case to Lord Penzance, after a monition such as is in question in this cause, a notice to appear has followed, and thereupon a sentence of suspension *a beneficio*, or of deprivation. It is useless to go again in detail through all the cases. It is obvious that there is no such case. I mean there is no case in which it is reported that this thing has been done. *Wilson* v. *Fendall* (36) and *Williams* v. *The Bishop of Salisbury* (37) shew only that a monition may be part of a sentence; they do not shew whether any action can be taken afterwards in the same suit on a repetition of the offence. *Blackmore* v. *Brider* (38) is relied on, because, in his judgment or sentence, Sir J. Nicholl uses the expression under 'pain of law.' And *Burgess* v. *Burgess* (7), because Lord Stowell says, 'If obedience be not given to this order, excommunication and other consequences will necessarily follow.' And Dr. Lushington has, in giving judgment, used similar expressions. It would not be candid, I think, to say that these are not at least important indications in favour of the affirmative proposition, but it seems clear to me that they are not the authority one would wish or expect to find. They are certainly consistent with the view of their being minatory cautions as to probable further proceedings, which would, however, be obliged to bear the form of a newly instituted suit."

Lord Justice Brett, if I rightly follow his argument, thinks that no power of the Court Ecclesiastical can exist unless it is everyday practice to exercise it. He, like Lord Justice Cotton, thinks that the silence of the Ecclesiastical Commissioners is decisive. But he goes much further than Lord Justice Cotton, for he says that no ulterior step of any kind can be taken in respect of a monition. And that, though contumacy might, before the statute 53 Geo. 3, have been punished by excommunication, and now by pronouncing the party contumacious, that can, he says, only be done by means of a new suit. I will not say that this is a *reductio ad absurdum*, though to my mind it is very like it, but I will say that it is a position requiring a good deal of argument and authority to establish it. And he disposes of the two cases in the Privy Council in a single sentence: "I must not omit to refer to the cases in the Privy Council. I must agree that we have not in them the

(36) 2 Moo. P.C. N.S. 375.
(37) Ibid.
(38) 2 Philli. 359.

matured view of the very learned Judges who sat there. I only wish sincerely we had."

I shall now conclude by remarking on the manner in which these learned Judges have dealt with the authority of the two cases of *Martin* v. *Mackonochie* (20) and *Hebbert* v. *Purchas* (21). The Chief Justice treats these as of very little authority. He says, "The jurisdiction was for the first time assumed (I had almost said usurped), not indeed by the Judges of the ordinary Ecclesiastical Courts, but by Judges who, however great and eminent, may, I hope without offence, be said to be less familiar with the administration of the ecclesiastical law, namely, by the Judicial Committee of the Privy Council." Lord Justice Cotton expressly, and Lord Justice Brett by implication, say that the deliberate decisions of the Judicial Committee would be very weighty, but that the two decisions in question were not deliberate. I cannot understand how they arrive at the conclusion.

In *Martin* v. *Mackonochie* (20) the defendant did not appear, but the Judicial Committee, consisting of the Lord Chancellor (Lord Hatherley), the Archbishop of York and Lord Chelmsford, did not the less consider the case. Judgment was reserved, and the reasons given by their Lordships for holding Mr. Mackonochie guilty of an ecclesiastical offence occupy five pages of print. Then they proceed to say, "Upon the former occasion their Lordships, after expressing their opinion judicially that the monition had been disobeyed, did not think it necessary to do more to mark their disapprobation of Mr. Mackonochie's course of proceeding than by directing that he should pay the costs of the application. Upon this repetition of his offence they think that they ought to proceed farther. They therefore declare that Mr. Mackonochie has not complied with the monition in respect of the elevation of the paten or wafer, nor as to abstaining from prostration before the consecrated elements, and they order that he be suspended for the space of three calendar months, from the time of notice of the suspension, from the discharge of his clerical duties and offices and the execution thereof." Their Lordships did not think it necessary to give their reasons for thinking that this sentence might be passed; the judgments in the present case shew that very good reasons might have been assigned. But it seems to me a very strong thing to assume that they passed a sentence, which admittedly was not one in the ordinary everyday routine of punishment, at haphazard, and without deliberately considering whether they had power to impose such a sentence. It seems to me not to be short of imputing to them, without any evidence, an arbitrary dereliction of duty.

In *Hebbert* v. *Purchas* (21) the Judicial Committee, consisting on this occasion of the Lord Chancellor (Lord Hatherley), Lord Chelmsford, Sir James Colvile and Sir Montague Smith, were asked to inflict a sentence of deprivation. They did not consider the sentence a thing requiring no deliberation, for they required the counsel for the prosecution to enquire into the precedents; and, after a month's interval, the argument was heard. Then the Lord Chancellor delivered a short verbal judgment refusing to pass a sentence of deprivation, but saying, "Their Lordships are quite satisfied that there exists in this tribunal, as there did exist in the High Court of Delegates, all the powers which have been transferred to the Committee—a power of suspension not only *ab officio* but *a beneficio* also, as a summary punishment for contumacy." How anyone can have persuaded himself that this was not the deliberate decision of the Lords there present, is to me inconceivable. It is true that they did not think it necessary to assign the reasons for this decision. I regret it; for if they had assigned reasons, even if of much less weight than those stated in the judgments in the Court of Appeal in this case, we should have been saved from this protracted and, I cannot but think, lamentable litigation.

I have only to add that I think the judgment should be affirmed and the appeal dismissed with costs.

LORD WATSON.—I shall endeavour to state very briefly the view which I take of this case.

I need not refer in detail to the various

proceedings which have taken place in the criminal suit instituted against the appellant before the Arches Court of Canterbury in the year 1874. The appellant maintains that the suit was brought to an end by the decree of the 7th of December, and the issue of a formal instrument of suspension under the seal of the Court, upon the 12th of December, 1874; that all subsequent procedure in the suit was irregular, and that the Judge of the Arches Court had not jurisdiction to pronounce the decree of the 1st of June, 1878, by which he suspended the appellant for three years *ab officio et beneficio*.

I have come to the conclusion that the questions raised by the appellant are, in substance, questions relating to procedure in the Ecclesiastical Courts. It is not disputed that the Court of Arches would have had power in a fresh suit to entertain the same charges which are dealt with by the decree of the 1st of June, 1878, and on finding these charges proved, to sentence the appellant to suspension *ab officio et beneficio* for the period of three years. The jurisdiction of the Court extended to the person of the appellant, to the subject-matter of the offences alleged against him, and to the punishment which was inflicted upon him; but it is said that the jurisdiction which the Court was thus possessed of could not be lawfully exercised except in one form of proceeding—a new criminal suit against the appellant instituted in terms of the Church Discipline Act. Whether that contention be well founded, and whether, according to the ancient law and practice of the Ecclesiastical Courts, it was also competent to take proceedings against the appellant in the suit which commenced in 1874, appear to me to be questions of procedure which it is within the province of the Ecclesiastical Courts to decide, and the temporal Courts ought not, in my opinion, to interfere with their determination, unless it can be shewn to be either repugnant to the principles of natural justice, or contrary to statute. The procedure of which the appellant complains, which has been held by the Judicial Committee of the Privy Council in the cases of *Martin* v. *Mackonochie* (20) and *Hebbert* v. *Purchas* (21) to be in strict accordance with the law and practice of the Ecclesiastical Courts, does not in my opinion offend either against justice or statute law. It appears to me to be a just and reasonable course of procedure, because it enables the Court to pronounce a milder sentence in the first instance, whilst it reserves the power of inflicting an adequate punishment, if the orders of the Court are not complied with. It is manifestly for the advantage of those offenders who, whenever the judgment of the Court is against them, endeavour to act in conformity with the laws of the Church; and it cannot be said to bear with undue severity upon those who wilfully continue practices which have been declared by the Court to be contrary to that law, and from which they have been judicially admonished to desist.

But it was argued for the appellant that the proceedings in question are contrary to the provisions of 53 Geo. 3. c. 127 and 3 & 4 Vict. c. 86. That argument necessarily proceeds upon the assumption that prior to the statute of Geo. 3 it was competent to punish by suspension acts of disobedience to a decree and monition of the Ecclesiastical Court, by proceedings taken in the same suit in which the decree and monition were made and issued. Neither of the statutes has, in my opinion, the least application of the facts assumed. The Act of 53 Geo. 3 deals only with the graver sentence of excommunication, and makes no change in the previous law or practice of the Ecclesiastical Courts with respect to sentences of suspension; and the Church Discipline Act of 1840, which regulates the mode of instituting in these Courts criminal suits against clerks in holy orders, does not affect any proceeding which, before its passing, might have been lawfully taken in a suit duly instituted.

I am accordingly of opinion that the judgment of the Court of Appeal ought to be affirmed. I desire to add that, although the grounds I have indicated appear to me to be sufficient for the disposal of this appeal, I am prepared to hold that the decisions of the Judicial Committee of the Privy Council in *Martin* v. *Mackonochie* (20) and *Hebbert* v. *Purchas*

(21) are according to law, and I refer to and accept the reasons which are stated in the exhaustive judgment delivered by the late Lord Justice Thesiger in the Court of Appeal.

Orders appealed from affirmed, and appeal dismissed with costs.

Solicitors—Brooks, Jenkins & Co., for appellant; The Solicitor to the Treasury, for Lord Penzance.

[IN THE COURT OF APPEAL.]

1881. May 9. June 20. } AKERBLOM *v.* PRICE, POTTER, WALKER AND COMPANY.*

Shipping—Pilotage—Salvage.

A ship bound for Barrow-in-Furness was driven by a violent storm to leeward of her port into Morecambe Bay. She could not beat to windward, but was being driven towards dangerous sands. Her captain and crew were ignorant of the locality, and unless guided to some part of the bay where she might take the ground or lie in safety she would inevitably have been lost. Some pilots, seeing her peril, put to sea, at considerable danger to their own lives, and being unable, through the height of the sea, to board the ship, they led her, by preceding her and signalling, to a safe anchorage in the bay. The ship had a pilot signal flying when the pilots put off. No mention was made from the ship of any port to which she should be steered; and she had not suffered any damage to her hull, spars or sails:—Held, *that the services rendered by the pilots were salvage, and not pilotage, services.*

Appeal from a judgment of the Queen's Bench Division making absolute a rule for a new trial.

The action was to recover a sum of 48*l.* 18*s.* 1*d.* as the share in respect of cargo of a sum of 100*l.* paid by the plaintiff for salvage services rendered to the ship *Ailo.*

* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

The facts and arguments are stated in the judgment (*post*).

Day and *Pollard*, for the plaintiff.

H. Matthews and *Ashton Cross*, for the defendants.

The following authorities were cited in addition to those referred to in the judgment: *The Joseph Harvey* (1), *The Æolus* (2), *The Jonge Andries* (3) and *The Anders Knape* (4).

Cur. adv. vult.

The judgment of the Court was delivered (on June 20) by

BRETT, L.J.—In this action, brought by the plaintiff, as shipowner, to recover from the defendants, as assignees of cargo, a general average contribution, the question in dispute was reduced to be whether a sum of 100*l.* paid by the plaintiff to certain pilots could be legally treated by the plaintiff, as against the defendants, as a payment for salvage services, or whether the plaintiff, as against the defendants, were entitled to say no more than that the payment was for services, which, however meritorious, were only pilotage services. If the first case were made out, the plaintiff would be entitled to succeed; if the second, the whole payment must be borne by the plaintiff, as the shipowner, and the defendants would be entitled to succeed. The case was tried before Baron Pollock and a special jury. Two questions were left to the jury, with one only of which it is necessary to deal. The jury found that the services were only pilotage services. Upon a rule for a new trial, on the ground of misdirection, and as for a verdict against evidence, the Divisional Court made the rule absolute. The appeal is against that order. Upon the hearing, it appearing to us that we had all the materials before us upon which to decide the case—that is to say, that we had all the evidence of direct facts before us, and that there remained only the question of

(1) 1 Ch. Rep. 306.

(2) 42 Law J. Rep. Adm. 14; Law Rep. 4 A. & E. 29.

(3) Swab. Adm. Rep. 226.

(4) 48 Law J. Rep. P., D. & A. 53; Law Rep. 4 P. D. 213.

what inferential fact ought to be drawn from those facts—we considered ourselves bound to go further than the Divisional Court, and to order that the verdict for the defendants should be set aside, and judgment should be entered for the plaintiff without another trial. The facts proved beyond controversy were that the vessel, bound for Barrow-in-Furness, was, by the violence of the wind and sea, driven to leeward of her port to Morecambe Bay; that by reason of the same violence of wind and sea, the vessel could not beat to windward so as to make her port or even remain where she was; but was being driven more and more to leeward towards dangerous sands; that her captain and crew were ignorant of the locality; that the vessel, unless guided to some part of the bay in which she might take the ground, or lie in comparative safety, must almost inevitably be lost; that the pilots, seeing her peril, put to sea from harbour in order to assist her; that by going to sea in such a storm they ran no inconsiderable danger of losing their own vessel and their lives; that being unable by reason of the height of the sea to board the vessel they led her, by preceding her and signalling to her, to a safe anchorage in the bay; that (and it is a strong indication of the opinion of all present of the urgency of the position) no mention was made from the vessel by the pilots of any port to which the vessel should be steered. The vessel had a pilot signal flying when the pilots put off, and when they approached the vessel; and the vessel had not suffered any damage to her hull, spars or sails. Upon these practically undisputed facts it was argued for the plaintiff that the jury ought in reason to have found for him on the ground that the ship was in distress, and that from that fact alone, when it exists, however great or small the distress, pilots are not bound to render any service to a ship except upon the terms of receiving salvage reward, and that the pilots in this case had not agreed to render services on any other terms. It was argued for the defendants that the jury were entitled and even bound to find for them, because the vessel was not herself damaged, and that, unless a ship be herself damaged, pilots are bound to serve her on request as pilots, and if they do serve her, are entitled to be paid only for pilotage service. Cases were cited from the Admiralty Reports on behalf of the plaintiff, in order to support in its entirety the proposition enunciated for them. These cases were criticised on behalf of the defendants in order to shew that in all of them there was in fact some damage to the ship itself besides its being otherwise in distress. It cannot be denied that the terms used by Dr. Lushington in *The Frederick* (5) and *The Eliza* (6), and several other cases, if accepted literally, support the plaintiff's view. Equally it cannot be denied that the criticism on them, made on behalf the defendants, is in fact correct. The difficulty of dealing with Admiralty Reports by way of authority is, that there is no necessity in that Court that the Judge should, in the exposition of the grounds of his judgment, discriminate strictly between the proposition of law which is to be satisfied by all the facts of the case and the rule of interpretation of the direct facts of maritime vicissitudes given in evidence, by which he desires to bind himself and his successors as to the inference of fact he and they ought as a general rule to draw from those facts. The latter use of authority is inapplicable as such to a trial by jury, because a jury does not disclose the reason why its members have drawn any particular inference of fact. A jury may be well assisted by having the reasoning of great Judges of the Admiralty Court explained to them. Upon consideration, we cannot adopt, as a rule of law or as a proper rule for drawing an inference of fact, the abrupt rule suggested for the defendants. And the rule enunciated by Dr. Lushington requires to be divided into its elements of law and fact before it can be applied to a trial by jury. The fundamental rule of administration of maritime law in all Courts of maritime jurisdiction is, that whenever the Court is called upon to decide between contending parties upon claims arising with regard

(5) 1 W. Rob. 17.
(6) Lush. Adm. 536.

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cide between the pilot and ship-
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and a fair and reasonable pilot, if
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med should be performed for or-
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y pilotage reward, or for salvage re-
? Would a fair owner have insisted,
quiring the necessary services, for
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of pilotage payment? Would a fair
have refused to perform the neces-
ervices unless upon the terms of a
ge reward? In such a dispute to be
mined by a Judge and jury, these, be-
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ıe questions to be left to the jury.
ıis case, for instance, the questions
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on of immediate danger of being
Was she saved from such danger
by the acts of the pilots? Were the acts of the pilots, by reason of the weather and the position of the ship, made so different in danger or in responsibility from the ordinary acts of service of pilots as that no fair or reasonable owner would have insisted on requiring such service for other than salvage reward? In a dispute to be determined by a Judge, in a Court of Admiralty or otherwise, these are the propositions which are to be applied to the particular facts of the case. It follows that there can be no such rigid rule of law or of interpretation of acts as is suggested on behalf of the defendants. It follows that the meaning of the phrase "in distress," used by Dr. Lushington, is not to be interpreted in the rigid manner suggested on behalf of the plaintiff. Suppose a ship previously reduced by accident to such a state of unseaworthiness as makes it expedient or necessary that she should enter a port of refuge, as by a leak or the loss of a mast, but is approaching such port in moderate weather, and so that she can enter it, if steered a right course, with ease, notwithstanding the damage done to her; can it be pretended that it would be reasonable and just, within the tests above enunciated, that a pilot conducting her into port should be treated as a salvor? Yet she would be an unseaworthy ship, a damaged ship, a disabled ship and, in a sense, a ship in distress. Suppose, on the other hand, the ship as a ship to be intact—no damage to hull, spars or sails, but driven by the most violent weather without power of resistance within half a mile of an iron-bound leeward coast, with no possibility of escape from immediate total destruction but by entry into a narrow, and, to the crew, unknown, haven of the coast; and suppose the weather and position to be such that, with all the knowledge and skill of the best pilot, there would still be the greatest danger that he and the ship might be lost; could any fair person say that a fair master would ask a pilot to come on board and assume such a responsibility and risk, or consider that, being on board, he should exercise such a responsible duty and run such a risk as has unexpectedly arisen, for any other

than salvage reward? These hypothetical cases shew that it is not the mere fact of injury to the hull, mast or sails of the ship which is to govern, but that the tribunal must determine, whether, under all the circumstances of the particular case, the service which the pilot has entered upon, or has unexpectedly found imposed upon him, was rendered so different in responsibility or danger or kind from the ordinary service of a pilot as to make it impossible that any fair owner should have insisted upon his being paid otherwise than by a salvage reward; or whether, although there was some increased responsibility or danger or unusual kind of service, any fair pilot would have refused to enter upon the service, or to continue to perform the service, unless paid otherwise than by a fair compensation for pilotage services. That a pilotage service may be turned by supervening casualties into a service to be compensated by salvage reward is thus laid down by Dr. Lushington: "The law I have laid down in more than one instance upon this point is, that if, in the performance of a contract of towage, an unforeseen and extraordinary peril arise to the vessel towed, the steamer is not at liberty to abandon the vessel, but is bound to render to her the necessary assistance, and therefore is entitled to salvage reward. I am of opinion that these rights and obligations incident to a contract of towage are implied by law, and that the law thereby secures equity to both parties in the true interests of the owners of ships. A similar law holds with respect to a pilot. On certain emergencies occurring, which require extraordinary service, he is bound to stay by the ship, but becomes entitled to salvage remuneration, and not a mere pilotage fee"—*The Saratoga* (7).

It must be remembered that in order to found a claim for salvage reward, it is absolutely essential that the ship should be in imminent danger of being lost, and should by the service be saved from such danger. It may be said, therefore (and we think would be truly said in fact, in almost every if not in every case), that, whenever the ship is in such danger, the service of the pilot must necessarily be different in kind, responsibility or danger from the ordinary service of a pilot. That, however, is a different proposition from either the one suggested for the plaintiff or that suggested for the defendants. It is consistent with the view that the true interpretation of the phrase used by Dr. Lushington is, that the ship must be not merely in distress in a general sense, but in such distress as to alter the service of the pilot to the extent above suggested. It leaves the rule of law to be, that, in order to entitle a pilot to salvage reward, he must not only shew that the ship was, in some sense, in distress, but that she was in such distress as to be in danger of being lost, and such as to call upon him to run such unusual danger, or incur such unusual responsibility, or exercise such unusual skill, or perform such an unusual kind of service, as to make it unfair and unjust that he should be paid otherwise than upon the terms of salvage reward. It seems to us perfectly clear that the services of the pilots in this case were within the rule thus laid down, and that the payment to them ought to be considered, as between the plaintiff and the defendants, as a payment of salvage reward.

We have thought it right to give our reasons at length, but we might decide this case by saying that the service rendered was one which the pilots were not bound to render; it was a danger they were not bound to encounter; next, that the service was not one of pilotage—it was not a piloting to any port or place, but a taking out, a saving from danger.

Judgment for the plaintiff.

Solicitors—Robert Greening, for plaintiff; Norris, J. J. & C. J. Allen, agents for Simpson & North, Liverpool, for defendants.

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(7) Lush. Adm. 318, at p. 321.

[IN THE QUEEN'S BENCH DIVISION.]

1881.
June 25.
July 4.

HARRIS *v.* TRUMAN, HANBURY AND COMPANY.

Bankruptcy—Property held by Bankrupt on Trust—Principal and Agent—Goods in Order or Disposition of Bankrupt—Bankruptcy Act, 1869 (32 *&* 33 *Vict. c.* 71), *s.* 15. *sub-ss.* 1 *and* 5.

Brewers had a malting agent, who acted for them alone. He had power, for the purpose of purchasing barley for malting, to draw on certain banking accounts of the brewers. He drew out money fraudulently, and bought barley on credit, which, by his conduct, he represented to the brewers to be barley paid for with their money. He also bought malt, which he represented to have been made from barley bought with their money. He became bankrupt. The brewers seized all barley and malt upon his premises, the value of which was less than the moneys he had drawn out. The trustee in his bankruptcy sued the brewers for the value:—Held, *that, as the bankrupt could not have been heard to say he was not trustee of the barley and malt for the brewers, the trustee in his bankruptcy likewise (the bankrupt not having been reputed owner) could not dispute the equitable right of the brewers, and that the brewers were consequently entitled to judgment.*

This was an action brought by the trustee of the estate of John D. Fairman, a bankrupt, to recover the value of barley and malt which the defendants had seized upon the bankrupt's premises. The facts will be found stated in the judgments.

Sir H. Giffard, *W. G. Harrison* and *J. F. Moulton*, for the plaintiff (on June 25), shewed cause against a rule obtained on behalf of the defendants for a new trial or for judgment, and moved for judgment. They referred to *Ex parte Batson; in re Gooch* (1) and *Ex parte Burbridge* (2), in addition to authorities mentioned in the judgments.

Sir F. Herschell (*Solicitor-General*) (*Benjamin* and *K. Digby* with him), for the defendants.

Cur. adv. vult.

(1) 3 Bro. C.C. 362.
(2) 1 Deac. 131.

The following judgments were delivered on July 4:—

FIELD, J.—This is an action brought by the plaintiff as trustee in bankruptcy of the estate of John D. Fairman (who became bankrupt on the 31st of December, 1878), to recover the value of large quantities of barley and malt seized by the defendants, and which the plaintiff alleges to have been, at the commencement of the bankruptcy, part of the bankrupt's estate. The defendants deny that the goods were the property of the bankrupt at the time of his bankruptcy, and further claim them as their property. The case was tried before me and a special jury, in the city of London. The plaintiff proved that the bankrupt was a licensed maltster, carrying on business at Bishop's Stortford and other places, that his name as licensee was fixed upon the maltings, as required by the 6 Geo. 4. c. 81, and that the barley and malt claimed were in his possession upon the premises at the time he became bankrupt. The plaintiff further proved that the bankrupt, having become hopelessly embarrassed, absconded on the 31st of December, 1878, and so committed an act of bankruptcy, and that the defendants entered into possession of his malting premises, and seized the malt and barley found there. From the evidence, in answer to this case, given by the defendants, it appeared that the great London and Burton brewers do not either make for themselves or buy ready-made all the malt which they require for the purposes of their business, but that they make arrangements with persons who occupy maltings, and take out licences as maltsters, and are known as "malting agents," who buy barley, malt it and deliver the malt to the brewer as required, the latter paying the agent a commission upon the quantity steeped or malted, and which commission covers the buying and the malting, but not the cost of the barley. The capital required for this latter purpose is so large that the brewer invariably finds it, but the arrangements between the maltster and the various brewers differ materially in many respects. In the case of some brewers, the mode of transacting business was such as to render it reasonably clear that the "malting

agent" passed the property in the barley bought by him to the brewers immediately on their making the specific payments which they did for the specific quantities of barley bought by the agent and invoiced to them. In the present case that system was not pursued; and, as there was never any specific agreement, either verbal or in writing, between the bankrupt and the defendants, it became necessary to resort to the course of business understood to be and actually adopted between the parties, in order to ascertain whether the property in the barley or malt in question had ever, and, if so, when, passed to the defendants. This course of business was as follows: The bankrupt hired or owned the necessary malting premises; he took out the necessary licences, employed the necessary people and paid their wages, superintended the malting, went to market and bought the barley, and delivered the malt, when made, into the defendants' sacks; and for all this his remuneration was an agreed commission upon the quantity of barley bought and steeped. He also insured the barley and malt against loss by fire. At one time he had effected the insurance with and paid the premiums to any office he pleased; but in latter years the defendants, who stand to their own fire losses, required all their agents, and amongst others the bankrupt, to insure with them, they deducting the amount of the annual premiums from the amount due to him for his commission. The purchases of barley were very large; and, in order to provide the necessary funds for this purpose, the defendants opened accounts with three banks, at each of which they always kept a balance, and which balances always exceeded the aggregate amount of the supposed cost of the barley supposed to have been bought by the bankrupt. These accounts were opened in the names of and fed by the defendants; they were intended to be operated upon solely for the business of purchasing barley by them, and were drawn upon by the bankrupt. The malting season extends from the beginning of October to April, and at the end of each season balances amounting to 1,500*l.* together were left at the defendants' bankers as a starting-point for the next season's operations. Each week during the season the bankrupt was understood to attend the markets and buy barley according to his own judgment and in his own name, he being admittedly, as between himself and the seller, the principal. The course of business in these markets is to buy by sample; the bulk is deliverable at variable periods, and if the bulk corresponds the payment is then due in cash.

It is important, however, to observe that the course of business which I am now detailing was that which the defendants understood it to be, but that as far as the bankrupt was concerned he had, in order to find money for his own purposes, for several years before his bankruptcy fraudulently departed from it in many most important respects without the defendants' knowledge.

Every week the bankrupt forwarded to the defendants a written statement of the parcels of barley he professed to have bought, and the names of the alleged sellers, and at the bottom were written the sums which the bankrupt requested the defendants to pay in to the credit of the defendants' provincial banking accounts, but these sums were not intended to represent, and did not represent, any payment for any specific barley, but were paid in in order to keep the accounts, upon which the bankrupt had the power of drawing, full. On every Monday the bankrupt left with the defendants half samples of barley, which were supposed to be those of the purchases contained in the preceding weekly memorandum, and the defendants examined the samples to see whether they suited their trade, and either approved or rejected them. The defendants always believed that the weekly sheets sent up by the bankrupt represented actual purchases of barley at prices actually given, and of which barley purchased they thought they saw the samples; and they believed that the bankrupt applied the moneys advanced by them to him in paying cash for these barleys at cash and not credit prices; and it was intended by the bankrupt that they should so understand and believe, his conduct in every respect amounting to a continuing course of representation to

that effect; but after the bankrupt had absconded they ascertained, for the first time, that for several years this had not been so, but that the weekly statements as to names, quantities and prices, or a very large proportion of them, were fictitious, and that, instead of paying cash, he had bought very large quantities on credit, the amount for barley thus bought remaining unpaid at the time of his bankruptcy being upwards of 40,000*l.*

At the end of every month the bankrupt forwarded to the defendants a statement of the parcels of barley bought, and the names of the sellers, and prices; and the defendants went through it, with the bankrupt, for the purpose of checking the quantities which were to be sent to Burton and those which were to be sent to London; and a copy of each of these statements was in due course entered in the defendants' "malt ledger," for the purpose of enabling them to make up the necessary final statement at the end of the season. This monthly statement was in like manner fictitious; but the defendants understood, and the bankrupt intended they should so understand, that it represented genuine cash purchases of barley of which they had approved, and which were to be malted by the bankrupt for them.

The first important step in the process of converting barley into malt is the "steeping." It is at this point that the duty to the Government becomes payable, and two of the defendants' firm had, as sureties, entered into the requisite bond for the purpose of securing the payment; at this stage also the revenue officer takes an account of and sends to the maltster his "charge," calculated upon the specific quantity of barley in actual process of being converted into malt, and, this being forwarded to the defendants, they forwarded direct to the Inland Revenue the amount of the specific charge thus made for the specific malt.

During the season the defendants visited the maltings whenever they pleased, and gave any directions they thought necessary; but the whole process of malting was carried on by the bankrupt's servants under his superintendence, and the malt was placed in defendants' sacks, and forwarded as they required, samples of the malt as dried off having been left by the bankrupt with the defendants for approval by them. At the end of the malting season a general statement was made up in the defendants' books, containing the different sums from time to time remitted by the defendants to their bankers, the cost of the quantities of barley which had been returned upon the monthly accounts as having been bought, and the amount of commission due to the bankrupt.

This course of business, as I have now stated it, was proved in the main by Arthur Pryor, one of the defendants.

On cross-examination, it was elicited from him that he had also been examined, as a witness, in a prior action, brought against the defendants by some sellers of barley to Fairman upon credit, for the price of barley sold; and it appeared that on that trial he had stated in cross-examination that the bankrupt was not their agent for buying barley, but was their agent for making it into malt at 4*s.* 8*d.* per quarter; and he adhered to the statement on the present occasion. Pryor had also answered certain interrogatories; and, as they were now put to him and he did not dissent from them, they became important evidence for the jury to act upon, in drawing conclusions as to what were the real relations between the bankrupt and the defendants in reference to the barley assumed to have been bought by him. The important interrogatories and answers were those numbered 2, 3, 5, 6, 9, 10, 11; and the propositions asserted in them are, it seems to me, first, that the bankrupt, in buying barley, did not buy "for" the defendants (No. 1), nor "for or on their account" (No. 5), nor "for the purpose of carrying on their business," and that "it was not received at the bankrupt's maltings and converted into malt for or on account of the defendants" (No. 6). Secondly, that the sums authorised to be drawn out by the bankrupt from time to time were not so authorised "in order that the bankrupt might be enabled to pay for the barley bought by him," but "in order that he might be supplied with money to enable him to carry on his business as a malting agent"

(No. 9). With regard also to the weekly memorandums, Mr. Pryor stated in evidence on the present trial, that in making the remittances mentioned at the foot of them they (the defendants) were not guided by the amount of purchases alleged, but by the requirements at the bottom. It appeared from other witnesses that, although all the barley which was actually malted on the bankrupt's premises was so malted with the intention of supplying it to the defendants as malt, it was not the case that all the barley bought by the bankrupt and brought on to the premises was so malted, because the bankrupt was in the habit, generally towards the end of each malting season, of selling barley, alleging as an excuse to his servants, falsely, that the defendants desired to reduce their stock, whereas in fact the defendants had no knowledge of any such practice, and the sales were made for the fraudulent purposes of raising money, and concealing his misappropriations. And it also appeared in evidence that the bankrupt had for some time past, instead of supplying the defendants with malt made by himself, bought ready-made duty-paid malt in the market and supplied it to the defendants. Of this, however, the latter were also ignorant.

At the close of the defendants' evidence both parties claimed judgment upon the facts proved.

The Solicitor-General submitted that, as a matter of law, on the facts found, the defendants were so entitled on the grounds—first, that the property in the barley and malt was not vested in the bankrupt on the 31st of December, but that as to the barley the property was vested in the defendants, either (1*a*) on the original purchase by the bankrupt, or (1*b*) on the samples having been approved by the defendants, or (1*c*) on the payment of the money; secondly, and as to the malt, that the conversion of the barley into malt did not alter the property, or that, at all events, the malt became the defendants' property as soon as it was made.

On the other hand, Sir Hardinge Giffard submitted, as a matter of law, that the defendants had no case as to either malt or barley—first, as to the barley, because the barley was bought in the bankrupt's name, and, as soon as the purchase was completed, vested in him; secondly, that the defendants had a right to reject; thirdly, that the payment relied upon was not a specific payment for any barley, but a general remittance in round sums; fourthly, that the bankrupt was not the agent of the defendants to buy; fifthly, that if he were, it was not shewn that any of the barley in his possession on the 31st of December was bought in accordance with any alleged authority, which was to buy for cash and not on credit, but that part, if not all of it, was bought on credit, and was not yet paid for. As to the malt, Sir Hardinge Giffard submitted—first, that the mere conversion into malt did not alter the property; secondly, that there was no evidence where the malt in the bankrupt's possession on the 31st of December came from; thirdly, that there was no proof of any approval of the sample of the malt. And he lastly submitted, as to both barley and malt, that even if the defendants were the true owners, the barley and malt were in the possession, order and disposition of the bankrupt as reputed owner with their consent. Upon this, I called the attention of the Solicitor-General to the state of the evidence on this last point; and he then gave a considerable body of evidence tending to shew that the bankrupt was not the reputed owner of the goods, by reason that a malting agent was not reputed to be an owner of the stock on his premises, it being well known to all persons dealing in the market that he was merely an agent, and that the stock was the property of the brewer, for whom it was well known he was acting.

I held that the questions raised as to the party in whom the property in the barley and malt was, as also that of order and disposition, were for the jury; of whom I asked specific questions, which, with the answers of the jury, were as follows:—

1. Was it the intention of the bankrupt and the defendants, as evidenced by the agreed course of dealing between them, that the property in the barley bought by the bankrupt should become vested in

the defendants—(*a*) at the time of the purchase by the bankrupt, or (*b*) on the approval of the sample, or (*b*[a]) correspondence of bulk with sample, or (*c*) on payment of the required amounts, or (*d*) at any and what later time before delivery to the defendants?—The jury answered all these questions in the negative.

2. As to the malt. Was it the intention that the malt should become the property of the defendants—(*a*) at its first coming into existence as malt, or (*b*) on payment of the duty, or (*c*) at any later stage before delivery?—The jury answered on payment of duty.

3. Were the barley and malt seized by the defendants, or any and what part thereof, any portion of the barley or malt bought by the bankrupt referred to in your previous findings?—The jury answered to this that there was no evidence.

4. Were the goods on the 31st of December in the possession, order or disposition of the bankrupt with the consent and permission of the defendants, of which goods the bankrupt was the reputed owner?—The jury answered to this that there was no evidence.

I asked the jury for an explanation of their last answer, and they added the following special finding: "We hold that as the goods in the possession of bankrupt on the 31st of December cannot be identified for lack of evidence, we cannot say whether they are or are not in the possession, order or disposition of the bankrupt with the consent or permission of the defendants."

Upon those findings I abstained from giving any judgment, leaving each party to move for what they might consider themselves entitled to; and, thereupon, the defendants obtained a rule to shew cause why the verdict should not be set aside, and a new trial had, on the grounds—first, that the verdict was against the weight of the evidence, and on other grounds not afterwards pressed, but amongst others on the ground of misdirection in not directing the jury that the defendants had a lien in equity upon the goods to their full value, or that the bankrupt was trustee of the goods for the defendants. The rule also asked that the judgment should be entered for the defendants. With regard to the alleged misdirection in not holding that the defendants were entitled to a lien, or that the bankrupt was a trustee for them, no such points were submitted to me by the Solicitor-General. The rule was argued before my brothers Manisty, Bowen and myself, during the last sitting.

In reference to that part of the rule which asks that the verdict may be set aside and a new trial had, if the ultimate result of the rule had rested upon the points raised at the trial, and upon which the jury pronounced their verdict, I should have felt myself obliged to act on the verdict; for, although the questions involved were nice and not free from difficulty, there was, I think, evidence upon which the jury might reasonably have found as they did. But, however that may be, and whether the legal ownership of the barley and malt was vested in the bankrupt or not, the defendants' counsel very strongly contended that they were entitled to judgment on the ground (which was not raised at the trial) that from the course of business, as understood by both parties, a trust and confidence had been created between the defendants and the bankrupt, by which the latter was bound to appropriate the moneys advanced to him in the cash purchase of barley of which the defendants were to approve, and which barley and no other was afterwards to be converted into malt for their specific business; and, on the last occasion that the case was before us, the reasonable suggestion of the Court, that we should be at liberty to draw any inferences of fact not inconsistent with the verdict, having been with great propriety assented to, it is no longer necessary to regard the question between the parties as resting upon the grounds urged at the trial, but we are at liberty to give judgment for either party upon any ground which, upon the evidence not in contest, either may be entitled to. Now it cannot, I think, be doubted that a trust to the effect contended for by the defendants' counsel was impressed upon the moneys advanced by the defendants to the bankrupt, and that the whole course of conduct on the part of the bankrupt amounted

to an engagement with the defendants so to use the money, and not to apply it to any other purpose, and to a representation that he was faithfully performing the trust. It must be recollected that, by the very terms on which the business was conducted, the bankrupt was not at liberty to buy barley, or use his maltings, for any other purpose than that of keeping up a regular supply of malt fit for the defendants' business, and to be supplied to them from the barley of which they should have approved, and he was not acting as malting agent, or otherwise, for any other brewer.

It, therefore, seems to follow that, when, in order to have barley on his premises to malt sufficient in quantity to represent that for the purchase of which he ought to have applied the money which he had fraudulently devoted to other purposes, he bought and brought on to the malting and proceeded to convert into malt barley otherwise bought, it is an irresistible presumption that he did so with the object and intention of malting that barley and supplying it as malt to the defendants, and of representing to them (as he in fact did at the end of every season, and in effect whenever upon their visits of inspection they saw barley on the premises) that the barley thus bought was bought for the benefit and purposes of the defendants in lieu of that which he ought to have applied their money to the payment of, and that he thus intentionally and irrevocably declared, as it seems to me, that he held that substituted barley upon the original trust with which the defendants' advances were impressed, and upon which he would have held barley bought with their money. That the defendants so understood it is clear; for it is impossible to suppose that they would have continued to make further advances to the bankrupt unless they had been led to believe, and did believe, that the money they had already advanced had been properly applied, that the monthly returns were true, and that the barley brought on to the malting from time to time was that for the purchase of which they had supplied the money.

At least, these are the inferences of fact which I cannot help drawing; and, if it be so, it is not, for my present purpose, worth while enquiring whether or not there was evidence in the case that all, or any, and what portion of the barley or malt seized by the defendants on the bankrupt's premises had been actually bought with the money supplied by the defendants and in accordance with the trust. For it has long been an acknowledged principle that the Courts will, when the circumstances justify it, presume that property bought by a trustee empowered to lay out money in the purchase of similar property has been bought with the trust money, and that, as between him and the *cestui que trust*, it will be taken that he has bought the property for the purposes of his trust; and this is so, not only when the question arises between the *cestui que trust* and the trustee, but also when it arises between the former and any representative of the latter whether by death or bankruptcy; and that the property is as much impressed with the trust in the hands of either executor or trustee, and does not form part of the general estate to be administered, but is the property of the defrauded *cestui que trust*. The trustee in bankruptcy, or executor, who derives the property by bankruptcy or through death can be in no better plight than the person he represents would have been, and holds it, when it comes to his hands, in trust for and applicable to the same purposes as the person he represents held it for—*Taylor* v. *Plumer* (3).

I consider, therefore, that all the barley and malt which was seized by the defendants, even if, as found by the jury, the legal property in it was in the bankrupt, and whether the whole or any part of it had been bought by the bankrupt on credit or not—inasmuch as it was not in value sufficient to cover the advances made by the defendants—was held by the bankrupt upon the trust for the defendants which he, in effect, by his conduct had declared it to be held upon.

The product of, or substitute for, any property subject to a trust follows the nature of the original property; and the

(3) 3 M. & S. 562.

upt could not have been, nor can presentative, the plaintiff, as trustee estate, be heard to allege or per- to avail himself of the bankrupt's raud and abuse of trust to defeat tle of his *cestui que trust.*

th regard to the question raised as e barley having been in the order isposition of the bankrupt, I am of on that the evidence on the part of efendants clearly shews that the upt was not the "reputed" owner, hat no title therefore passes to the iff under the 5th sub-section of n 15 of the Bankruptcy Act of 1869. my brothers concur in the result at I have arrived, although they will ss their own views, the consequence at the defendants are entitled to ment with costs.

NISTY, J.—The plaintiff is the trustee e estate of one John Fairman, a upt, who for many years was malt- gent for the defendants, the well- n brewers, Truman, Hanbury, Bux- & Co. Fairman acted as malting for the defendants exclusively. He nded on the 31st of December, 1878, vas adjudicated bankrupt on the 14th anuary, 1879. The business of ng for the defendants was carried r Fairman at Bishop's Stortford, and al other places. It is not necessary e to describe the course of business en the defendants and the bank- my brother Field having fully done On the 31st of December, 1878, when nan absconded, there was in the ngs barley of the value of over 0*l.*, and malt of the value of over 0*l.* The defendants had paid the e duty upon part of this malt. The upon which the duty was paid was e value of about 14,000*l.* During our months ending the 31st of De- er, 1878, the defendants had paid to nan (by placing it to his credit with ankers) 121,000*l.*, which was more sufficient to cover, not only the of all the barley which he led the dants to believe that he had pur- d for them during that time, in- ng what was in the maltings when sconded, but also his commission on all the malt which he led the defendants to believe that he made for them during that time, including the malt which was upon the premises when he absconded. Between the time when Fairman absconded, and by so doing committed an act of bankruptcy—namely, the 31st of December, 1878—and the time when he was adjudicated a bankrupt (14th of January, 1879), the defendants took possession of all the barley and malt which was in the maltings, and hence the present action by the plaintiff as trustee of Fairman's estate. After the bankruptcy, the defendants discovered that Fairman had been practising upon them a system of deceit and fraud for several years, by buying upon credit large quantities of barley other than that of which he had submitted samples, and at prices below those stated in his accounts, and also by buying considerable quantities of malt in lieu of malt which he professed to have made upon the premises. By these means, the bankrupt defrauded the defendants of upwards of 100,000*l.*, without taking into account the 57,000*l.* worth of barley and malt which is the subject of the present dispute. He also at the time of his absconding owed a large sum—about 40,000*l.*—to farmers and dealers of whom he had bought barley and malt on credit. The defendants have paid all the farmers, protesting at the same time that they were not under any obligation to do so, but they have refused to pay, and have not paid, the dealers.

The question in the cause is, Whether the plaintiff, as trustee of Fairman's estate, is entitled to the barley and malt which was taken possession of by the defendants as already mentioned, or any part of it. The case came on for trial before Mr. Justice Field and a special jury at the Guildhall in London, in May, 1880, when the learned Judge left several questions to the jury. My brother Field has already stated what these questions and the answers to them were, and I need not repeat them. According to these findings, the property in the whole of the barley (value about 22,000*l.*), and in the part of the malt on which the excise duty had not been paid (value about

21,000*l.*), was in Fairman, while the property in the malt upon which duty had been paid (value about 14,000*l.*) was in the defendants. The learned Judge reserved the case for further consideration.

In June, 1880, the defendants obtained a rule to shew cause why the verdict should not be set aside, and a new trial had, on the grounds—first, that the verdict was against the weight of the evidence; secondly, that the learned Judge misdirected the jury in not directing a verdict for the defendants, and in directing the jury that there was any evidence in support of the plaintiff's case, and that there was evidence that the property in the goods had not passed to the defendants, and that the burden of proving the identity of the goods was upon the defendants, and that the acts or admissions of the bankrupt were not evidence against or binding upon the trustee, and in not directing the jury that the defendants had a lien in law or in equity upon the goods for their full value, or that the bankrupt was trustee of the goods for the defendants; or why judgment should not be entered for the defendants. The plaintiff moved for judgment in his favour for the value of both the barley and the malt.

The defendants' rule and the plaintiff's motion came on together for argument. It was agreed that the Court should have power to draw inferences of fact not inconsistent with the findings of the jury.

In my view of the case, it is immaterial whether the property in the goods was vested in Fairman or the defendants, because, having regard to all the circumstances of this case, I am of opinion, and I find as a fact, that Fairman held both the barley and the malt as agent of, and in trust for, the defendants; consequently, subject to the question of reputed ownership to which I shall presently advert, neither the barley nor the malt would pass to the plaintiff. A trust, or, in other words, a beneficial interest in personal property, unattended with possession or the legal ownership of it, need not be created by writing, seeing that chattels personal are not within the Statute of Frauds—*McFadden* v. *Jenkins* (4). Such a trust may be either express or implied, an implied trust being founded upon an unexpressed but presumable intention of the parties having regard to all the circumstances of each case.

An implied trust and an express trust stand upon the same footing, and, subject to any questions of reputed ownership, are alike sufficient to prevent personal property passing to a trustee in bankruptcy—see sub-section 1 of section 15 of the Bankruptcy Act, 1869, and the following cases: *Godfrey* v. *Furzo* (5), *Taylor* v. *Plumer* (3), *Thompson* v. *Giles* (6), *Frith* v. *Cartland* (7), *In re Hallett's Estate* (8).

I fail to see any difference between the case of an agent entrusted with goods for the purposes of sale and an agent entrusted with goods for any other purpose, such as that of converting barley into malt for his principal—see *per* Jessel, M.R., *In re Hallett's Estate* (8).

It was contended on the part of the plaintiff that, inasmuch as part of the barley in question was bought by the bankrupt on credit, and was not the identical barley of which samples had been shewn to the defendants, and inasmuch as the part so bought was mixed with and could not be distinguished from the other part which was bought according to instructions and paid for out of defendants' money, the whole belonged to Fairman, and passed to the plaintiff as the trustee of his estate.

It was also contended that the whole of the malt belonged to Fairman, and passed to the plaintiff, because part of it had been bought by the bankrupt, and was not made with barley purchased pursuant to the defendants' instructions, and because the part so bought was mixed with and undistinguishable from the remainder.

It seems to me that there are several answers to these contentions. One is that, as against an innocent person, no one can set up his own fraud or misconduct as a defence. Fairman, by his con-

(4) 1 Ph. 157; 12 Law J. Rep. Chanc. 146.

(5) 3 P. Wms. 185.

(6) 2 B. & C. 422.

(7) 2 Hem. & M. 417; 34 Law J. Rep. Chanc. 301.

(8) 49 Law J. Rep. Chanc. 415; Law Rep. 13 Ch. D. 696.

and representations, induced the idants to believe that the barley h was from time to time brought the maltings was purchased for them; the defendants, believing such to be act, made him payments from time me which were more than sufficient ver the price of the whole of it. He, fore, could not have been heard to hat he did not hold the barley for as their malting agent—see *Carr* v. *London and North Western Railway pany* (9).

nother answer is, that when the pro- in the possession of an agent who nes a bankrupt is not the identical erty entrusted or intended to be en- ed to him, but has been acquired by in lieu of such property, the property quired does not pass to the trustee nkruptcy—see *Taylor* v. *Plumer* (3). case is also an authority for the pro- ion that, apart from statutory pro- n (such as that relating to reputed rship), the trustee of a bankrupt is n any better position than the bank- himself as regards the rights of parties—*per* Lord Ellenborough, at p. 578; and see *per* Lord Justice s in delivering the considered judg- of the Court of Appeal—*In re Maple-* (10). A third answer is, that, even e trustee would have been entitled e part of the barley and of the malt ht by the bankrupt in breach of his , provided it had been kept separate the rest or could otherwise be iden- (which I deny), he is not so entitled r the circumstances, it being well d that if an agent or trustee mixes property with his own so that he is le to distinguish which is his own, whole will be treated as trust pro- , subject to any equitable claim h the agent or trustee may be able tablish—see *Spence* v. *The Union ne Insurance Company* (11), *In re tt's Estate* (8). In the present case clear that neither the bankrupt nor the plaintiff, as his representative, could establish an equitable claim to any part either of the barley or the malt.

Another ground upon which the plaintiff claims to be entitled to the barley and the malt is that at the time of Fairman's bankruptcy the goods were in Fairman's possession, order and disposition as reputed owner with the consent of the defendants as true owners, within the meaning of sub-section 5 of the 15th section of the Bankruptcy Act, 1869. Assuming the law to be as contended by the plaintiff's counsel, namely, that if the defendants had only an equitable title to the goods they were the true owners within the meaning of the statute, so that the question of Fairman's reputed ownership arises—see *In re Jackson* (12)—still that question is one of fact—see *Ex parte Couston* (13); and, having regard to all the circumstances of this case, and the evidence adduced on the part of the defendants, I have no hesitation in finding as a fact that the goods were not, nor was any part of them, in the possession, order or disposition of Fairman as reputed owner with the consent of the defendants as true owners. All the large brewers have malting agents. Fairman was well known to be the malting agent for the defendants, and for no one else, and I cannot believe that a single person who had dealings with him supposed, or could reasonably have supposed for a moment, that he was the owner of either the 35,000*l.* worth of malt or the 22,000*l.* worth of barley which was in the maltings.

It only remains for me to notice the answers of one of the defendants (Mr. Pryor) to certain interrogatories which were administered to him in an action which was brought by Messrs. Few & Thoday, who were corn merchants, against the present defendants. The action was brought to recover the price of a quantity of barley which Few & Thoday alleged Fairman had bought of them as agent for the defendants. The defendants denied that Fairman bought

44 Law J. Rep. C.P. 109; Law Rep. 10 07.

) 46 Law J. Rep. Bankr. 14; Law Rep. 4 150.

) 37 Law J. Rep. C.P. 169; Law Rep. 3 27.

(12) 40 Law J. Rep. Bankr. 57; Law Rep. 12 Eq. 354.

(13) 42 Law J. Rep. Bankr. 50; Law Rep. 8 Chanc. App. 520.

the barley on their credit, and, on the contrary, insisted that he had no authority to pledge their credit for it, the arrangement with him being that he was to buy barley in his own name and not as their agent, they keeping him in funds to enable him to pay for it in cash when it was brought into the maltings. The object of the interrogatories was to obtain admissions which would fix the defendants as undisclosed principals, and the answers were artfully framed to meet equally artful interrogatories. Some of the answers were far from being ingenuous, but I fail to see how in any view they can assist the present plaintiff. If they were true, then the property in the barley vested in Fairman in the first instance, and according to the finding of the jury it remained vested in him down to the time of his bankruptcy, but nevertheless, in my opinion, he held it on trust for the defendants. If, on the other hand, the answers were false, and the property was vested in the defendants, the verdict is wrong and ought to be set aside.

It is conceded by the plaintiff that, subject to the question of reputed ownership, the defendants are entitled to judgment as regards the malt on which they had paid the excise duty; but, for the reasons which I have given, I am of opinion that the plaintiff's motion for judgment should be dismissed with costs, and that judgment should be entered for the defendants for the whole of the goods (both barley and malt) with costs.

BOWEN, J.—The facts of this case have been stated so fully by my learned brothers Field and Manisty that it becomes unnecessary for me to restate them.

I, also, am of opinion that judgment should be entered for the defendants; and the reasons for my arriving at this view are substantially those stated by my brother Field.

It is perfectly true that there is no evidence to shew that any portion of the specific barley seized by the defendants, and in question in this action, was barley actually bought by the bankrupt with the defendants' money. But it was proved, and not disputed, that the bankrupt had no right, as between himself and the defendants, to have upon his premises barley which was not so bought. The barley actually there, if not purchased by means of the defendants' funds, was fraudulently substituted by the bankrupt in the place of the barley that should have been so purchased; and I think that neither he nor his trustee in bankruptcy can stand in a better position, towards the defendants, in respect of the barley in fact on the premises, than if it was barley acquired by the honest expenditure of the moneys furnished to him. The only question, accordingly, which seems to me to be left is the question whether, if the barley in question had been (as it should have been) purchased by the bankrupt out of such moneys, the trustee could now claim it against the defendants.

I will assume, for the purpose of this argument, and in accordance with the findings of the jury, that the legal ownership in the barley bought remained in the bankrupt till the payment of the duty on the malt. I entertain grave doubts whether this is the correct view of the transactions between them; but I will assume, for the purposes of argument, that it is so.

I am, nevertheless, of opinion, even if the legal property in the barley purchased by the means of the moneys supplied by the defendants would not have vested in the defendants, and whether the bankrupt would have held such barley as trustee for them, or not, to the full extent of its value, that still they would, at least, have had a charge upon such purchased barley to the extent of the moneys they had advanced.

At the end of every month the bankrupt forwarded to the defendants a monthly statement, which represented that the moneys which had been supplied to him had been, in fact, expended on the specific purchases therein detailed, and that the barley so purchased had, in fact, been delivered to and appropriated by him for the purpose of the malting. Every month the defendants went through this statement with the bankrupt, with the object of distinguishing the quantities of barley to be forwarded respectively to Burton and to London; and copies of this monthly statement were regularly entered in the defendants' ledger, for the purpose

of the final settlement of accounts between them and him. It is impossible to doubt that it was on the faith of the accuracy of these representations, contained in the monthly statements, that the defendants both allowed the bankrupt to retain the moneys he had actually received and continued their advances to him. It appears to me that both parties meant that the specific barley purchased by the bankrupt, and brought upon his premises, should be appropriated to the purposes of the malting, and should not be parted with by the bankrupt to other persons, but should remain as a security to the defendants for the advances, even if, as the jury have found, it was not meant to become the absolute property of the defendants. If this be the true effect of the transactions, it seems to me that the bankrupt, by fraudulently substituting for the barley which ought to have been so bought other barley which was purchased by him in other ways, cannot get rid of the charge which it was the intention of the parties to create. This point was not made at the trial; and the jury therefore, necessarily, received no direction upon it. I should have great doubt and hesitation whether, on this ground, the case could escape being sent down for a new trial, whatever the inconveniences and expense of such a course. But the parties have agreed that the Court should draw all inferences of fact which are not inconsistent with the findings of the jury; and I have no hesitation in drawing the inference that the intention of the parties was what I have said. Such a charge would, I think, not be destroyed in any way by the bankruptcy, nor be affected by the reputed ownership clause of the Bankruptcy Act, on which part of the case I have nothing to add to what has been said already by my brothers Field and Manisty.

Judgment for the defendants.

Solicitors—W. P. Slater, for plaintiff; Clapham & Fitch, for defendants.

[IN THE COURT OF APPEAL.]

(*Appeal from the Queen's Bench Division.*)

1881. March 15. May 16.

WRIGHT *v.* MARWOOD AND OTHERS.

GORDON *v.* MARWOOD AND OTHERS.*

Shipping — General Average — Deck Cargo—Jettison—Contribution.

The defendants, shipowners, contracted with the plaintiff to carry his cattle, on deck, from New York to Portsmouth. No custom to carry cattle on deck existed. During the voyage the ship encountered heavy weather, and the master made a proper and necessary jettison of the cattle: —Held (*reversing the judgment of the Queen's Bench Division*), *that the plaintiff was not entitled to contribution from the defendants in respect of his loss either by way of general average on ship, freight and cargo, or as a particular right to contribution from the defendants alone.*

Argument of rule *nisi* granted by the Court of Appeal. The two actions were brought to recover a general average contribution from the defendants in respect of the loss of the plaintiff's cattle, which were jettisoned whilst being carried on the defendants' ship. The same question was raised in both cases, at the trial before Brett, L.J., with a jury. The following facts were proved in *Wright* v. *Marwood and Others*:—

The plaintiff was a cattle dealer carrying on business in Canada, and the defendants were the owners of the steamship *Gladys*.

In April, 1878, the *Gladys* was lying in the port of New York, and the defendants, through agents, entered into the following written agreement with the plaintiff:—

"It is this day mutually agreed between Joshua S. Tucker & Co., agents of the British steamer *Gladys*, now lying in the port of New York, of the first part, and George Wright, party of the second part, that the party of the first part agrees to let to the party of the second part the upper deck of the steamer *Gladys*, except

* *Coram* Lord Coleridge, C.J.; Baggallay, L.J and Bramwell, L.J.

so much as is necessary for the proper working of the vessel, in the master's judgment, for a cargo of cattle to be landed at Portsmouth, England; and the party of the second part agrees to furnish the said vessel not exceeding one hundred (100) head of cattle, or as many as the master decides to take, and to pay the said vessel in advance, on signing bills of lading, the sum of four pounds fifteen shillings (4*l.* 15*s.*) per head. Vessel not responsible for mortality or accident of any nature or kind, and only to supply necessary water for the cattle, the party of the second part furnishing fodder, fittings and attendants. Vessel giving free passage and victuals to attendants, not exceeding five, and cabin passage and fare for one superintendent.

"The said party of the second part also agrees to pay the master a gratuity of twenty pounds (20*l.*) Br. stg. on signing bills of lading.

"Cattle to be put on board and landed at risk and expense of party of second part, and to be taken from alongside vessel immediately on arrival at Portsmouth.

"New York, 17th of April, 1878."

The plaintiff, on the 25th of April, 1878, shipped fifty-three head of cattle on board the *Gladys*, under the agreement. When the shipment was made the defendants' agents gave a bill of lading to the plaintiff, providing that the cattle should be delivered in good order and condition, "the dangers of the seas only excepted," and in the margin was a note, "not accountable for mortality, or for any accident or injury of any kind or nature whatever." The *Gladys* commenced her voyage on the 28th of April, and, the ship having encountered very heavy weather, the master threw overboard the whole of the plaintiff's cattle.

At the trial before Brett, L.J., with a jury, it was admitted that the master was justified in making the jettison, which was necessary for the reasonable safety of the ship.

No evidence was given of any custom allowing cattle to be carried as a deck cargo.

Brett, L.J., considered himself bound by the authority of *Johnson* v. *Chapman* (1), and directed the jury to find for the plaintiff, and gave judgment for him in each case.

The defendants moved for a rule for a new trial in the Queen's Bench Division, but the Court (Lush, J., and Manisty, J.) thought the case was governed in principle by *Johnson* v. *Chapman* (1), and refused a rule.

The Court of Appeal granted a rule *nisi* for a new trial, on the ground of misdirection of the learned Judge in telling the jury that, under the contract, the plaintiff was legally entitled to claim a general average contribution from the defendants in respect of the loss occasioned by the jettison of the cattle.

C. Russell and *Bigham* now shewed cause.—First, the fact that the cattle were carried on deck does not restrain the defendants from liability to contribute to general average. It was formerly supposed that no deck cargo ought to be carried, and that, if carried, no claim for contribution could be sustained, the reason being that such cargo adds to the danger of navigation, and impedes the working of the ship, and is liable to be washed overboard—2 *Parsons on Marine Insurance*, p. 218. But exceptions have arisen with respect to ships carrying certain descriptions of goods to and from foreign ports, and also with respect to ships engaged in making coasting voyages. Wherever, by custom, cargo may be carried on deck the shipowner is liable to a general average contribution, because the contract must be taken to have been made with reference to the custom—2 *Parsons on Marine Insurance*, p. 224, *Da Costa* v. *Edmunds* (2), *Gould* v. *Oliver* (3), *Johnson* v. *Chapman* (1). The last case is exactly in point. Where the contract expressly provides that goods shall be carried on deck, as it does here, the shipowner is clearly liable to general average, and this case is stronger than where the goods are carried under a custom to carry on deck.

(1) 19 Com. B. Rep. N.S. 563; 35 Law J. Rep. C.P. 23.
(2) 4 Campb. 142.
(3) 4 Bing. N.C. 134.

e is nothing illegal in carrying goods ck—*Milward* v. *Hibbert* (4).
condly, if liability to a general average ibution is established, it is submitted at least the ship and shipowner's ht is liable to contribute. There is ound for contending that owners of) below deck are liable, if they were arties to the contract under which oods in question were carried on , and had no notice or knowledge of contract. The defendants are not led to take into account the value of oods carried under deck in order to a the amount of their contribution.
irdly, the defendants are not relieved liability by the clause in the bill of g, "not accountable for mortality, r any accident or injury of any kind ature whatever"—*Schmidt* v. *The l Mail Steamship Company* (5), *es* v. *Allen* (6).
njamin and *Myburgh* supported the —The defendants are not liable to eneral average contribution for the of the cattle. The only exceptions) rule that the owner of goods carried ck is not entitled to any general ge contribution in case of the jettison e goods, are, where there is a custom rry the goods on deck, or where the ge is a coasting voyage only. authorities cited for the plaintiff with these exceptions to the general and were decided upon the question her the exceptions ought to have pleaded or not. In *Johnson* v. *man* (1) it was not necessary to e the question under consideration because the point was abandoned ounsel. The decision of Willes, J., herefore *obiter dictum*. Both *John- . Chapman* (1) and *Milward* v. *Hib- '4)* are in the defendants' favour, in r as they state the general rule that is no general average contribution spect of goods carried on deck. *y* v. *Milward* (7) also turns upon a ion of pleading, but is really in favour of the defendants. The goods here were not lost by perils of the sea, but through being carried on deck, and the plaintiff does not set up any custom. The general rule therefore prevails. The text-writers are all against the view which the plaintiff contends for—2 *Arnould on Marine Insurance*, pt. 3, c. iv. p. 824; 1 *Park on Insurances*, c. vii. pp. 284, 285; 2 *Phillips on Insurances*, c. xv. s. 2, par. 1282; 2 *Parsons on Marine Insurance*, c. v. s. 3, p. 217. According to the American authorities deck cargoes are not the subject of general average—*Smith* v. *Wright* (8), *The Paragon* (9). The laws of nearly all other civilised countries are in accordance with American law. (See the comparative table of the laws of foreign nations as to general average given in *Lowndes on General Average* (2nd ed.) pp. 28, 29.) Unless the Court is bound by direct authority, it is undesirable to give a decision which would cause the law of England to differ from that of other nations upon this point.

As to the plaintiff's second contention, it is submitted that there is no authority for calculating general average in the way suggested. It would not be general average, but a sum to be paid under the contract between the shipowner and the shipper of the goods.

Cur. adv. vult.

The judgment of the Court was (on May 16) delivered by

BRAMWELL, L.J.—In these cases the plaintiffs seek to recover against the defendants, ship and freight owners, a contribution as, or in the nature of, general average in respect of the goods of the plaintiffs, jettisoned for the safety of ship and cargo. It is all-important to note that the plaintiffs' goods were deck cargo loaded on deck with their assent, on a general ship, not one chartered to them, no doubt at a lower freight than if they had been, as I suppose they might have been, below deck, and that there is no custom alleged bearing upon the case. Now when such sacrifice is made, as was here, for the common good, as a

3 Q.B. Rep. 120; 11 Law J. Rep. Q.B.

45 Law J. Rep. Q.B. 646.
49 Law J. Rep. Q.B. 201; Law Rep. 5 Q.B.

Jo. & Ca. (Ir.) 224.

(8) 1 Caine's Rep. 43.
(9) Ware (Maine), 322.

rule it comes within general average, and must be borne proportionally "by those interested." It is not necessary to say what is the origin or principle of the rule, but to judge from the way general average is claimed in England, it would seem to arise from an implied contract *inter se* to contribute "by those interested." To this rule there is an exception, namely, deck cargo jettisoned is not entitled to general average contribution. Here again the reason or principle is perhaps not important. So is the law. The reason among others, however, assigned is, that deck cargo is a dangerous cargo, certain to be jettisoned before any other, and liable to be unduly jettisoned owing to the facility of doing it, when cargo under hatches would not be. So that if we treat general average as matter of implied contract, that ought not to be implied where risk and benefit are not in fair proportion; if, as a matter of positive law, that is the reason which caused the exception. If the goods jettisoned are loaded on deck without the shippers' consent, the shipowner is liable to the goods owner; if with his consent, still other cargo owners will not be. To this exception, however, there are two exceptions, which, perhaps, resolve themselves into one, namely, that coasting vessels are without the exception, and also those cases where by custom the deck cargo is one customary in the trade, and perhaps also from the port. It is said that there is a further exception, namely, where by agreement with the shipper the cargo is shipped on deck. I am of a different opinion. In the first place, the exception is stated by all writers and authorities as extending to the case of deck cargo, whether loaded on deck with or without the owners' consent. It is put in a dilemma—that if without, there is a remedy against the shipowner; if with, it is the act of the cargo owner that has made his goods subject to extra risk, so that it is not fair that other cargo should be on a footing with his. No reason can be given for the claim as of general average. It struck me for the moment that there was no difference between a custom and a particular agreement, because customs are incorporated in agreements unless expressly negatived, and are therefore part of them. But to this the obvious answer was given by Mr. Benjamin, that whatever may be the agreement between deck cargo owner and shipowner, the other cargo owners are no parties to it, nor bound to enquire into it or notice it, as they are bound to take notice of a custom. Then it is said that it is established by authority. I think it is not. I am dealing now with the plaintiffs' claim as one of general average—that is to say, of a right to contribution from ship freight and cargo. The first case relied on is *Milward* v. *Hibbert* (4). That was an action against underwriters by shipowner to recover what the shipowner had had to pay as a contribution by way of general average for goods jettisoned, and all that was decided was, that a plea saying that it was a deck cargo which was jettisoned was bad, "for not shewing that such loading was improper under the circumstances." It may be observed that the voyage was a coasting voyage, namely, from Waterford to London. The judgment begins, "The plea assumes that in no case whatever can the shipowner recover from the underwriter the value of goods loaded on deck." It then discusses a passage in an edition of *Lord Tenterden on Shipping*, published after his death, shews it varies from what was said in editions in his lifetime, and says that the general rule is not so large as is stated in the later edition. The judgment then proceeds: "Now it is obvious there may be other and valid reasons for stowing goods on deck;" and finishes thus: "It seems to the Court, for the reasons assigned, that the mere fact of stowing them on deck will not relieve the underwriter from responsibility, inasmuch as they may be placed there according to the usage of trade, and so as not to impede the navigation, or in any way increase the risk." It was not averred in the plea that there was no such usage, and that the risk was increased, and so the plea was held bad. That case has no bearing on the present. Consistently with the plea there might have been (and in fact probably was) the custom. Here we know there was none. The other

elied on by the plaintiffs was *John-*
. *Chapman* (1). That was not a
f general average. The plaintiff had
ored the defendants' ship, loaded the
i cargo, part of which by the charter
o be, and was, deck cargo, and was
ntitled to a contribution from the
and with reason. He was not seek-
from other cargo owners, but from
ipowner who shared the benefit and
; in reason to share the risk of the
argo. As Mr. Benjamin pointed out,
ounsel for the shipowner never
sted the plaintiff's right if it was a
of sacrifice. The counsel for the
iff indeed did contend for what was
ntested; why one cannot see, unless
w that, though deck cargo, it was
reck but sacrifice. But what is the
nent? "The question is, what was
?" At p. 581 of the report Mr.
e Willes discusses that. Then he
(at p. 583), "In this case there was
k cargo, and the first observation
ally would arise upon its being a deck
, and upon the exception with regard
k cargoes, but that is taken out of
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harter-party. This is an action by
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if shipping a deck cargo was lawful.
you have established that it is a
cargo lawfully, then by the contract
e parties it becomes subject to the
f general average." Now certainly
last sentence gives some colour to
aintiffs' contention. But the learned
should be understood as speaking
ation to the subject-matter. It was
claim for general average as against
ther than the shipowner. It was
particular claim against him, and is
to be subject to the "rule" of
general average. If Mr. Justice Willes had said that it could have been maintained against the cargo owners, had there been any, it would have been wholly extra-judicial, for there were none. But he did not say nor mean to say so. For he says, "The deck cargo was in contemplation of the parties," which would not be true of other cargo owners. The case then was not one of general average. It was as though the plaintiff was owner of deck cargo, and A owner of other cargo, and A had agreed to contribute if deck cargo was jettisoned. In the case before us Mr. Russell felt the difficulty of maintaining the claim as one of general average, namely, one to which ship and other cargo should contribute. For, said he, if you hold other cargo not liable to contribute, at all events do not take it into account as diminishing what ship and freight are to contribute. Now it seems to us there is positively no reason nor colour of authority for saying other cargo owners would contribute here. They are bound by no agreement they have made. But then it may be said (and Mr. Russell so contended in the alternative), Let ship and freight contribute in some proportion. It remains to consider whether the claim in this form can be maintained; that is to say, not as one of general average, but of particular right against the shipowner to contribution. It is put in two ways—first, as though there was not other cargo; secondly, as though there was, though not liable to contribute, to be taken into account in ascertaining what ship and freight should contribute. First, let us consider the claim to contribution against ship and freight owner, as though there was other cargo, not however to be made liable. Now why should the shipowner be taken to have agreed that when deck cargo was sacrificed, not for his own exclusive benefit, but of his and others, he would bear a proportion of loss as though he alone was benefited? There is no general law or rule of general average applicable to such a case. To maintain the plaintiffs' claim one must imply a particular agreement by the defendants, that if the plaintiffs' cattle were jettisoned for the common good, the defendants would bear a loss proportioned

to the value of his ship and freight as compared with the cattle—that is, ship and freight worth 99,000*l.*; cattle worth 1,000*l.*; other cargo a million. Defendant is to pay ninety-nine per cent. of the loss. Why? We see no reason. In the case of *Johnson* v. *Chapman* (1) the plaintiff and defendant got all the benefit from the jettison—not so here. In that case all subject to general average was brought into the account. Here it would not be. Then take the other way the claim is presented, namely, the claim to recover from ship and freight owner such a sum as the plaintiffs would get from him if entitled to general average from all. To take the figures as before—plaintiff's cattle 1,000*l.*; ship and freight 99,000*l.*; other cargo a million. Plaintiff would be entitled to about 90*l.* from the defendants. Again we ask, why and for what reason? There cannot be a doubt that the cattle freight was less than it would have been if they had been (as I have said, I suppose they might have been) under deck. Here again there is no general law or rule applicable to the case. An agreement must be implied, and we ought not to imply agreements which parties can expressly make if they please, without some very strong reason for so doing. We see none, nor authority. We prefer to hold that the plaintiffs shipped their cattle as they did without bargaining for compensation from anyone if they were jettisoned, and must bear all the loss themselves, at least without such right to contribution as they are now claiming.

We must add, we think it very undesirable our law should differ from that of other nations, as we think it would if we decided otherwise. There is no authority in our law that we can find to justify the claim in any of the three ways in which it is made, while the law and practice of foreign countries are decidedly to the contrary—*Parsons' Maritime Law*, p. 307; *Emerigon*, c. xii. s. 42. The latter expressly says, "There is no remedy against the master if, with consent of the merchant, the goods are on deck." See also *Lowndes on Average*, and the various codes cited by him, some of which, however, seem to make no distinction as to deck cargoes. It is to be remembered that the plaintiffs make no complaint of any breach of the contract to carry—no complaint that their goods were improperly jettisoned, or that other goods might have been jettisoned with equal advantage to the ship, the owner of which might have been entitled to general average, or the jettison of which, or part of which, might have diminished the necessary jettison of the plaintiffs' goods. Their claim is for general average, or contribution in the nature of general average. We are of opinion that the judgment must be reversed.

Judgment reversed.

Solicitors—Chester, Mayhew, Broome & Griffiths, agents for Haigh, Son & Ayrton, Liverpool, for plaintiffs; Johnsons, Upton, Budd & Atkey, for defendants.

[IN THE QUEEN'S BENCH DIVISION.]

1881. June 20. July 4. } PARKYNS (*appellant*) v. PREIST (*respondent*).

Locomotive—Tricycle—Highway, Locomotive on—The Locomotive Act, 1861 (24 & 25 *Vict. c.* 70), *s.* 12—*The Locomotives Act*, 1865 (28 & 29 *Vict. c.* 83), *ss.* 3, 4, 7—*The Highways and Locomotives* (*Amendment*) *Act*, 1878 (41 & 42 *Vict. c.* 77), *ss.* 28, 29, 38.

A motor tricycle was capable of being propelled by steam alone at the rate of ten miles an hour, but when so propelled there was no noise or escape of steam, and nothing which could frighten horses or cause danger to the public using the highway beyond any ordinary tricycle. The weight was 2 *cwt., and the wheels having indiarubber tires would not injure the surface of the road.*

The person riding on the tricycle could work it by his feet, either independently of, or in conjunction with the application of the steam power, and by an automatic brake the machine could be stopped in a very few yards.

On a summons against the rider for non-

compliance with the rules and regulations for the use of locomotives on highways prescribed by the Locomotives Acts, 1861, 1865 *and* 1878, *the magistrate convicted the appellant.*

On appeal it was,—

Held, *that the conviction was right, as the tricycle was a locomotive within the definition in section* 38 *of the Highways and Locomotives* (*Amendment*) *Act*, 1878 (41 *& 42 Vict. c.* 77).

This was a Case stated by a Metropolitan police magistrate on his conviction of the appellant on summonses charging him with using a certain locomotive propelled by steam, without observing the conditions prescribed by section 3 of 28 & 29 Vict. c. 83, and section 29 of 41 & 42 Vict. c. 77.

The case and facts are fully stated in the judgment.

J. W. Mellor (*Channell* with him), for the appellant.—This tricycle is not within the mischief of the statutes, and clearly was not contemplated by them. They were directed to traction engines, heavy machines, and it will be seen that the separate provisions are wholly inapplicable to such a case as this. The decisions in *Taylor* v. *Goodwin* (1) and *Williams* v. *Ellis* (2) shew that regard will be had to the sort of vehicle contemplated by Acts of Parliament creating penalties or imposing tolls.

Leese, contra, was not called on to argue.

Cur. adv. vult.

The judgment of the Court (3), written by Pollock, B., was (on July 4) read by

LORD COLERIDGE, C.J.—This is an appeal against the conviction of the appellant by a Metropolitan police magistrate under five summonses, whereby the appellant was charged with using a certain locomotive propelled by steam, being a motor tricycle, upon a public highway, without observing the conditions prescribed by section 3 of the Locomotives Act, 1865 (28 & 29 Vict. c. 83), and section 29 of the Amending Act of 1878 (41 & 42 Vict. c. 77), and by other enactments.

It was admitted before the magistrate and before us, that those conditions had not been observed; and the only question raised for our opinion is, whether the machine in question was rightly held by the magistrates to be a locomotive within the meaning of these sections. The first of these provides that "every locomotive propelled by steam or any other than animal power, on any turnpike road or public highway, shall be worked" according to certain rules and regulations thereinafter contained. Section 29 of the second Act repeals a portion of section 3 of the first Act, and substitutes another regulation to be observed while the locomotive is in motion; but by section 38 the word "locomotive" is again defined as meaning "any locomotive propelled by steam or by other than animal power." The tricycle in question is described in paragraph 8 of the case before us, wherein the evidence of the respondent is set out. He says that he "saw propelled on the public highway, at the rate of about five miles a hour, a tricycle, on which was sitting a man working treadles with his feet, in the manner in which tricycles are usually propelled. He noticed some metal boxes under the seat of the vehicle, but when the vehicle passed him he saw no sign of steam and heard no noise. The metal cases contained a small steam-engine and boiler, and a condensing apparatus, and he saw that the steam was up for the occasion."

On the part of the appellant, Mr. Bateman, an engineer and machinist, was called as a witness. He described the machine as being like an ordinary tricycle, and capable of propulsion in the ordinary way by the feet of the rider, but with auxiliary steam power to assist the rider, which steam power was, however, sufficiently powerful to move the vehicle, if desired, without the foot motion. In a metal case (size about two feet by two feet by nine inches), placed below the level of the seat, and near the feet of the

(1) 48 Law J. Rep. M.C. 104; Law Rep. 4 Q.B. D. 228.

(2) 49 Law J. Rep. M.C. 47; Law Rep. 5 Q.B. D. 175.

(3) Lord Coleridge, C.J.; Pollock, B.; and Manisty, J.

rider is a small copper tubular boiler and an engine. The fuel used is gas evolved from methylated spirit or mineral oil, in the same manner as in the contrivance known as the Whitechapel lamp. There is, therefore, no smoke, and the exhaust steam instead of being blown off into the atmosphere, producing the puffing noise common to locomotives, is discharged into a coiled pipe in another metal case behind the rider's seat, and is there condensed and returned by a small pump to the boiler as hot water, thus at once economising water and fuel and preventing escape of steam into the atmosphere. The power of the engine was about one horse power indicated, and it was capable of driving the vehicle on a level road at a rate of nearly ten miles an hour, but not more. When the vehicle was so driven there was nothing to indicate that it was being worked by steam power, and nothing which could frighten horses or cause danger to the public using the highway beyond any ordinary tricycle. The weight of the machine was proved to be about 2 cwt., and the tires of the wheels about 1½ inches in width, being similar to bicycle wheels, but somewhat stouter and stronger. The tires being of indiarubber, no injury could be done to the surface of the road by working the machine on it.

It was further proved that the machine was fitted with a brake, sufficiently powerful to stop the machine in a very few yards against the power of the steam even if it continued working. This was effected by the brake having a powerful leverage, so that a force far less than the force of the steam applied to the brake would nevertheless stop the machine. The brake is also fitted with an automatic action, by which when the weight of the rider is off the seat the seat rises, and thereby applies the brake, so that when there is no person sitting on the seat the brake is applied and prevents the machine moving. The machine is guided by a handle, and can be turned completely round in twice its own length. The boiler is tested to bear a pressure of 700 lbs., and it is habitually worked with a pressure of about 150 lbs. Even if the boiler did burst, being tubular and of copper, the only result would be a rent in one of the tubes, and there would be no explosion.

In answer to questions put to him on behalf of the appellant, Mr. Bateman explained that the principle of the invention was capable of extension to larger carriages, but that the use of indiarubber tires practically limited the weight to something not greatly exceeding the weight of this particular machine, and also that the fuel used could not be used economically to obtain very much greater power than was obtained.

It is scarcely necessary to do more than to read this description in order to shew that the tricycle in question comes within the words of the above statutes, as being "a locomotive propelled by steam, or any other than animal power." It cannot be less within this description because it is capable of propulsion in the ordinary way by the foot of the rider, it being expressly found in the case that the steam power was sufficiently powerful to move it, if desired, without the foot motion. It was argued, however, on behalf of the appellant, that such a machine could not have been within the contemplation of the framers of the statutes in question, which apparently were intended to be directed against the use of locomotives larger in size and heavier in weight, and therefore more dangerous to persons using the public highway, than the locomotive in question. It is probable that the statutes in question were not pointed against the specific form of locomotive which is described in this case. Indeed, such a locomotive was not known when they were passed, and probably not contemplated. As, however, it comes within the very words of the statute, it seems to us that we cannot, upon any true ground of construction, exclude it from their operation; and it may be observed that even if the fullest scope be given to this argument, Mr. Bateman's explanation that the principle of the invention was capable of extension to larger carriages would shew that a locomotive similar in construction and principle to that which is the subject-matter of this case might, by reason of its size and power, become much more dangerous; and if this be so, the question to be considered in each case would

not be whether the locomotive in question properly came within the language of the statutes, but whether, by reason of the size or weight of the particular machine, it came within the mischief supposed to be contemplated, which shews that such an argument is vicious.

Two cases were cited by counsel for the appellant; but in truth they have no bearing upon the present case. The first was that of *Taylor* v. *Goodwin* (1), in which it was held by this Court that a person riding upon a bicycle on a highway at such a pace as to endanger the life or limb of passengers may be convicted of furiously driving a carriage under the provisions of the Highway Act (5 & 6 Will. 4. c. 50), s. 78. The argument in that case turned wholly upon the meaning of the word "carriage" in that Act, and it gives us no assistance. The second case was that of *Williams* v. *Ellis* (2). In this case, where a local turnpike Act imposed a toll upon any horse, mule or other beast drawing any coach, sociable, chariot, berlin, &c., it was held that a bicycle was not a carriage liable to toll under the Act. This case was decided upon the ground that the carriages referred to in the statute must be carriages *ejusdem generis* with the carriages previously specified. This does not appear to us to have any material bearing upon the question now before us.

We think that the decision of the magistrate was correct, and that the conviction should stand, with costs.

Conviction affirmed.

Solicitors—Milne, Riddle & Mellor, for appellant; Gregory, Rowcliffes & Co., for respondent.

[IN THE QUEEN'S BENCH DIVISION.]

1881. May 23, 26. } DAVIES *v.* WISE. CRAMER AND COMPANY (*claimants*).

County Court — Interpleader — Sale of Claimants' Goods—19 *&* 20 *Vict. c.* 108. *s.* 72—30 *&* 31 *Vict. c.* 142. *s.* 31—*County Court Rules*, 1875, *Order XXI. rule* 1.

A claimant to goods seized in execution under County Court process, may, by 19 *&* 20 *Vict. c.* 108 (*the County Courts Act*, 1856), *s.* 72, *prevent their sale by depositing with the bailiff either the value of the goods or possession-money; in default of so doing, the bailiff is compelled to sell, and he is not bound previously to make a request for such deposit—notwithstanding Order XXI. rule* 1 *of the County Court Rules*, 1875—*nor to apply for an interpleader summons under* 30 *&* 31 *Vict. c.* 142 (*the County Courts Act*, 1867), *s.* 31, *in order to justify the sale.*

Appeal from the County Court of Chester by Special Case.

The plaintiff, having recovered judgment against the defendant for 10*l.* 2*s.* 6*d.*, issued execution under which the bailiff of the County Court on the 8th of September seized, amongst other things, a piano which had been lent on hire by the claimants to the defendant, on terms known as the hiring system. The terms were, that on payment of 42*l.* in twelve instalments of 3*l.* 10*s.* the piano was to belong to the defendant. In case of default of any of the instalments the claimants were to be entitled to resume possession of the piano, and until full payment of the 42*l.* the piano was to remain the property of the claimants. At the date of the seizure of the piano the instalments were in arrear.

On the 11th of September, while the bailiff was in possession, the landlord of the defendant's premises distrained for 13*l.* rent. No formal notice, under 19 & 20 Vict. c. 108. s. 75, was delivered by the landlord to the bailiff, but the distress warrant was shown to the bailiff, and on the bailiff giving an undertaking to pay the 13*l.* rent due to the landlord out of the first proceeds of sale, which he afterwards did, the landlord withdrew.

On the 22nd of September, 1880, the

claimants first heard of the seizure of the piano, and their manager immediately went to Chester and saw the assistant of the bailiff and gave him verbal notice that the piano seized was the property of the claimants, and on the same day the claimants wrote to the bailiff, as follows:—

"We give you notice that the piano seized from the house of Mr. Wise, is our property, being only lent on hire, and that any goods of Mr. Wise in your or his possession, must be sold first to cover rent owing, irrespective of any other debt that you may hold execution for; should you sell after this notice we shall hold you responsible for value of piano—42*l.*"

The same day the bailiff replied as follows:—

"I intend selling everything seized before I sell piano. After selling goods, if you are agreeable, and with Mr. Wise's written consent, I will give up possession of piano to you on payment of balance required, which will be, I should think, from 11*l.* to 13*l.*"

On the 23rd of September the goods seized by the bailiff (including the piano) were sold by the bailiff; the claimants' manager attended the sale on their behalf and announced to all present that the piano was the property of the claimants and protested against the sale.

When most of the goods had been sold, but before the piano was sold, the bailiff told the claimants' manager that a sum of 10*l.* was required to make up the amount required, and stated if that amount was paid, or a guarantee given for that amount, the piano should not be sold. The claimants' manager declined to pay that sum or to give any guarantee, nor did the claimants at any time tender to the bailiff the value of the piano or possession-money. The bailiff did not ask the claimants to deposit the cost of keeping possession of the piano or its value. The piano was then sold and realised 17*l.* This sum was afterwards paid into Court by the bailiff.

On the 1st of October the bailiff took out an interpleader summons, calling on the claimants to appear and support their claim. The claimants delivered particulars claiming the piano, and subsequently by leave of the Judge amended their particulars by adding a claim against the high bailiff for damages, in which they claimed the difference between the price alleged to have been realised by the sale of the piano and the value of the same on the ground that he improperly and illegally sold the piano after its seizure and after notice of their claim.

On the 4th of November the summons was heard, and it was proved that the value of the piano was 35*l.*

The learned County Court Judge reserved judgment, and on the 25th of November gave judgment for the claimants for the amount realised by the sale of the piano with costs, but held that they had established no claim against the bailiff for damages.

From this judgment appeal was now brought, and the question for the opinion of the Court was whether, upon the facts above stated, the County Court Judge ought to have given the claimants damages as against the bailiff to the extent of the difference between the amount paid into Court and the value of the piano.

R. Henn Collins, for the claimants.—First, the bailiff was not justified in selling until he had taken out a summons under section 31 of 30 & 31 Vict. c. 142 (1). That section is for the purpose of

(1) 30 & 31 Vict. c. 142 (County Courts Act, 1867). Section 31: "If any claim shall be made to or in respect of any goods or chattels taken in execution under the process of a County Court, or in respect of the proceeds or value thereof by any person, it shall be lawful for the Registrar of the Court upon application of the high bailiff, as well before as after any action brought against him, to issue a summons, calling before the said Court as well the party issuing such process as the party making such claim, and the Judge of the Court shall adjudicate upon such claim, and make such order between the parties in respect thereof, and of the costs of the proceedings, as to him shall seem fit, and shall also adjudicate between such parties, or either of them, and the high bailiff, with respect to any damage or claim of or to damages arising or capable of arising out of the execution of such process by the high bailiff, and make such order in respect thereof and of the costs of the proceedings as to him shall seem fit, and such orders shall be enforced in like manner as any order in any suit

protecting the bailiff from conflicting claims, and if he chooses to sell the goods without availing himself of the protection of section 31, he sells at his own risk of being right as to ownership. "Claim," in section 72 of 19 & 20 Vict. c. 108 (2), means a claim met by a summons taken out by the high bailiff, and until such summons the remainder of the section enabling him to sell does not operate. Before selling, the bailiff must request the claimant to make the deposit directed by section 72 (2). See County Court Rules, 1875, Order XXI. rule 1 (3).

Secondly, it was not necessary to sell the piano at all, except for the rent; and the bailiff had no right to levy for the rent because the landlord had not complied with the requirements of 19 & 20 Vict. c. 108. s. 75. The County Court Judge should have given judgment against the bailiff for the amount claimed.

H. Tindal Atkinson, for the high bailiff, was called upon to argue on the first point only.—A summons under section 31 is not a condition precedent to the sale, otherwise the high bailiff would have to delay the sale until the next Court day. If the claimant makes the deposit directed by section 72 the bailiff takes out an interpleader summons, but if no deposit is made, he is compelled to sell. The words of the section are he "shall" sell. The question of whether the claimants are entitled to any damages are in the discretion of the County Court Judge. They stood by and saw the sale take place, and the County Court Judge has decided they are not entitled to damages.

Cur. adv. vult.

HUDDLESTON, B. (on May 26).—This was an interpleader issue, tried before the Judge of the County Court, in which the claimants asserted their title to a piano lent on hire by them to the execution debtor on the terms that it was to remain the claimants' property until the amount of the hire had been paid. The County Court Judge gave judgment for the claimants on the interpleader; but they further preferred a claim against the bailiff, because he had sold the piano, claiming the difference between the value of the piano and the price for which it was sold, and on this head judgment was given against them. From this judgment appeal is now brought, and the question is whether they are entitled to claim damages against the bailiff. The claimants based their right to damages on the ground that the bailiff illegally sold, and contended that he ought not to have sold before an interpleader summons had been taken out, or at all events until he had requested the claimants to deposit the value of the piano or the amount to which he would be entitled for keeping possession of it until the settlement of the claim. We are consequently called on

brought in such Court, and shall be final and conclusive as between the parties and as between them or either of them and the high bailiff, unless the decision of the Court shall be in either case appealed from; and upon the issue of the summons any action which shall have been brought in any Court in respect of such claim, or of any damage arising out of the execution of such process, shall be stayed."

(2) 19 & 20 Vict. c. 108 (County Courts Act, 1856). Section 72: "Where any claim shall be made under section 118 of 9 & 10 Vict. c. 95 to or in respect of any goods taken in execution under the process of a County Court, the claimant may deposit with the bailiff either the amount of the value of the goods claimed, such value to be fixed by appraisement in case of dispute, to be by such bailiff paid into Court, to abide the decision of the Judge upon such claim, or the sum which the bailiff shall be allowed to charge as costs for keeping possession of such goods until such decision can be obtained; and in default of the claimant so doing the bailiff shall sell such goods as if no such claim had been made, and shall pay into Court the proceeds of such sale to abide the decision of the Judge."

(3) County Court Rules, 1875, Order XXI. rule 1: "Where any claim is made to or in respect of any goods or chattels taken in execution under the process of any County Court, or in respect of the proceeds or value thereof, and summonses have been issued on the application of the bailiff, such summonses shall be served in such time and mode as hereinbefore directed for an ordinary summons to appear to a plaint, and the case shall proceed as if the claimant were the plaintiff, and the execution creditor the defendant; provided that where the claimant has not at the request of the bailiff made deposit in accordance with section 72 of the County Courts Act, 1856, the time of service may, if the high bailiff so desires, by leave of the Judge or Registrar, be such time as will obtain a speedy decision the claim."

to decide whether it is necessary that a request should be made by the bailiff to deposit the amount of the goods before he can sell them, or whether he can sell before taking out a summons under the interpleader clauses of the County Courts Act. I am of opinion the decision of the County Court Judge is right; and that if the claimant wishes to prevent the sale he must take the first step and make the deposit required by section 72, and that no previous request to do so need be made by the bailiff.

This turns upon section 31 of the County Courts Act, 1867, and section 72 of the County Courts Act, 1856, and the Orders of the County Court. Section 31 of the County Courts Act, 1867, which is substituted for the repealed section 118 of 9 & 10 Vict. c. 95, provides for interpleaders; and the clear object of the section is to protect the bailiff when two conflicting claims are made, and to do justice between the parties. The bailiff receives a writ which he has to execute on the debtor in the interest of the creditor; he is met by the claims of a third party. When conflicting claims are thus raised to the goods seized under the writ, the law empowers the bailiff to apply to the Registrar, who is supposed to be the stationary official, and he is thereupon to issue a summons under section 31 of the County Courts Act, 1867, calling the parties before the Court. The summons being issued the claimant is to come in and support his claim, and the Judge of the County Court will adjudicate on the whole matter; if there is any complaint against the bailiff the Judge may deal with it, and he may award damages against the bailiff; in short, he can deal with all matters, he has the whole jurisdiction, and no further steps can be taken. Such is, I think, the effect of section 31; it is for the relief of the bailiff, to protect him from conflicting claims and a means whereby the whole question may be decided.

I now come to section 72 of the County Courts Act, 1856. That section provides for the case where the bailiff may sell; the words of the section are clear. It was urged before us that the claim referred to was a claim by summons, but I do not agree with that. In order to prevent the sale the claimant may deposit with the bailiff the amount of the value of the goods claimed—if he does not know, who does know?—but in case of any dispute the value is to be fixed by appraisement; the amount is to be paid into Court for the Court to deal with it under section 31 of the Act of 1867 with reference to the claims of all parties; or if the claimant does not choose to deposit the value of the goods, he may deposit the sum which the bailiff may charge for keeping possession of the goods until the decision under section 31 can be obtained. The bailiff would know the day on which the sitting of the Court would take place, and he charges accordingly. In default of either of these modes of preventing the sale, the bailiff "shall" sell the goods. Therefore the bailiff is to sell unless the claimant adopts one of the two alternatives. Who then is to take the first step? Obviously the claimant.

Some doubt was raised because of the words "at the request" of the bailiff which are used in Order XXI. rule 1 of the Rules of Court, 1875. How those words were inserted I know not; no request is necessary. There is no provision for such a request in section 72, and the words "at the request" have been introduced into the rules without reflection or due consideration of the Act.

Under these circumstances I think the view of the County Court Judge that the bailiff was justified in selling was right, and the suggestion that he ought, before doing so, to have made a request and taken out a summons to be of no avail. For these reasons I am of opinion the appeal should be dismissed with costs.

HAWKINS, J.—I am also of opinion that the appeal should be dismissed with costs. Section 72 of the Act of 1856 points out the manner in which the claimant may appear to prevent the sale. The meaning of that section is that if goods seized under the procedure of the County Court are claimed by another person, the person claiming may prevent the sale if he chooses either to deposit with the bailiff the value of the goods, or such a sum as the bailiff may charge for keeping possession of the goods until the

vies v. *Wise*, Q.B.

to them has been determined. r XXI. rule 1 is intended to expedite roceedings when the claimant has ade a deposit in accordance with n 72, and gives the County Court such power to hear the case as enable the parties to obtain a y decision.

at was done? The piano was l under the County Court process. clear the claimants knew of this re, for they sent their agent over to st. He did claim for them verbally, he was told that if he chose to it even less than was necessary to posited under this section the piano l not be sold; but with full know- that the piano had been seized and to be sold the claimants took no e, nor did they pay, nor offer to pay, as it suggested they were prepared y any sum of money which it was sary should be paid in order to pre- the sale. They did not fulfil the rements of this section; and as they ot, the bailiff, as he was bound, sold goods as if no such claim had been , and paid into Court the proceeds e sale to abide the decision of the e.

sold the goods, in my judgment, r the authority of the Act, but this d not have prevented an action st him for illegal seizure or sale. true that if an action had been ght the bailiff would have been en- to stay the action under section 31 e Act of 1867. If he chooses to put nachinery of this section in motion ay—whether the goods are sold or in his possession, whether an action rought or not—take out an inter- ler summons, and on this the County t Judge is finally to determine not the title to the goods, but all ers arising out of the execution of process. See *Death* v. *Harrison* (4), wed in *Hills* v. *Renny* (5), where the point was established.

hat then were the objections raised e action of the bailiff in support of the claimants' claim for damages? One point, which was not much pressed and I think was disposed of in the argument, was that it was not necessary to sell the piano because sufficient goods of the execution debtor were sold to satisfy the levy at the suit of the execution creditor, and it was only necessary to sell the piano to satisfy the rent. The counsel for the claimants said that the bailiff had no right to levy the latter amount, because the formal notice required by the statute 19 & 20 Vict. c. 108. s. 75 was not given; but the bailiff was shewn the warrant under which the landlord had lawfully distrained, and he gave an undertaking that on the landlord retiring he would sell the goods and hand over to the landlord the sum to which he was entitled for rent. It seems to me that the formal notice required by statute is only intended to compel the high bailiff to take care that the landlord's claim is provided for out of the levy, and does not affect the case as between the claimant of the goods and the bailiff. It seems clear that the piano would have been sold under the distress for rent.

Another contention on the part of the claimants was that, assuming the County Court Judge had jurisdiction, he ought to have given the claimants the full value of the property illegally seized—namely, 35*l*. He has refused to do so. I do not say he might not have done so, for I think it is a matter for him to determine; but I think he was justified in his refusal because the sale being authorised under section 72 the claimants had failed to comply with the requirements of that section, which are provided in order to enable a claimant to prevent the sale of his goods. In default of compliance it is imperative on the bailiff to sell the goods and pay the proceeds into Court. The claimants must be taken to have known that if they thought fit they could stop the sale either by depositing with the bailiff the amount of the value of the goods, or a sum for keeping possession of the goods until the decision of the County Court Judge.

It seems to me very analogous to the proceedings under sheriff's process, and I find an authority very much in point

40 Law J. Rep. Exch. 26; Law Rep. 6 15.
49 Law J. Rep. Exch. 710; 5 Ex. D. 313.

—*Abbott* v. *Richards* (6)—in which Baron Pollock said, "I find no suggestion in the affidavits of any special damage; and the supposed hardship on the party, of having his goods seized, and sold perhaps, for less than their value, and receiving only the proceeds of the sale, is a matter which might and ought to be brought before the Judge at the time of the making of the order. Here, nothing of that nature appears to have been stated to him. There may, perhaps, be some doubt as to the extent of the Judge's authority under the Act; my impression is that he has a right to do all that is just, proper and equitable under the circumstances. Here we must presume that he did so. It would, therefore, be very unjust to make the sheriff responsible for what he did under the order of the Judge." That last sentence may be applied to the bailiff on this occasion. He sold under the authority of the Act, and if the sheriff is protected *a fortiori* the bailiff is protected.

The County Court Judge has taken all the circumstances into his consideration, and if he has a discretion he has wisely exercised it. It may be he was compelled to give judgment for what the goods fetched on the authority of the case cited, but he might very well say that if the claimants leave their piano in the hands of a man to treat as his own, and do not when it is seized in execution choose to pay the amount necessary to stop the sale, they are not entitled to any special damages.

Appeal dismissed.

Solicitors—H. G. Field, agent for T. Etty, Liverpool, for the claimants; Reep, Lane & Co., for the bailiff.

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(6) 15 Mee. & W. 194; 15 Law J. Rep. Exch. 330.

[IN THE QUEEN'S BENCH DIVISION.]

1881. March 14. } *In re* ROYLE.

Bankruptcy — Trustee — Resignation or Removal — Default in Accounting — Committal to Prison — Bankruptcy Rules, 1870, *rule* 126—"*Shall enforce obedience.*"

The Comptroller in Bankruptcy reported to the Court having jurisdiction in a certain bankruptcy, that an ex-trustee in the bankruptcy had, contrary to rule 126 *of the Bankruptcy Rules*, 1870, *failed to render to the Registrar an account shewing what he had done while trustee, and to account for the property of the bankrupt, and had not, upon being required by the Comptroller, given satisfactory explanation of his conduct. The trustee was summoned to attend at the Court, and did not do so. The Court committed him for contempt. Upon application for a habeas corpus to discharge him out of custody,*—Held, *that rule* 126, *in directing the Court to "enforce obedience" to the requisitions of the rule, did not justify a committal without a previous order of the Court requiring obedience to such requisitions, and that the prisoner must accordingly be discharged out of custody.*

This was a rule calling upon the Judge of the County Court of Lancashire, holden at Manchester, the High Bailiff of that Court and the Comptroller in Bankruptcy, to shew cause why a writ of *habeas corpus* should not issue to the keeper of the Manchester City Gaol to bring up the body of Pookes Royle, with a view to his being discharged out of custody.

The material facts, according to the affidavits, were as follows:—

Royle was appointed in 1877 trustee of the estate of R. B. Pellow, adjudicated a bankrupt by the Manchester County Court. Royle was, in 1878, himself adjudicated a bankrupt, and thereupon (under section 83 of the Bankruptcy Act, 1869) ceased to be trustee. On the 27th of January, 1880, the Comptroller in Bankruptcy reported to the County Court that Royle had failed to render to the Registrar, to be filed with the proceedings, an account in writing

ing what he had done while trustee, to duly account for the property of ankrupt, as required by rule 126 of ankruptcy Rules, 1870; and had not, being thereunto required by the ptroller, given satisfactory explana- to the Comptroller of his conduct in behalf; and the Comptroller prayed lecision of the Court thereon. In ıance of such report, Royle was d with a notice from the Court ring him to attend at the Court on 5th of March, 1880, to explain why ıd failed to comply with the said re- tion of the Comptroller, and giving notice that, should he not attend, Court would in his absence make such as it might think just. Royle did ıor did anyone on his behalf attend. Court adjudged that he was in con- t, and ordered that he should stand nitted to Manchester Gaol for his mpt. A warrant was issued for his t, and for his detention till he should scharged from custody by order of the t, and he was arrested and was now isoner accordingly. This rule was ed for and obtained on the several nds that the order of committal was without notice to Royle of any al application to commit him; that pplication made was not supported ffidavit; that Royle had not dis- ed any order of any Court, and had been guilty of any contempt; that nly order which the County Court power to make on the hearing of the cation on the 5th of March (if it had r to make any order at all) was an to compel Royle to comply with requirements of the Comptroller in a specified time; and on other nds immaterial to be noticed (1).

Crump shewed cause.—The order of committal was rightly made. The words of rule 126 (1), "the Court shall enforce obedience," authorise a committal to prison for default already made, and do not necessitate the previous making by the Court of an order limiting a time for compliance. The rule itself prescribes the time within which its requisitions are to be complied with. Rules 178 and 179 do not apply where the Comptroller in Bankruptcy reports the conduct of a trustee to the Court and the Court acts upon such report, there being in such circumstances no application to the Court to commit, but rather an acting by the Court *proprio motu*.

Phillimore, in support of the rule, was not called on.

DENMAN, J.—I am of opinion that the rule must be made absolute. Rule 126 of the Bankruptcy Rules, 1870, says that where a trustee resigns, or is removed, he is within four days thereafter to render to the Registrar an account shewing what he has done while trustee, and to duly account for all property of the bankrupt, and "if he do not comply with these requisitions within the prescribed time, the Court" is to "enforce obedience

The Bankruptcy Act, 1869 (32 & 33 Vict. , s. 56: "Every trustee . . . . shall from o time, as may be prescribed, . . . transmit Comptroller a statement shewing the pro- gs in such bankruptcy, . . . containing the ibed particulars, . . . and any trustee failing nsmit accounts in compliance with this section be deemed guilty of a contempt. . . ."
tion 57: "The Comptroller shall examine the nents transmitted to him, and shall call the e to account for any misfeasance . . . . or ion which may appear on such statements, ay require the trustee to make good any loss. . . . If the trustee fail to comply with such requisition of the Comptroller, the Comptroller may report the same to the Court; and the Court, after hearing the explanation (if any) of the trustee, shall make such order in the premises as it thinks just."

The Bankruptcy Rules, 1870, rule 126: "Where a trustee shall resign or be removed from his office, he shall within four days thereafter render to the Registrar, to be filed with the proceedings, an account in writing shewing what he has done while trustee, and shall duly account for all moneys or property of the bankrupt. If he do not comply with these requisitions within the prescribed time, the Court shall enforce obedience thereto."

Rule 178: "An application to the Court to commit any person for contempt of Court shall be supported by affidavit, and be filed in the Court in which the proceedings are."

Rule 179: "Upon the filing of such application, the Registrar shall fix a time and place for the Court to hear the application, and shall issue a notice to be served . . . . personally on the person sought to be committed three days at the least before the day of hearing, . . . unless the Court shall . . . direct service . . . . to be made in some other manner."

In re Royle, Q.B.

thereto." The rule cannot be read so as to make its language satisfactory, speaking as it does of enforcing obedience where there has been such non-compliance; but we must construe the rule as best we can. And I am of opinion that, although the making by the Court of an order limiting a time for doing what was required, upon pain of being liable to be committed to prison, would have been a mode of "enforcing obedience," a committal to prison without giving such opportunity for obedience was not a mode of "enforcing obedience." I need not refer to any other of the objections taken, rule 126 being what is relied on to shew that the committal was right.

POLLOCK, B.—I am of the same opinion. This case does not turn upon general principles as to the powers of Courts to punish for disobedience to their orders; it turns upon whether the committal is justified by rule 126 of the Bankruptcy Rules, 1870. Possibly the framers of that rule overlooked the case of a trustee who, by entire failure to give, notwithstanding full opportunity, any reason for non-compliance with the requisitions of the rule, has shewn a fixed intention to evade compliance as far as he possibly can. But the words of the rule are that in default of compliance the Court is to "enforce obedience." And I agree with my brother Denman that those words do not justify a committal for the disobedience which the rule supposes to have already taken place, but justify a committal only if there should be continuing disobedience after the Court has made an order requiring compliance with the rule, or (to speak more strictly) such compliance as the lapse of the four days mentioned in the rule leaves possible.

Rule absolute.

Solicitors—Brooks, Jenkins & Co., agents for R. Higham, Manchester, for prisoner; W. W. Aldridge, for the Comptroller in Bankruptcy.

[IN THE QUEEN'S BENCH DIVISION.]

1881. May 2, 3. M'LAREN (*petitioner*) *v.* HOBBS (*respondent*). BERWICK-UPON-TWEED (BOROUGH) ELECTION PETITION.

Parliament—Election Petition—Costs as to Witnesses—Parliamentary Elections Act, 1868 (31 & 32 *Vict. c.* 125), *ss.* 34 *and* 41.

In taxing under the Parliamentary Elections Act, 1868 (31 & 32 *Vict. c.* 125), *s.* 41, *costs between the parties to an election petition under that Act, the Master disallowed part of what had been allowed by certificate of the Registrar under section* 34 *for the reasonable expenses of witnesses, and in particular taxed the allowance per diem to certain witnesses down to a smaller sum. Upon application to review the taxation,*— Held, *that the Master was not bound by the certificate of the Registrar.*

The respondent applied, by summons at chambers, for an order to the Master to review his taxation of costs in this case; and the application was referred by Cave, J., to the Court.

The Master had, in taxing the respondent's costs, disallowed (*inter alia*) part of the items for witnesses, allowing less than amounts which, by certificate under section 34 of the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), had been allowed to the respondent's witnesses by the Registrar of the Court for the trial of the petition; and in particular the Master had taxed the allowance per diem to professional men residing in the town who were called as witnesses down to one guinea per diem.

The following were (so far as material) the respondent's objections to the Master's taxation, and the Master's answers thereto:—

Objection 5 (allowance to witnesses).—Having regard to sections 3 & 34 of 31 & 32 Vict. c. 125 and rule 5 of the Additional General Rules of 27th of January, 1875 (1), and also to the judgment in

(1) 31 & 32 Vict. c. 125 (the Parliamentary Elections Act, 1868), s. 3: The following terms shall in this Act have the meanings hereinafter assigned to them unless there is something in the context repugnant to such construction: . . .

h v. *Nolan* (2), it is submitted that axing Master has no power to review scind the amount of the certificate of the Registrar given in this case, and that, instead of the amount of 45*l.* inserted in the bill of costs by the Master, the amount of the Registrar's certificate of the 12th of March, 1881, should be inserted. It is also submitted that, if the Taxing Master was at liberty to tax the costs of the witnesses after the Registrar had so certified as aforesaid, . . . the sum allowed by the Taxing Master was, having regard to the judgments in *Hill* v. *Peel* (3), *Broad* v. *Fowler* (3), and *Pegler* v. *Gurney* (3), and in *French* v. *Nolan* (2), and to the special allowances and general provisions in the schedule to the Additional Rules of Court under the Judicature Act, 1875, and to the time occupied by the trial, inadequate, and ought to be increased.

Answer.—Section 34 (even if the term "prescribed officer" there used, notwithstanding the definition in section 27, means the Registrar) can only, as it appears to me, apply to the allowance to be made to the witnesses as against the party who obtains their attendance; otherwise it would throw on the party who has to pay the costs all the expense of his adversary's witnesses, whether material or not, and even though they may be kept in attendance doubly as long as may be necessary. . . . In the taxation the Registrar does not appear to have acted on any recognised principle or allowable scale. . . .

Macaskie, for the respondent.—The Legislature clearly intended to provide by section 34 (1) of the Parliamentary Elections Act, 1868, that the costs of witnesses should be ascertained once for all by the Registrar. The language of Lush, J., in the *Harwich Election Case* (4), implies that the Master has no power in the matter. The Master had, at all events, no power to disallow any part of the items for witnesses on the ground that the amounts allowed by the Registrar were unduly liberal to the witnesses. If the Master had the power which he assumed, he exercised his power wrongly: one guinea a day for professional witnesses is

cribed" shall mean "prescribed by the of Court."
ion 27: The duties to be performed by the ibed officer . . . . shall be performed by . . . of the Masters of the Court of on Pleas . . . . as may be determined by ief Justice. . . .
ion 34: The reasonable expenses incurred y person in appearing to give evidence at ial of an election petition under this Act, ing to the scale allowed to witnesses on the of civil actions at the assizes, may be d to such person by a certificate under the of the Judge or of the prescribed officer, ich expenses, if the witness was called and ned by the Judge, shall be deemed part of penses of providing a Court, and in other hall be deemed to be costs of the petition.
ion 41: All costs . . . . and expenses of icidental to the presentation of a petition this Act, and to the proceedings consequent n, with the exception of such costs . . . . xpenses as are . . . . otherwise provided all be defrayed by the parties to the petition h manner and . . . . proportions as the or Judge may determine, regard being had disallowance of any costs . . . . or ex- which may, in the opinion of the Court or , have been caused by vexatious conduct, ided allegations, or unfounded objections on rt either of the petitioner or the respondent, gard being had to the discouragement of edless expense by throwing the burden of the same on the parties by whom it has aused, whether such parties are or are not whole successful.
costs may be taxed in the prescribed manner, ccording to the same principles as costs n attorney and client are taxed in a suit in igh Court of Chancery. . . .
es made (under section 25) on 21st of Novem- 368, rule 39: An officer shall be appointed h Court for the trial of an election petition, hall attend at the trial in like manner as the of assize and of arraigns attend at the .
h officer may be called the Registrar of that . . . .
e 40: The reasonable costs of any witness e ascertained by the Registrar of the Court, ie certificate allowing them shall be under nd.
revocation by later rule below.]
e 55: Costs shall be taxed by the Master. . . . es of the 27th of January, 1875, rule 5: 0 is hereby revoked, and in lieu thereof it ered that the amount to be paid to any s whose expenses shall be allowed by the shall be ascertained and certified by the rar. . . .
7 Irish Rep. Com. Law, 445.

(3) 39 Law J. Rep. C.P. 89; Law Rep. 5 C.P. 172.
(4) 3 O'M. & H. 71.

not enough—*Turnbull* v. *Janson* (5). The costs are by section 41 (1) to be taxed "according to the same principles as costs between attorney and client are taxed in a suit in the High Court of Chancery."

[FIELD, J., referred to *Hill* v. *Peel* (3).]

The application, if dismissed, should be dismissed without costs, regard being had to the *Harwich Election Case* (4) and *Turnbull* v. *Janson* (5).

McClymont, for the petitioner, was not heard.

LORD COLERIDGE, C.J.—I am of opinion that we cannot properly interfere with the Master's taxation in this case.

Points of importance have been raised on which I may express my opinion, although in doing so I may to some extent be going beyond what the substance of this case requires.

As between witnesses and the party summoning them, the reasonable expenses of witnesses (directed by the Act to be "according to the scale allowed to witnesses on the trial of civil actions at the assizes") are clearly, by section 34 of the Parliamentary Elections Act, 1868 (1), to be ascertained by the officer acting under that section, who, under rule 39 of November, 1868 (1), and rule 5 of January, 1875 (1), is called the Registrar. But the party to the petition might, in order to punish his adversary, summon an unnecessary number, and therefore, although it is reasonable that the witnesses—who have nothing to do with that—should nevertheless be paid, injustice would be apt to follow if this ascertaining of the expenses of witnesses were to bind the opposite party. Then section 41 (1) says, "The costs may be taxed in the prescribed manner" (as to which it is prescribed by rule 55 of November, 1868, that the taxation shall be by the Master), and goes on to say that the taxation shall be "according to the same principles as costs between attorney and client are taxed in a suit in the High Court of Chancery." The Master is then, in taxing the costs, to allow the expenses of witnesses where such expenses would be allowed in taxing in a suit in the Court of Chancery in which costs are directed to be paid as between solicitor and client. But there is nothing to shew that the ascertaining of the reasonableness of the expenses of witnesses by the Registrar is to bind the opponent of the party summoning them; and it appears to me that it would be unjust that he should be so bound. I am satisfied that in the *Harwich Case* (4) Mr. Justice Lush never meant to lay down that as against the opposite party the expenses of witnesses are to be ascertained by the Registrar's certificate. The question, therefore, comes to be whether there is sufficient ground for interfering with the Master's exercise of his power in his disallowance of particular items or parts of items. [The Chief Justice referred to some of the items, and remarked that the Master had exercised his discretion in a regular manner.] I come now to my reasons for thinking that, although this application ought to be dismissed, it ought to be dismissed without costs. The Master has taxed the allowances for professional men residing in the town who were called as witnesses down to one guinea *per diem*. Now in *Turnbull* v. *Janson* (5) expressions appear to have been used by the Court to the effect that the 8th rule of the Special Allowances and General Provisions in the Additional Rules of Court under the Judicature Act, 1875, was inconsistent with the former scale allowance of one guinea. I do not think it necessary distinctly to differ from any part of the decision in *Turnbull* v. *Janson* (5); but the carefully reasoned judgment of Grove, J., in *Mackley* v. *Chillingworth* (6), appears to me not to have been sufficiently noticed in that case. The circumstances of the two cases were no doubt different, but the reasons given in *Mackley* v. *Chillingworth* (6) deserved, I think, attention, and if it were necessary here to choose between the two cases, I should, so far as *Turnbull* v. *Janson* (5) differs from *Mackley* v. *Chillingworth* (6), elect to follow *Mackley* v. *Chillingworth* (6). The Master, however, in this case has exercised his discretion, although adopting in fact the old scale allowance; and, therefore, *Turnbull* v. *Janson* (5)

(5) 47 Law J. Rep. C.P. 384; Law Rep. 3 C.P. D. 264.

(6) 46 Law J. Rep. C.P. 484; Law Rep. 2 C.P. D. 273.

would not justify our directing a review of the taxation, although, having regard to expressions used by the Court in that case, the respondent was warranted in making this application for the purpose of obtaining such review.

FIELD, J.—I am of the same opinion. The points raised are not without difficulty. The first question for our decision is, whether the Master, in taxing under section 41 of the Parliamentary Elections Act, 1868 (1), the costs of proceedings under that Act, is bound to allow all sums which, as between witnesses and the party summoning them, have been allowed by the Registrar, acting under section 34, for the expenses of witnesses. No doubt section 34 does provide for an enquiry into the reasonableness of the expenses of witnesses; and, on behalf of the respondent, it has been contended that the enquiry thereunder is final and binds the Master when taxing costs. The Master, however, has, in his answers to the respondent's objections to the taxation, given reasons for considering that so wide a construction of section 34 cannot be a right construction; and I think the conclusion which the Master has arrived at on that point is right. Next, it is said, on the part of the respondent, that the Master, in taxing the allowances for professional witnesses down to one guinea a day, has erroneously thought himself bound by the old scale allowance; but the Master appears to have exercised his discretion, and not to have simply followed the old scale, and consequently that ground of objection to the taxation also fails. With respect to the question whether rule 8 of the Special Allowances and General Provisions in the Additional Rules under the Judicature Act, 1875, has repealed the old scale, I should have very much doubted its having done so; but there are in *Turnbull* v. *Janson* (5) expressions which may be taken to say that it has done so. It is, however, unnecessary to give a decision on the point.

Application dismissed.

Solicitors—Pyke & Minchin, for petitioner; Shum, Crossman, Crossman & Prichard, agents for John Dunlop, Berwick-on-Tweed, for respondent.

[IN THE COURT OF APPEAL.]

(*Appeal from the Common Pleas Division.*)

1881. June 21. } LYONS *v.* TUCKER. *

Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 10—*Priority—Registered and Unregistered Bills of Sale—Seizure.*

Appeal from a judgment of the Common Pleas Division, reported *Ante*, p. 322.

R. S. Wright, for the plaintiff.
A. Charles, for the defendant.

It was agreed that the decision of the Common Pleas Division had been overruled by the judgment of the Court of Appeal in *Conelly* v. *Steer* (1). Their Lordships therefore reversed the judgment in the present case without hearing argument.

Judgment reversed.

Solicitors—Aldridge, Thorn & Morris, agents for Square, Bridgman & Bond, Plymouth, for plaintiff; Park, Nelson, Ponsonby & Co., agents for G. H. E. Rundle, Devonport, for defendant.

[IN THE COMMON PLEAS DIVISION.]

1881. Feb. 24. } RICHARDSON (*appellant*) *v.* SAUNDERS (*respondent*).

Elementary Education Acts, 1870 *and* 1876—*Compliance with Attendance Order—Attendance without Fees — Liability of Parent to Conviction under* 39 & 40 *Vict. c.* 79. *s.* 12—*Remission of Fees*, 33 & 34 *Vict. c.* 75. *s.* 17.

[For the report of the above case, see 50 Law J. Rep. M.C. 65.]

* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

(1) *Ante*, p. 326.

[IN THE COURT OF APPEAL.]
(*Appeal from the Exchequer Division.*)

1881. March 22, 24, 26. } BRAIN AND ANOTHER *v.* THOMAS AND ANOTHER.*

Forest of Dean Act (1 *&* 2 *Vict. c.* 43. *s.* 29)—*Statutory Duty—Duty to be enforced by Injunction—Remedy by Action for Injury caused by Breach of Duty created by Statute — Mines — Mortgagor and Mortgagee — Liability of Mortgagee for Injury done by Mortgagor in Possession to adjoining Mine.*

The statute 1 *&* 2 *Vict. c.* 43, *and the rules made under it, regulate the use of adjoining gales in the Forest of Dean. By section* 29 *compliance with the rules may be enforced "by or on behalf of Her Majesty, her heirs or successors, or by any other person or persons, by injunction of Her Majesty's Court of Exchequer or otherwise, in such manner as the said Court shall, on application, think fit." The plaintiffs brought an action for damages against the defendants, as owners of adjoining gales in the Forest of Dean, for injury sustained by the plaintiffs through the stopping of the engines in the defendants' gale contrary to one of the rules. Some of the defendants were mortgagors in possession of and working the gale. The other defendants were mortgagees who had never been in possession of or worked it:*—Held (*affirming the judgment of the Exchequer Division*), *that, with respect to the defendants who were mortgagors, the specific remedy given by section* 29, *for enforcing compliance with the rules, did not exclude the plaintiffs' right to recover damages for injuries caused to them by an antecedent breach of the rules.* Held *also* (*reversing the judgment of the Exchequer Division*), *that the mortgagees were not liable in the action.*

Ross *v.* Rugge-Price (45 Law J. Rep. Exch. 777; Law Rep. 1 Ex. D. 269) *approved and followed.*

Appeal from a judgment of the Exchequer Division upon a Special Case.

The action was brought by the plaintiffs, who were owners of a certain gale in the Forest of Dean, to recover from the defendants, as owners of an adjoining gale on the land side of the plaintiffs' gale, damages for injuries sustained by reason of the stopping of the engines in the defendants' gale, contrary to rule 19 of the rules made under the Forest of Dean Act (1 Vict. c. 43) (1).

Some of the defendants were mortgagors in possession of and working the gale before and at the time of the injury complained of; the other defendants were mortgagees out of possession, and had never been in possession of or worked the gale.

The Special Case set out at length the special facts, with respect to the working and position of the gales, relied on by both sides. Various contentions were raised and disposed of in the Exchequer Division and the Court of Appeal upon the facts so stated, but it is thought unnecessary to notice them further in this report.

* *Coram* Lord Selborne, L.C.; Baggallay, L.J.; and Bramwell, L.J.

(1) Section 29 of 1 & 2 Vict. c 43, enacts "That the Commissioners for the Forest of Dean appointed by the Act shall specify, in their award, 'such general rules and regulations as to them shall seem equitable for the mode in which all the said gales, &c., shall be worked, and after such award, all such gales, &c., shall be worked according to the true intent of such rules and regulations.' And that in case any persons entitled to or in possession of a gale, &c., shall wilfully proceed in working such gale contrary to the said rules and regulations, after seven days' notice in writing by the gaveller or deputy gaveller to stop and discontinue such working, then the said gale, &c., shall be liable to be forfeited as and for a breach of condition, . . . and the person or persons in possession of any such gale, &c., may be evicted therefrom by Her Majesty, her heirs or successors, as might be done on the forfeiture of a lease for breach of condition; . . . 'and in addition to such right or power of eviction, the compliance with such rules, orders and regulations may be enforced by and on the behalf of Her Majesty, her heirs, &c., or by any other person or persons by injunction of Her Majesty's Court of Exchequer, or otherwise, in such manner as the said Court shall on application think fit."

By rule 19 of the Rules and Regulations, it is provided that, "In all cases where gales lying on the land side of other gales are drained by steam-engines, and when by the stopping of those engines the water may be thrown into dip gales, the galees of the land collieries shall be bound to work their engine or engines so as to prevent any of the water of these gales from pouring down into the dip gale so long as they shall continue to hold possession of such land gales."

Brain v. *Thomas* (*App.*), *Exch.*

The Exchequer Division (Kelly, C.B., and Pollock, B.) gave judgment for the plaintiffs against all the defendants.

The defendants appealed.

A. Charles and *R. T. Reid*, for the defendants.—The defendants are not liable to any action for damages in respect of the injuries complained of. Section 29 of the Act provides specific remedies for breach of the rules, and any liability at common law is excluded by the operation of the section. *Ross* v. *Rugge-Price* (2) will be cited against this view, but it is submitted that that case was wrongly decided. *Atkinson* v. *The Newcastle and Gateshead Waterworks Company* (3), although the decision was upon another statute, shews that the breach of a duty created by statute, causing injury, does not of necessity vest a right of action in the person who suffers the injury. In the latter case the authority of *Couch* v. *Steel* (4) was doubted. In any event those of the defendants who are mortgagees are not liable. Their position is simply that of persons who have a security for their debt with certain rights arising from that position. They have never been in possession of the gale in question here, or interfered in any way with the working of it.

The Attorney-General (*Sir H. James*) and *J. G. Wood*, for the plaintiffs.—*Ross* v. *Rugge-Price* (2) was rightly decided. The object of rule 19 was to protect private rights, and *Atkinson* v. *The Newcastle and Gateshead Waterworks Company* (3) is different from the present case. It perhaps cannot be argued with any great confidence that the mortgagees were liable, but it may be suggested that they have the legal estate, and could at any moment compel the mortgagor to perform his statutory duty, because upon his failure to perform it, he might be evicted and their security destroyed.

A. Charles, in reply.—In *Ross* v. *Rugge-Price*, Bramwell, B., expressed his view that section 29 did not give any remedy for injuries sustained by an antecedent breach of the statutory duty. It is submitted that the true view is that the statute does not mean that there should be any remedy for breach of a duty created for the first time, the breach being antecedent to the period when the statute gives specific remedies.

Cur. adv. vult.

The following judgments were (on March 26) delivered:—

LORD SELBORNE, L.C. (after disposing of other arguments founded on the particular facts stated in the case).—The next argument was that the rule does not give any person who may be injured by its non-observance any remedy by way of damages against any person or persons who have not observed it. The ground is said to be that where a statute creates an offence, and defines particular remedies against the person committing that offence, *prima facie* the party injured can avail himself of the remedies so defined, and no other. I see no reason to call that rule in question. But it must be examined with reference to the terms in which the statute deals with the subject. Rule 19 says distinctly that the galees of the land collieries shall be bound, under certain circumstances, to work their engines, and the clause in the Act itself (section 29) tells what the consequences of disobedience to the rule are to be: First, if after seven days' notice the galee shall wilfully proceed in working his gale contrary to the rules, his works, pits, &c., are liable to be forfeited as and for a breach of condition, and the person or persons in possession may be evicted therefrom by Her Majesty, her heirs and successors, as might be done on forfeiture of a lease for breach of a condition. If the section stopped at that point there might be considerable ground for saying that no one is contemplated by the section as being injured except the Crown. But the section goes further and provides: "And in addition to such right or power of eviction, the compliance with such rules, &c., may be enforced by or on behalf of Her Majesty, her heirs or successors, or by any other person or persons, by injunction of Her Majesty's Court of Exchequer or otherwise, in such

(2) 45 Law J. Rep. Exch. 777; Law Rep. 1 Ex. D. 269.

(3) 46 Law J. Rep. Exch. 775; Law Rep. 6 Exch. 404; 2 Ex. D. 441.

(4) 3 E. & B. 402; 23 Law J. Rep. Q.B. 121.

manner as the said Court shall, on application, think fit." Now, on consideration, I agree with the view taken of the words "or otherwise" by Baron Bramwell in *Ross* v. *Rugge-Price* (2). They probably mean that if an injunction to restrain be not the proper remedy, a mandatory order may be made. In other words, they refer rather to prevention than to damages. One thing at least is clear, that the interest which is to be protected is not that of the Crown only, but of any other person or persons who may suffer from the violation of the rules. But if the person injured has a right to require the duty imposed by the rules to be enforced by injunction, on the ground that a wrong has already been done to him by not obeying the rules, there is no reason why he should be precluded from recovering damages in respect of the past, where actual damage has been sustained. I should have been of this opinion if there had been no previous decision on the subject, but the case of *Ross* v. *Rugge-Price* (2) is directly in point, and I have no hesitation in following it.

With respect to the liability of those defendants who are mortgagees, no serious attempt was made to sustain the judgment of the Court below. An injunction has, very properly, not been granted against them. They are not in possession, and to hold them liable, not having been in possession, not having done the damage complained of and not having worked the mines, would be contrary to reason and law.

I am of opinion that judgment generally should be given for the mortgagees with costs.

BRAMWELL, L.J., and BAGGALLAY, L.J., concurred.

Judgment affirmed as to the defendants other than the mortgagees; reversed as to the mortgagees.

Solicitors—Rogerson & Ford, agents for Goold & Goold, Newnham, for plaintiffs; Field, Roscoe & Co., agents for Wintle & Maule, Newnham, for defendants.

[IN THE QUEEN'S BENCH DIVISION.]

1881. March 5. COLEMAN (*appellant*) *v.* THE CHURCHWARDENS AND OVERSEERS OF BIRMINGHAM (*respondents*).

Poor Law—Maintenance of Grandchild—Coverture—Married Woman having separate Property—Statutes 43 *Eliz. c.* 2. *s.* 7 *and* 33 *&* 34 *Vict. c.* 93. *ss.* 13 *and* 14.

[For the report of the above case, see 50 Law J. Rep. M.C. 92.]

[IN THE COURT OF APPEAL.]

(*Appeal from the Queen's Bench Division.*)

1881. May 20. *Ex parte* WHITCHURCH; *in re* AN ORDER MADE BY JUSTICES OF NOTTINGHAM.

Practice—Appeal—Public Health Act, 1875 (38 & 39 *Vict. c* 55), *ss.* 91, 94, 95, 96, 251—*Appeal from Order of Justices to abate Nuisance* — "*Criminal cause or matter*"—*The Judicature Act*, 1873, *s.* 47.

[For the report of the above case, see 50 Law J. Rep. M.C. 99.]

[IN THE QUEEN'S BENCH DIVISION.]

1881. May 30. THE ALRESFORD RURAL SANITARY AUTHORITY (*appellants*) *v.* SCOTT (*respondent*).

Highways, Repair of—5 *&* 6 *Will.* 4. *c.* 50. *ss.* 51, 53, 54—*Gathering Stones on Enclosed Land—Licence to Surveyor to "gather" Stones without making Satisfaction to Owner.*

[For the report of the above case, see 50 Law J. Rep. M.C. 103.]

[IN THE HOUSE OF LORDS.]

1881. May 5, 6. DAVIS *v.* TREHARNE.

Mining Lease—Damage to Surface.

The mines under certain lands were demised to D., who covenanted to work them "in the usual and most approved way in which the same is performed in other works of the like kind in the county of G."

The surface was let upon building leases to T., reserving the minerals to the lessor, with power to enter upon the land for the purpose of working the mines and to erect buildings, &c., "and do and execute all such other acts, works and things upon, in or under or above the said premises as shall be necessary or convenient for working and carrying away the same," making compensation "for all damage occasioned by the exercise of the rights hereby reserved":—

Held, *that by the "usual and most approved manner of working" in the county of G. was not meant such a mode of working as would let down the surface, and that the lessee was not thereby absolved from the obligation to support the surface.* Held *also, that the reservation in the building leases did not include the right to let down the surface.*

This was an appeal from a decision of the Court of Appeal, affirming one of Lord Coleridge, C.J.

In January, 1865, J. P. Traherne demised to Davis certain veins, mines and seams of coal, ironstone, &c., being part of the minerals under a farm called Llwydarth, in the county of Glamorgan, with power to Davis to enter into and upon certain parts of the said farm, and to open, get and carry away the said veins, &c., subject to certain rents and royalties. Davis covenanted to work the said veins, &c., "in the usual and most approved way in which the same is performed in other works of the like kind in the county of Glamorgan," and at the end of the term to compensate the lessor for any damage done to the surface of the said farm.

In January, 1869, Traherne granted a ninety-nine years' building lease of part of the farm, "with the cottage or dwelling-house and outbuildings thereon," to Thomas Thomas, reserving the minerals with power to the lessor, his heirs and assigns, or other persons entitled to the reversion, "to enter and be upon the said premises to search for, win and work and carry away the minerals, &c., in or under the land, or in or under any other lands, which, or the mines and minerals under which, may for the time being belong to the said J. P. Traherne, and to erect all such buildings, machinery and things," &c., "he and they making reasonable compensation" to Thomas, his assigns, &c., "for all damage occasioned by the exercise of the rights hereby reserved."

Thomas's lease passed by assignment to the respondent Treharne.

In July, 1869, Davis surrendered his mining lease and took a fresh one comprising all the veins of coal, &c., lying under the said farm. The covenants were precisely similar to those in the original lease.

In 1871, Traherne granted a building lease of the residue of the farm to Treharne, reserving the minerals with power to the lessor, his heirs and assigns, or the persons entitled to the reversion, &c., to enter upon the land, and search for and carry away the minerals, &c., in or under such land, and to erect buildings, &c., "and do and execute all such other acts, works and things upon, in or under or above the said premises as shall be necessary or convenient for working and carrying away the same; he and they making reasonable compensation to the said William Treharne, his executors, administrators and assigns for all damage occasioned by the exercise of the rights hereby reserved."

In 1878, the respondent Treharne brought an action against Davis for injury caused to his land and the houses erected thereon, by the letting down of the surface in consequence of the working out of the minerals. The action was tried before Lord Coleridge, at Swansea, and the jury found that the houses were injured by the letting down of the surface occasioned by the working of the mines since July, 1869. It was admitted that the working was in the usual and most approved manner prevailing in the county

of Glamorgan. The damages were assessed by an official referee at 700*l.*, and Lord Coleridge gave judgment for that amount, and an injunction restraining the defendant from working so as to cause further damage.

This decision was affirmed by the Court of Appeal. Davis then brought this appeal.

The Solicitor-General (*Sir F. Herschell*) and *Benjamin*, for the appellant, contended that the terms of the leases authorised the letting down of the surface. The usual and most approved manner of working in the county of Glamorgan had been admittedly followed, and the building lease reserved the power of doing acts and things under the surface necessary or convenient for working the coal, and compensation was to be paid for damage caused by the exercise of the right reserved. The only damage which could b occasioned by works underground was the letting down of the surface.

They cited the following cases: *Aspden* v. *Seddon* (1), *Eadon* v. *Jeffcock* (2), *Taylor* v. *Shafto* (3), *Hext* v. *Gill* (4).

McIntyre and *B. F. Williams*, for the respondent, were not called upon.

THE LORD CHANCELLOR (LORD SELBORNE).—I believe none of your Lordships has any doubt on this case, and under those circumstances it is not necessary to call upon the learned counsel for the respondent.

The first question is, whether in the mining lease which was granted to the defendant, Mr. Davis, there was a power, as against the lessor, to let down the surface. It appears to me that there is no portion of the lease which in any way justifies any such conclusion. It is a lease carefully prepared in a form usual in mining leases. It gives the lessee power to work the veins, mines and seams in the usual way. It gives large surface privileges; it excepts certain mines, veins and seams, and it provides (this is the clause mainly relied upon) that the lessee shall work the said seams and veins of coal during the continuance of the demise "in the usual and most approved way in which the same is performed in other works of the like kind in the county of Glamorgan." It appears from parts of the evidence, and it was not in dispute at the trial, that, subject to the question of the right to let down the surface or to injure the surface by taking away the coals, the actual working of this mine was carried on "in the usual and most approved way" in which such works were performed in other parts of the county of Glamorgan. I assume that in the appellant's favour.

But what does that mean? It refers simply to the mode of carrying on the underground works in the mine, which cannot by possibility, either in the county of Glamorgan, or anywhere, be a custom or manner or method of working without regard to the rights of other persons. It is impossible that those words, "the usual and most approved way of working in the county of Glamorgan," can have been intended to absolve the lessee from a legal obligation collateral to the working of the mine. For this purpose it cannot make any difference whether the question arises between a lessor who is owner of the surface and his lessee, or between the lessee and a surface owner who is not lessor. Those words are equally apt, equally effectual, and have the same meaning in each of those cases. They relate simply to the manner of working the mine for mining purposes; they have no reference to the rights of other persons which there could not possibly be any local custom in such a district as a county to disregard, and which must be respected in carrying on those works; they cannot be understood to have been meant by either of these parties to signify that the working must be carried on as if there were no such rights of other persons or of the lessor himself, which the lessee was bound to respect.

That point being determined, the case (as was admitted by the learned Solicitor-

(1) 44 Law J. Rep. Chanc. 359; Law Rep. 10 Ch. App. 394.
(2) 42 Law J. Rep. Exch. 36; Law Rep. 7 Exch. 379.
(3) 8 B. & S. 228.
(4) 41 Law J. Rep. Chanc. 761; Law Rep. 7 Ch. App. 699.

General) is really at an end, because the other document, the surface lease under which the plaintiff claims, cannot confer any right upon the lessee of the mines. The most that it does is to subject the surface lessee to such burdens as, according to its true construction, the lease of the mines imposes on him. I will, therefore, say no more upon that subject than that I cannot read the words "or under," which were relied upon, as in any way requiring an implication that the parties contemplated such underground works as might injure the surface. It appears to me that the powers given by the clause in which these words occur, to "execute all such other acts, works and things upon, in or under or above the premises as shall be necessary or convenient for working and carrying away the same"—that is, the mines and minerals previously mentioned—are introduced for a merely subsidiary purpose, and that we must look to the principal words which precede them, to see what were the reserved powers, and for what purposes they were reserved. The previous words have no tendency whatever to shew that it was meant to give any power to take away minerals so as to injure the surface.

The last point which Mr. Benjamin made I confess appears to me to have nothing in it. The learned Judge asked three particular questions of the jury, which were answered, and which had reference, no doubt, to the real issue between the parties, and not to matters which were not in controversy. There does not seem to have been any controversy as to the precise time at which anything was done before 1871, or its precise effect upon the question between the parties. No such question arose at all, and the evidence appears to have been such as really to exclude it. I consider that we are dealing simply with the case of a verdict in favour of the plaintiff, and 700*l.* damages found, not indeed by a jury, but by a referee substituted for a jury; and that there is no ground to infer that any part of those damages was given in respect of any act or matter for which, as between these parties, the defendant ought not to be responsible to the plaintiff.

I therefore move your Lordships to affirm the judgment of the Court below, and to dismiss the appeal with costs.

LORD BLACKBURN.—I am entirely of the same opinion. I think it must be taken as perfectly settled ground that, as of common right, the surface land has a right to be supported by subjacent strata of minerals. Although that is common right, it may be shewn—the burden lying upon those who wish to shew it—that the person who has got the surface obtained it either upon terms which would give him no right to support, he having accepted it and taken it upon those terms, or that before he got it the person from whom he claims, the owner of the surface, had parted with the right of support from below, in which case, of course, the owner of the surface could be in no better position than the person who sold it to him. In common right, the person who owns the surface has a right to have it properly supported below by minerals, and, if there are mineral workings under the surface, to have a proper support left for it by pillars.

The question here arises whether upon these deeds that right of support was taken away. I think wherever there is a lease of minerals granted to a man on the terms that he shall raise the minerals and pay a royalty on the minerals he raises, there is an inducement, an object, on the part of the grantor of the lease to wish to have as much mineral as possible brought out, so as to get a greater benefit in the shape of royalty. If he has the power of controlling the surface, if it is still in his possession or under his control, so that he may deal with the surface as he likes, it may be a very prudent thing for him to agree with the person who takes the lease of the mines that he shall raise all the coal whatsoever, without regard to whether it lets the surface fall down or not, because the lessor may think that the value of the royalty upon the coals will, to him, far exceed any mischief that may occur upon the surface. Whether he would be right in so thinking or not would depend upon what the nature of the surface was, and what was the value of the minerals below. If it was a piece

of moorland pasture lying above some very extensive and valuable coalfields, I suppose nobody would venture to say that he would not greatly prefer to draw the mineral rent and let the pasture go. He would say, "Letting the pasture go will not do me a great deal of harm, and getting the mineral royalty will do me a great deal of good." On the other hand, I suppose nobody would doubt that if a man had the minerals below building land, upon which a very valuable set of buildings in a town had been erected, it would not be good sense on his part to say, "I require the mineral lessee to take away the minerals, and let the houses come tumbling down;" that would be folly. But that is not what we have to consider —that is what the parties had to consider for themselves, namely, Was the nature of the property such that it was a prudent and judicious thing to bargain that the mineral lessee should take all the minerals, paying a royalty rent upon them, and letting down the surface, if such was the consequence; or was it a prudent thing to say that he should take it upon the terms that he was to get all the minerals he could, respecting the right of support of the surface? Which of these alternatives was the more prudent it was for the parties to consider.

But what I apprehend a Court of law has to do is to look at the documents, and see whether the parties have agreed upon something different from the common right. If Mr. Traherne, when he let the land, had by express words or by necessary implication said, "You may take away all the minerals," or "You must take away all the minerals, letting down the surface," he had a perfect right, at least before he had made the two building leases, to do so. But, whether he has done so or not is a question turning upon the construction of the documents. And when I come to look at the documents, though one is more ready, it being a lease, to believe that the parties meant to say, "You shall take all the minerals, letting down the surface," than one would have been if it was a sale, or a reservation of minerals below, to be taken out at some future time, I cannot agree with what seems to have been said (I do not know whether that was what was meant) by Mr. Baron Cleasby, in the case of *Eadon* v. *Jeffcock* (2)—I cannot agree that it follows from that that there is not a right of support. I think the right of support exists unless it is taken away. I think the fact that it is a lease may be one of the elements to be taken into consideration in seeing whether it is taken away or not, but that it is not enough of itself to decide that question.

Looking at these two documents, I cannot find anything that takes away that right of support. It is quite true that where parties have agreed in this way, You shall make compensation for whatever injury you do in respect of these rights, and amongst other things you shall make compensation for what you do in letting down the surface, the conclusion is very strong from that, that the lessor says, You may let down the surface. I do not say that it is conclusive, but it is a very strong argument, if you find that clause, to say that he did mean that the lessee might let down the surface. But when you find it said, as it is here, that he shall do certain things underground and a great many things upon the surface, and afterwards make compensation (as it is said in the lease) "for all damage occasioned by the exercise of the rights hereby reserved," or (as it is said in the lease) shall at the end of the lease "compensate the lessor for any damage or injury done to the surface of the said farms and lands" (that means any damage done to the surface of the said farms and lands in the exercise of the rights previously given), and when we find that those rights do include a great many things which will necessarily damage the surface, the reasonable conclusion is that the meaning is that there is to be compensation for things done in the exercise of those rights. I cannot see that that affords any argument whatever for saying that the lessor intended that the lessee should be able to do something more, and let down the surface. Yet that is really the whole argument; it stands upon that—that because a clause saying you shall make compensation for letting down the surface affords a strong argument for saying you may let down

the surface, therefore a clause saying you shall make compensation for damage done to the surface affords a strong argument for saying that the lessee might let down the surface. I cannot see that. It does not seem to me to be any argument at all.

As to the last point Mr. Benjamin took, when we come to look at it, I think it would be a monstrous iniquity if we were to yield to it. It appears to me that the real controversy at the trial was whether the damage was occasioned by working out the old Victoria seam long before Mr. Davis, the defendant, had anything to do with the mines, or whether the damage was occasioned by the taking away of certain pillars in the years 1874 and 1875. The two surface leases were in 1869 and 1871. Lord Chief Justice Coleridge, in summing up to the jury, said, and everybody I take it then said, "The real question is, Was the damage done before 1869 or after?" Now it is said that that leaves it open to be a possible thing that it was done between 1869 and 1871. That is clearly against all the contention that was made at the trial, and it would be a monstrous thing if, for such a trifle as that, which it would hardly be using too strong a phrase to call a slip, we were to set aside the verdict.

I am clearly of opinion that the judgment is right, and should be affirmed.

LORD WATSON.—I agree with your Lordships in the result at which you have arrived.

When a proprietor of the surface and the subjacent strata grants a lease of the whole or part of his minerals to a tenant, I think it is an implied term of that contract that support shall be given in the course of working to the surface of the land. If it is not intended that that right should be reserved, the parties must make it very clear upon the face of their contract; in other words, they must express their intention so clearly as to enable a Court to say that such intention is plain. I think that rule was laid down by the late Lord Justice Mellish in the case of *Hext* v. *Gill* (4), and I quite agree with that ruling. It may be done in express terms; but, of course, it is not necessary that express language must be used; for it may appear by a plain implication from other clauses of the deed, as in the case of *Taylor* v. *Shafto* (3), where an obligation was laid upon the tenant to perform certain acts which were plainly inconsistent with supporting the surface.

But, applying those principles to the present case, I am quite unable to find in the terms of this mineral lease of July, 1869, anything to countenance the view that the parties did intend to take away from the landlord, who was letting his minerals, the right to have the surface supported. The clauses with regard to working, and the clause with regard to compensation, are clearly not intended to have any bearing upon the question which is now raised. The clause as to working implies no obligation to work any particular seam or to work any particular part of a seam; and there is nowhere in the four corners of this lease any obligation laid upon the tenant to work out the whole of the minerals. I think the conception of the lease shews that it was intended that he should leave workable minerals at the end of his lease, because he contracted to leave the plant and fittings of the mine in good and proper condition; and those numerous stipulations which follow this, which were so largely commented upon by the learned counsel at the bar, were all for the purpose of keeping the mine in proper order, so that the landlord, either by self or tenant, might enter upon it at the expiry of this lease.

The clauses as to compensation for surface damage would have that bearing if, as was very ingeniously argued by Mr. Benjamin, all those particular things which are mentioned immediately before had been mentioned as causes of injury to the surface. I cannot so read them. The two things are quite distinct. The one obligation is to leave everything that is necessary for the due working of the mine in proper order at the termination of the lease. The other, which is quite distinct, is an obligation to compensate the landlord for any permanent injury done to the surface of his estate by reason of the operations of the mineral tenant during his working.

Davis v. *Treharne, H.L.*

Therefore, I have no hesitation whatever in holding that the argument addressed to us is ill-founded; and I will only add that it appears to me that every one of those clauses which have been so strongly founded upon would have been an intelligible and appropriate clause in this lease, even though it had contained an express provision to the effect that the tenant in working should not let down the surface of the ground.

I so entirely concur with your Lordships upon the other points of this case, which are perhaps not so material as that which I have dealt with, that I do not think it necessary to add anything to what has fallen from your Lordships.

Judgment under appeal affirmed, and appeal dismissed with costs.

Solicitors—Merediths, Roberts & Mills, agents for G. J. Simpson, Sheffield, for appellant; J. H. Wrentmore, agent for A. Curtis, Neath, for respondent.

[IN THE QUEEN'S BENCH DIVISION.]

1881. June 2, 3. CHAPMAN (*appellant*) *v.* THE ROYAL BANK OF SCOTLAND (*respondents*).

Inhabited House Duty—House used solely for Trade—Meaning of "House"—Exemption from Duty—House let into Tenements—Absence of Structural Division—Statutes, 48 *Geo.* 3. *c.* 55. *sched. B;* 57 *Geo.* 3. *c.* 25. *s.* 1; 41 *Vict. c.* 15. *s.* 13. *sub-s.* 1.

By 48 *Geo.* 3. *c.* 55, *certain duties are imposed on inhabited dwelling-houses. By* 57 *Geo.* 3. *c.* 25. *s.* 1, *houses are exempted from duties payable under* 48 *Geo.* 3. *c.* 55, *when used solely for the purposes of trade. By* 41 *Vict. c.* 15. *s.* 13. *sub-s.* 1, *where any house being one property shall be divided into and let in different tenements, and any of such tenements are occupied solely for the purposes of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit, or are unoccupied, the person chargeable as occupier shall be at liberty to give notice in writing, at any time during the year of assessment, to the surveyor of taxes stating therein the facts; and after the receipt of such notice, the commissioners acting in the execution of the Acts relating to the inhabited house duty shall, upon proof of the facts to their satisfaction, grant relief from the amount of duty charged in the assessment, so as to confine the same to the duty on the value according to which the house should, in their opinion, have been assessed, if it had been a house comprising only the tenements other than such as are occupied as aforesaid, or are unoccupied.*

The ground floor and basement of certain premises were in the occupation of the respondents, and were used by them solely as a bank for the purpose of carrying on their business as bankers. The premises in question consisted of the ground floor and basement aforesaid and upper floors, but such ground floor and basement had no internal communication whatever with the rest of the building, being separated by a party-wall from the basement to the first floor, and approached by a separate entrance from the street:—

Held, *that the portion of the premises so used by the respondents for banking purposes was a separate house within* 48 *Geo.* 3. *c.* 55, *and was exempt from inhabited house duty under* 57 *Geo.* 3. *c.* 25.

The first and second floors of the above premises ran over the whole of the building, and were occupied by several traders and used entirely for business purposes. The third floor was occupied by traders, with the exception of two rooms in the occupation of D., a clerk in the employ of the respondents, who resided therein at night. The fourth floor was in the occupation of the housekeeper, wife and family. The whole of the upper floors was approached by one entrance from the street:—

Held, *that the different rooms or portions of the premises occupied as above mentioned were liable to inhabited house duty, inasmuch as they did not come within* 41 *Vict. c.* 15. *s.* 13. *sub-s.* 1, *which contemplated some structural division of the different tenements.*

At a meeting of the commissioners for the general purposes of the Income Tax Acts and for executing the Acts relating to the inhabited house duties for the City

of London, held on the 17th of July, 1879, the respondents appealed against an assessment to the inhabited house duty for the year ending the 5th of April, 1879, of 6,000*l.* upon and being the full value of the whole of the premises No. 123 Bishopsgate Street, in the City of London, and claimed exemption in respect of one portion of the premises under the Act 57 Geo. 3. c. 25, and in respect of the other portion under 41 Vict. c. 15. s. 13.

The premises constituting No. 123 Bishopsgate Street consist of basement, ground and upper floors, with two separate main entrances from the street.

The ground floor and basement of the building are on the south side, with one of the entrances on the ground floor, are in the occupation of the respondents, and are used by them as a bank for the purpose of carrying on their business as bankers, and have no internal communication whatever with the rest of the building, being separated by a party-wall from the basement to the first floor. The ground floor of the building on the north side is at present unoccupied.

The first and second floors, which run over the whole of the premises, are occupied by several traders, and are used entirely for business purposes. The third floor is also let to and occupied by traders with the exception of two rooms in the occupation of Mr. Dennistown, a clerk in the employ of the respondents, who resides there at night. The fourth floor is in the occupation of the housekeeper, wife and family. The whole of the upper floors, as well as the ground floor of the building on the north side, is approached by the other entrance.

The respondents, the Royal Bank of Scotland, contended, first, that the premises in their own occupation were so structurally severed from the rest of the building as to be a different tenement; and inasmuch as they were used for the purposes of trade only, no person sleeping or dwelling therein at night time, they were exempt under 57 Geo. 3. c. 25; that, as regards the rest of the building, it came within 41 Vict. c. 15. s. 13. sub-s. 1, as a house divided into and let into different tenements, and that the assessment should be reduced to the value of such tenements as were otherwise occupied than for trade, business, profession or calling by which the occupier seeks a livelihood or profit.

It was contended on the other side that the whole was occupied as one building in one occupation and ownership, and that the occupation of the two rooms rent free by the bank clerk must be regarded as the occupation of the bank itself, and that consequently the premises did not come within 41 Vict. c. 15. s. 13. sub-s. 1, as being let in different tenements and occupied solely for the purposes of business, but that the whole of the premises were liable to inhabited house duty.

The commissioners were of opinion that the premises, as divided, were so structurally severed as to form two distinct buildings; that the building or tenement in the occupation of the Royal Bank of Scotland was exempt from the inhabited house duty; that the other building being let out in tenements came within 41 Vict. c. 15. s. 13. sub-s. 1, and reduced the assessment to the sum of 150*l.*, being the annual value of the tenements occupied otherwise than for trade (1).

(1) By 48 Geo. 3. c. 55. sched. B, inhabited dwelling-houses are liable to certain duties therein specified.

By 57 Geo. 3. c. 25. s. 1, all houses are exempt which are used solely for the purposes of trade.

By 41 Vict. c. 15. s. 13. sub-s. 1, "Where any house, being one property, shall be divided into and let in different tenements, and any of such tenements are occupied solely for the purposes of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit, or are unoccupied, the person chargeable as occupier of the house shall be at liberty to give notice in writing, at any time during the year of assessment, to the surveyor of taxes for the parish or place in which the house is situate, stating therein the facts; and after the receipt of such notice the commissioners acting in the execution of the Acts relating to the inhabited house duty shall, upon proof of the facts to their satisfaction, grant relief from the amount of duty charged in the assessment, so as to confine the same to the duty on the value according to which the house should in their opinion have been assessed, if it had been a house comprising only the tenements other than such as are occupied as aforesaid, or are unoccupied."

The Solicitor-General (*Sir F. Herschell*) and *Dicey*, for the appellant.—The first question is, whether the ground floor and basement constitute a separate tenement to be treated as entirely distinct from the building generally. If this portion of the building is to be treated as a separate house, it must be conceded that it is entitled to claim exemption under 57 Geo. 3. c. 25. There is no definition of a house either in 48 Geo. 3. c. 55 or 57 Geo. 3. c. 25. The appellant, however, contends, upon the facts as stated, that the whole of the premises together must be considered as forming one house in the occupation of the respondents; that the portion occupied by the bank is not a separate house, and that, therefore, such portion is liable to the duty imposed by the statute.

Assuming, however, that the ground-floor and basement are to be regarded as being a separate house, it is clear that the decision of the commissioners cannot be supported as to the remainder of the premises. The mere fact of the different floors being let into tenements is not sufficient to entitle the respondents to claim exemption under 41 Vict. c. 15. s. 13. sub-s. 1. The words of the sub-section are "divided into and let," &c.; and in order to come within the operation of that sub-section, it must be shewn that there is a structural division of some kind between the different tenements. *Prima facie* this portion of the premises is clearly assessable, and, if exempt, the exemption can only arise under 41 Vict. c. 15. The object of section 13 was to extinguish the hardship inflicted by the decisions in *The Attorney-General* v. *The Mutual Tontine Westminster Chambers Association* (2) and *Rusby* v. *Newson* (3). In the first of those cases it was held that a block of buildings divided into flats must be regarded as one entire house, and was properly assessed in the aggregate, though many of the flats were unoccupied. And in *Rusby* v. *Newson* (3) it was decided that where a building assessed to inhabited house duty was used partly for trade purposes, no abatement could be claimed in respect of the portion so used. It was to meet such cases as these that the 41 Vict. c. 15. s. 13 was passed. Moreover, the occupation of the two rooms by Mr. Dennistown would disentitle the respondents to claim any exemption under 41 Vict. c. 15. s. 13—see Lindley's, J., judgment in *The Yorkshire Fire Insurance Company* v. *Clayton* (4).

Meadows White and *Shiress Will*, for the respondents.—As regards the ground-floor and basement occupied by the respondents for banking purposes, it is contended that such premises clearly constitute a separate house apart from the other portion of the building. The severance is complete, and the respondents can therefore claim exemption under 57 Geo. 3. c. 25. s. 1. The remainder of the premises come, it is submitted, within 41 Vict. c. 15. s. 13. The floors and rooms are independent tenements within that statute, and such as are used for trade purposes only are not liable to pay duty. The operation of the sub-section is not confined to cases where there is an actual structural severance between the different tenements. The occupation by Mr. Dennistown was not such as to deprive the respondents of their exemption.

HUDDLESTON, B.—In this case the Commissioners of Inland Revenue have decided that the part of the premises in the occupation of the Royal Bank of Scotland was exempt from inhabited house duty, and they have also held that other portions were exempt under 41 Vict. c. 15.

The first question, therefore, is, whether the premises on the ground-floor and basement of the building, which are entered by one of the entrances, and which are occupied and used by the respondents as bankers, and which have no internal communication whatever with the rest of the building, come within the meaning of the term "dwelling-house" as used in 48 Geo. 3. c. 55, and so as to be exempt under 57 Geo. 3. c. 25. It was argued for the Crown that they were merely a portion of an inhabited house. Now, it is very difficult to define exactly

(2) 44 Law J. Rep. Exch. 146; 45 ibid. 886; Law Rep. 10 Exch. 305; 1 Ex. D. 469.

(3) 44 Law J. Rep. Exch. 143; Law Rep. 10 Exch. 322.

(4) *Ante*, p. 471; Law Rep. 6 Q.B. D. 557.

what is meant by a "house." A fair definition of the term is given in the books on criminal law—namely, "a permanent building in which the renter or owner and his family dwell and lie"—see *Archbold's Criminal Cases* (18th ed.), tit. "Burglary," p. 518. It must not be a mere enclosed ground, or any tent or booth, as in a market or fair, but a permanent building; and it is laid down by the authorities that a room or lodging in a private house may be the mansion for the time being of the lodger, if the owner doth not himself dwell in the house, or if he and his lodger enter by different outer doors; but if the owner himself lies in the house, and has but one outer door at which he and his lodger enter, such lodger seems only to be an inmate, and all the premises to be but one mansion or dwelling-house of the owner. But what we are dealing with here is a building structurally separated from the rest of the house with an outer door of its own, and which in ordinary parlance would be described as a house; and being a house, and occupied merely for business purposes, we think it is exempt from inhabited house duty.

Then we have to consider the question with reference to the other part of the premises, and these, as it seems to me, constitute a "house," bearing in mind what I have already said on the meaning of that term; and inasmuch as they are not used exclusively for the purposes of trade or business they are not exempt from duty. But it has been contended that they are exempt under the provisions of 41 Vict. c. 15. s. 13. The *onus* of proving exemption lies upon the respondents, who must shew that the house, being one property, was divided into and let in different tenements. I am inclined to agree with the view taken by my brothers Grove and Lindley, in the case of *The Yorkshire Fire Insurance Company* v. *Clayton* (4), that in order to come within the sub-section the house must be divided into and let in separate and distinct tenements; and that if the owner occupy any portion of the premises, the house would not come within the exemption. But it is not necessary to decide that point here, because it seems to me clear on another ground that these premises do not come within the sub-section. That sub-section contemplates the case of a house let and divided into separate tenements structurally distinct from one another, as in the *Westminster Case* (2). A familiar instance is where a house is let into flats, but with a common staircase, each flat being structurally divided so as to form a separate tenement. These were the kind of cases contemplated by the Legislature, whose object was to obviate the difficulties which arose in consequence of the decisions in *Rusby* v. *Newson* (3) and *The Attorney-General* v. *The Mutual Tontine Westminster Chambers Association* (2). Here it does not appear that the premises are structurally divided into different tenements, and I think, therefore, that they do not come within the sub-section. Under these circumstances, the order made by the commissioners must stand with reference to one portion of the premises, and be reversed with reference to the other portions.

HAWKINS, J.—I am of opinion that the commissioners were clearly right on the first point. The portion of the building which was used and occupied as a bank was as distinct and as much separated from the rest of the building as it was possible to be, and falls within the exemption given by 57 Geo. 3. c. 25. I also think it falls within 41 Vict. c. 15. s. 13, if it were necessary to have recourse to the provisions of that statute. I don't pretend myself to give any definition of the term "house." But it seems to me impossible to say that such a building as this is not a house, absolutely and entirely isolated as it is from every other part of the building, and with a separate outer door from the street. Suppose it had stood alone; suppose there had been a single room with a basement below and with substantial walls round it, and with a door opening to the street; and suppose a man lived and carried on his business there; how could it be said that it was not a house? Then, if that be so, why is it the less a house because the owner has thought fit to allow an adjoining house to be built over

it? For these reasons I think this portion of the premises was clearly exempt under one or the other statute.

As to the rest of the building, I do not agree with the decision of the commissioners. I don't think it necessary to discuss the authorities which were brought before the Court in the case of *The Attorney-General* v. *The Mutual Tontine Westminster Chambers Association* (2) and *Rushy* v. *Newson* (3). The acknowledged hardship of the decisions in those cases led to the passing of 41 Vict. c. 15. s. 13. The 1st sub-section of section 13 is alone material; the 2nd sub-section does not apply to this part of the premises, but includes a tenement occupied as a single tenement by an occupier for trade or business purposes, and was intended to give relief to the occupier of such a building, even though he might have some person dwelling there for the sake of protection. But of course, if any part of the house was used by the occupier for residential purposes, the house would not be entitled to exemption, because, in such a case, it would not be occupied solely for the purpose of trade or business. Let us, therefore, now consider the meaning of the 1st sub-section, and the hardships which were thereby intended to be removed. It must be noticed that before exemption can be claimed under sub-section 1, the house must have been divided and let into different tenements. What is the meaning of the word "divided" in the sub-section? Mr. White contended that the exemption applied even though there was no structural division; but in my opinion such a contention cannot prevail. The words are not only "let in different tenements," but "divided into and let in different tenements." How can there be different tenements unless there be some structural severance? It is difficult to say what kind of structural severance there must be; it need not, I apprehend, be effected in any particular way. There must be, however, a real division into separate tenements; a mere imaginary line would not suffice. But there must be a division analogous to what we find in chambers and a great many of those mercantile buildings to be found in the City of London. There must be a letting of a separate tenement other than a mere apartment, as appears, I think, from the Income Tax Act (16 & 17 Vict. c. 34), s. 36, which draws a distinction between apartments and tenements; therefore, having regard to previous legislation, it would be wrong to say that this portion of the building could be considered a separate tenement. I think there must exist a division of the house into distinct tenements, so that each particular tenement may constitute a house within a house, subject only to access by a common staircase. Now I cannot find here the existence of any such structural division. *Prima facie*, the *onus* lies on the respondents to bring themselves within the exemption clause, and from the description of the premises given in the case, I think there are ample reasons for saying that they are liable to the payment of the inhabited house duty.

There is one point upon which it is not necessary for us to give a decision, but about which I should like to make a few observations. It has been contended that Mr. Dennistown must be considered to have occupied as a servant or clerk on behalf of the landlord. If he had resided in the portion of the house in which the banking business was carried on, and had resided there, as a clerk, rent free, as part of his salary, there would have been an end of the question, and in that case the house could no longer be considered as being occupied solely for the purposes of trade. But the bank have nothing to do with that portion of the building, and do not occupy any portion of it for themselves. It is a mere coincidence, as it seems to me, that one of their clerks occupies those two rooms. But assuming that the house had been divided into a number of separate tenements, and that they had been occupied by a number of different persons, and one of them by Mr. Dennistown, as representing the landlord, I am far from saying that the house would, on account of Mr. Dennistown's occupation, be incapable of being exempt. I make this observation because I cannot myself agree with certain portions of my brother Lindley's judgment in the

case of *The Yorkshire Insurance Company* v. *Clayton* (4). I think that the Legislature intended that exemption should be given when the house, being one entire property, is subdivided into separate and distinct tenements for the purpose of letting, and substantially the whole house is let or intended to be let. Suppose a house divided into a hundred different tenements, ninety-nine of which could be profitably used for the purposes of trade, but one of which, being inapplicable for such purposes, was occupied by the landlord, in such a case I cannot think that the Legislature intended to deprive the landlord of all benefit of the exemption. It is not, however, necessary to decide the point now, and I should not have made any observations upon it but for the reasons I have already mentioned.

I am of opinion that the decision of the commissioners was right as regards one portion of the premises, but wrong as regards the other portion.

Judgment accordingly.

Solicitors—Solicitor to Inland Revenue, for the Crown; William Gordon, for respondents.

[IN THE COURT OF APPEAL.]

(*Appeal from the Common Pleas Division.*)

1881. April 29, 30. } SPARROW *v.* HILL AND ANOTHER.*

Practice — Costs — Taxation of Costs where Plaintiff succeeds only on part of his Claim—Apportionment of Costs.

In an action to recover the price of work done in and about a house the plaintiff claimed for three distinct items of work, and recovered a sum of 37*l. in respect of one only of the items. An order was thereupon made "that the plaintiff recover against the defendants such costs as one of the Masters may find that he has rightly incurred in recovering the above amount to be taxed; and that the defendants recover against the plaintiff such costs as they have rightly incurred in defending themselves on those points on which they have succeeded to be also taxed":—* Held (*reversing the decision of the Common Pleas Division*), *that upon the true construction of the order the plaintiff was entitled, upon taxation, to be allowed the general costs of the cause, excluding only such costs as were applicable exclusively to the two items on which he failed, and that the defendants were entitled to be allowed such costs only as were incurred exclusively with respect to the two items on which their defence was successful.*

Appeal from a decision of the Common Pleas Division, on a summons to review taxation of costs, reported *Ante*, p. 410, where the facts are fully stated.

Buszard and *Dugdale*, for the plaintiff.

W. Graham, for the defendants.

The following were referred to in argument: *Field* v. *The Great Northern Railway Company* (1), *Mason* v. *Brentini* (2), *Myers* v. *Defries* (3), *Knight* v. *Pursell* (4), *Seton on Decrees* (4th ed.), vol. i. p. 117, *Heighington* v. *Grant* (5), *Hardy* v. *Hull* (6), Order VI. Rules of the Supreme Court (Costs), 1875.

BRAMWELL, L.J.—I am of opinion that, under this order, the plaintiff should get the general costs of the cause, but he should not get the costs exclusively incurred in attempting to recover on items of claim in respect of which he failed. The defendants should get such costs as they incurred exclusively in defending themselves against claims in respect of which their defence was successful. The Master seems to have adopted this view, though, perhaps, he has not been very liberal in his allowances to the defendants. That, however, is a matter with which we

* *Coram* Bramwell, L.J.; Brett, L.J.; Cotton, L.J.

(1) 47 Law J. Rep. Exch. 662; Law Rep. 3 Ex. D. 261.
(2) Law Rep. 13 Ch. D. 287.
(3) 49 Law J. Rep. Exch. 266.
(4) Ibid. Chanc. 120.
(5) 1 Beav. 228; 10 Law J. Rep. Chanc. 12.
(6) 17 Beav. 355.

have nothing to do. The appeal must be allowed.

BRETT, L.J.—The undisclosed foundation of Mr. Graham's argument is that all the Courts have now become Courts of Chancery, and that the practice of the Court of Chancery is now to govern costs in all cases. He quoted numerous text-books and authorities tending to shew how the Court of Chancery would have construed this order. There were two forms of orders as to costs in a Chancery suit, but an action at common law is on a different footing altogether. In my opinion the proper way is to deal with these costs as costs incurred in a common law action, where there is one cause of action and several issues, and the plaintiff has succeeded in recovering something, but has failed with respect to particular issues. The authorities cited to us upon the construction of orders as to costs in Chancery suits do not help us to construe the order here, which is different, and applies to a different case. The action is substantially a common law action. It is brought for one cause of action, though there are three items of claim. The defence set up is one defence. The Master has allowed the general costs of the cause to the plaintiff, disallowing those costs which applied exclusively to the parts of the claim upon which the plaintiff did not succeed. I think he proceeded upon a right principle. If he has allowed too little to the defendants in apportioning the costs rightly incurred by the defendants in successfully defending themselves, the Master has done nothing so wrong that we ought to interfere. The difficulty is not a legal one with which we can deal. The order is not either of the forms of order which exist in the Court of Chancery, but a new and special one. I think the construction of the Divisional Court was wrong.

COTTON, L.J.—We have only to construe the order in this particular case. It differs entirely from the order in *Knight* v. *Purssell* (4). It does not give a proportion of the whole costs of the action to one party, and a proportion of them to the other, but it is an order giving the plaintiff the costs of the suit, less those which apply exclusively to those items of claim on which he failed. I am of opinion that the principle upon which the Master acted was right.

Appeal allowed.

Solicitors—Walker, Son & Field, agents for Smith & Howe, Wednesbury, for plaintiff; Taylor, Hoare & Taylor, agents for Maples & M'Craith, Nottingham, for defendants.

[IN THE COURT OF APPEAL.]

1881. June 22.

BREE *v.* MARESCAUX.*

Practice—Writ for Service out of Jurisdiction—Slander—Publication Abroad with Damage in England—Order II. rule 4; *Order XI. rule* 1.

Where a charge of misconduct made out of the jurisdiction against an officer of an English vessel to the captain is reported to the owners in England, who dismiss the officer, "the act or thing for which damages are sought to be recovered" is not done within the jurisdiction, so as to admit of a writ in an action for slander against the person making the charge being issued for service out of the jurisdiction under Order XI. rule 1.

Appeal against the order of Cave, J., at chambers, declining to give leave to issue a writ for service out of the jurisdiction upon Marescaux, a British subject residing at Kingston, Jamaica.

According to the affidavit made in support of the application, Bree was third officer on board the Royal Mail Steam Packet Company's vessel *Para*, and Marescaux was a passenger by that vessel, on a voyage from England to Jamaica. During the voyage Marescaux made a complaint to the captain, charging Bree with misconduct towards a lady, one of the pas-

* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

rs. On the arrival of the vessel at ca, the company's superintendent unicated to Bree the charge made st him. Bree denied the charge, but told that the matter would be ed to the company at the London

It was accordingly reported to the ors of the company at the chief in Moorgate Street, London. In quence of this report Bree was, on turn of the vessel to Southampton, ssed from the service of the com- The affidavit stated that the slander lained of was spoken and published arescaux to the captain of the vessel, ent of the company, and was in- d to be transmitted to the company ndon.

ler II. rule 4 provides that, "No of summons for service out of the iction, or of which notice is to be out of the jurisdiction, shall be l without the leave of a Court or ;" and Order XI. rule 1 provides ervice out of the jurisdiction may be ed by the Court or a Judge "when- any act or thing sought to be re- ed or removed, or for which damages ought to be recovered, was or is to ne, or is situate within the jurisdic-

F. Silvester, on the 15th of June, l a Divisional Court to allow the to issue. He contended that the er complained of was an "act or for which damages are sought to covered;" which was "done within risdiction." The slander was reported ngland, as Marescaux knew and led that it should be, and he is re- ible for the consequences of his act. cause of action was not complete Bree was dismissed. It was as if er had been sent from Jamaica to on by Marescaux. He cited *Evans holson* (1) and *The Queen* v. *Rogers*

NMAN, J.—I am of opinion, with regret, that we ought not to set the decision of my brother Cave.

45 Law J. Rep. C.P. 111 *n*; 32 Law Times, 78.

47 Law J. Rep. M.C. 11.

The rule requires the "act or thing" to be done within the jurisdiction. The action suggested is an action for a slander uttered abroad, resulting in special damage in England. The words, it is said, are not in themselves actionable, but the special damage so makes them. I think the "thing done" in a case of slander are the words uttered. The proposed defendant did nothing within the jurisdiction. Something occurs afterwards within the jurisdiction, but it was not done by him. It was the act of some one else. This reasoning may be technical, but the words must not be strained. The Legislature has provided the words, and we have to interpret them, without speculating as to what might have been said. The case is simply not within the words.

WILLIAMS, J.—My inclination was the other way. The plaintiff complains that the blow aimed at his character fell in Southampton. A shot fired from outside the jurisdiction might produce a wound within it. On that analogy I think the act may be said to be done within the jurisdiction. That, I think, might have been the correct view, but considering the opinions which have been expressed, that view is, I think, immaterial.

E. F. Silvester now moved the Court of Appeal for leave to issue the writ.

BRAMWELL, L.J.—I am of opinion that this application must be refused. I am not sure if I were to draw these rules *de novo* that I should not say that such a cause of action as this should give a right to sue, or, at all events, that the rules should give the Court power to allow the service out of the jurisdiction of a writ in such a case as this. That, however, is not the question here. The plaintiff is, I think, in this difficulty: if the complaint which he makes is that the defendant spoke the words which he complains of as defamatory, then these words were not spoken within the jurisdiction. If, however, on the authority of a case (3) I

(3) *Wilby* v. *Elston* (8 Com. B. Rep. 142; 18 Law J. Rep. C.P. 320), in which it was held by Coltman, J., Maule, J., Cresswell, J., and Williams, J., that "not guilty" in an action for words not actionable *per se* puts in issue the special damage.

cannot find, but which I remember—I was counsel in it, and Mr. Justice Maule was one of the Judges—if I say on the authority of that case the true cause of action is the special damage caused by the repetition of the words spoken, then the authorities show that a man is not liable for damage caused by the unauthorised repetition of words spoken by him. That is to say, if A B speaks of X Y that which is defamatory, he is liable for the damage caused by the utterance to C D of that slander; but if C D voluntarily repeats the slander to E F, and X Y is damaged by that repetition, then A B is not liable for the damage so caused; so that here, if the damage suffered in England is the cause of action, then the intended defendant did not cause that damage, and is not liable for it. The affidavits state that Marescaux intended that the slander should be repeated in England. That may be; but I am unable to come to the conclusion that Marescaux requested that the complaint should be sent to England. He probably left the matter in the captain's hands, doubtless expecting that it would be acted on, but not directly authorising any particular proceeding. Therefore the case is in that dilemma, and we must hold that the writ cannot be served out of the jurisdiction. I do not know whether it is necessary that I should refer to the case of *The Great Australian Gold Mining Company* v. *Martin* (4), in order to distinguish it from this case. I think that the further affidavit which the Court required in that case shows the distinction; for that affidavit stated that the defendant "made in England certain false and fraudulent misrepresentations." The distinction is therefore manifest, and we must refuse this motion.

BRETT, L.J., and COTTON, L.J., concurred.

Appeal dismissed.

Solicitors—Alderson & Fenwick, for applicant.

(4) 46 Law J. Rep. Chanc. 289; Law Rep. 5 Ch. D. 1.

[IN THE QUEEN'S BENCH DIVISION.]

1881. June 20, 21. CLARKE v. BRADLAUGH.

Writ—Time from which it Dates—Issued same Day as Cause of Action—Fractions of a Day—Fiction of Law.

A statement of claim alleged that the cause of action accrued on the 2nd of July, and before the issuing of the writ, which as a fact was issued the same day.

Demurrer on the ground that the writ being a judicial act must be taken to date from the earliest moment of the day, and therefore to have been issued before the cause of action accrued:—

Held, *that the doctrine on which the demurrer was founded did not apply, and that the plaintiff was entitled to shew that the cause of action accrued before the issuing of the writ.*

Demurrer to a statement of claim.

The statement of claim alleged that the defendant, who was a member of the House of Commons for the borough of Northampton, on the 2nd day of July, 1880 [and before the issuing of the writ in this action] (1), sat and voted in the House of Commons after the Speaker had been chosen, without having made and subscribed the oath appointed to be taken by members of the House of Commons according to the Parliamentary Oaths Act, 1866, as altered by the Promissory Oaths Act, 1868. The plaintiff sued the defendant for the sum of 500*l.*

The statement of defence and demurrer were as follows:—

The defendant denies that he sat and voted, as in the statement of claim mentioned, before the issuing of the writ in this action.

The defendant demurs to the statement of claim, and says that the same is bad in law, on the ground that it discloses no cause of action in the plaintiff, inasmuch as it alleges that the defendant sat and voted in the House of Commons on the day on which the writ was issued, and upon other grounds sufficient in law to sustain this demurrer.

The *Defendant*, in person, in support of

(1) The words in brackets were added in the course of the argument by order of the Court.

the demurrer.—Judicial proceedings are to be considered as taking place at the earliest period of the day on which they are done, whether between the Crown and a subject or between subject and subject—*The Queen* v. *Edwards* (2), *Wright* v. *Mills* (3). A writ of summons is a judicial act equally with a writ of execution. By Order II. rule 8 of the Rules of Court, 1875, every writ of summons, and also every other writ, is to bear date on the day on which it is issued; it is to be tested in the name of the Lord Chancellor, or, if his office is vacant, in the name of the Lord Chief Justice of England. In early times the chief judicial employment of the Chancellor was the devising of new writs (4); they are now tested in the name of the Lord Chancellor; these words would be meaningless unless the writ is a judicial act. The writ of summons commences "We command you;" and if the party summoned did not appear he would be liable to judgment. In *Campbell* v. *Strangeways* (5) it was held that a dog licence operated only from the time when it was granted, and did not relate back to the earliest moment of the day on which it was issued, so as to cover a previous violation of the Act; but the case is not in point and it is virtually overruled, for it is founded on *Chick* v. *Smith* (6), and does not notice that that case is overruled by *The Queen* v. *Edwards* (2) and *Wright* v. *Mills* (3). "A common informer shall not be at liberty to quit the teste and avail himself of the real time: even forms shall not be dispensed with to aid popular prosecutors"—*Combe* v. *Pitt* (7). In that case *Pye* v. *Coke* (8) was cited to shew that where two informations are exhibited on the same day the defendant "needs not to answer either," and it appears to have been conceded that if two actions were brought on the same day against the same person for the same offence, one might be pleaded to the other. In *Castrique* v. *Bernabo* (9), where a writ on a bill of exchange was issued the same day as notice of dishonour, it was held that it could not be presumed that the defendant received the notice of dishonour before the writ. Lord Denman, C.J., says, "No presumptions ought to be made in favour of a plaintiff, who ought to have a complete cause of action before he brings one."

Sir H. Giffard (*Kydd* with him), for the plaintiff.—The question is, what is the extent and meaning of the rule of law which has been adopted to prevent judicial acts being tried as to their priorities? No principle is involved, and the practice of the Courts must be ascertained. The phrase "judicial proceedings" is not applicable to writs, and no case has been quoted to say it is, except the argument of the counsel in *Combe* v. *Pitt* (7); and in that case Lord Mansfield says, "I do not see why the very hour may not be distinguished where it is necessary and can be done; for it is not like a mathematical point which cannot be divided." The application of the writ, and the serving it out, are the acts of the party, and as such may be put in issue—see *Lord Porchester* v. *Petrie* (10), where it is said, "The cases that have been cited" (mentioning *Combe* v. *Pitt* (7)) "are not applicable. The priority of judgment was not the point in any of them. The question in all was the priority of the commencement of the suit, which is the act of the party, while the judgment is the act of the Court." A writ is not a judicial act when it is the act of the party.

In delivering the judgment of the Court in *The Queen* v. *Edwards* (2), Coleridge, J., says, "And although the Court will enquire at what time a party does an act, as filing a bill or delivering his declaration, and for that purpose will take notice of the usual hours for sitting (11), it is otherwise with regard to a judicial proceeding. This distinction is pointed out in *Lord Porchester's Case* (10) by Lord Mansfield and recognised by Buller, J., in *Pugh* v. *Robinson* (12);

(2) 23 Law J. Rep. Exch. 42, 165; Law Rep. 9 Exch. 32, 628.
(3) 4 Hurl. & N. 488; 28 Law J. Rep. Exch. 223.
(4) 3 Hadley & Broom's Commentaries, 31.
(5) 47 Law J. Rep. M.C. 6; Law Rep. 3 C.P. D. 105.
(6) 8 Dowl. P.C. 37.
(7) 3 Burr. 423.
(8) 14 Jacob, 1.
(9) 6 Q.B. Rep. 498; 14 Law J. Rep. Q.B. 3.
(10) 3 Dougl. 261, and at p. 273.
(11) See 2 Lev. 141, 176; Bull. N.P. 137.
(12) 1 Term Rep. 116.

it is indeed also mentioned in the judgment of *Swain* v. *Morland* (13)."

The *Defendant*, in reply.—Prior to 2 Will. 4. c. 39, the issuing of a writ was the act of the party, but that Act, which was passed for uniformity of process, made a change by which every suit was commenced by writ of summons. Section 11 of that Act, and Order II. rule 8 are inconsistent with the suggestion that the issuing of a writ is the act of the party. *Alston* v. *Underhill* (14) shews that what might formerly have been the act of the party is now the act of the Court. A writ of execution is undistinguishable from a writ of summons: the form, the commencement and the ending are the same.

DENMAN, J.—I am of opinion that this demurrer must be overruled. The statement of claim as now altered states that on the 2nd of July, and before the issuing of the writ, which was issued on the same day, the defendant sat and voted in the House of Commons without taking the oath, thereby, as we must assume, incurring a penalty. To this the defendant demurs on the ground that the statement of claim discloses no cause of action, because, even if the writ was issued later in the day than the sitting and voting, nevertheless, in contemplation of law it must be taken to have been issued before the cause of action, because a writ being a judicial act dates from the earliest period of the day on which it is issued.

The contention was founded on a doctrine of law derived from certain decisions and *dicta*; roughly stated, it is that judicial acts date from the commencement of the day on which they are done, and no doubt in several cases strong consequences have followed from its application. This doctrine was cited in *Wright* v. *Mills* (3) and *The Queen* v. *Edwards* (2); but the question for us to determine is, whether it is applicable to such a case as this; and after fully attending to the arguments which have been addressed to us and the cases which have been cited, I have come to the conclusion that it cannot be applied. It is a fiction of law, and one principle pervading and overriding all legal fictions would be violated by holding it to be applicable to the present case. For a legal fiction is for the purpose of doing justice, and if the doctrine relied on were to hold good in this case it would tend, not to effect justice but injustice; it would be tantamount to laying down that in any case in which a wrong has been committed the wrongdoer is to have a certain time in which to escape from the jurisdiction of the Court. Supposing, for instance, a man were to commit an assault at ten o'clock in the morning, it would follow, if this rule were to be applied, that no writ could be issued until twenty-four hours had elapsed; and I cannot see that such an application of it would further the ends of justice—it would, on the contrary, cause injustice; and unless some cogent authority can be cited requiring that the rule should be applicable to such a case as the present no Court ought for the first time so to hold.

It appears to me sufficient to rest our decision on this ground, without going minutely into any attempts to lay down the exact line or limit at which the doctrine ceases or commences to apply. It has been suggested that the doctrine does not apply where there are conflicting rights between subject and subject, and that in other cases it does apply; but suffice it to say, without going into those questions, that it cannot be applied to such a case as this, on the ground that to apply it would be to defeat the very object for which alone a legal fiction is to be resorted to: it would be giving priority to the writ of summons only to defeat it and make the action abortive. On that ground alone I feel it to be impossible to apply the rule to such a case as this; if it is to be so applied it must be by a Court of Appeal, and not by this Court. No authority has been cited to shew that the rule ought to be applied to a writ of summons. I think it ought not to be so applied, and, therefore, that this demurrer should be overruled.

WILLIAMS, J.—I am of the same opinion. On this demurrer it must be taken that the cause of action accrued before the commencement of the action. But it is contended by the defendant that this admission is contradicted, because the

(13) 1 B. & B. 376.
(14) 1 Cr. & M. 492.

of the writ being a judicial act by fiction of law be taken to have issued immediately after midnight ie 1st of July, and therefore before ccruing of the cause of action. But ems to me that such a contention violence to the principle of the cases *Lord Porchester's Case* (10) down- s, and in no sense follows from them. is an averment on the record that ause of action preceded the writ, and re asked to set a fiction of law st that positive averment. No rule w compels us to violate common- and common understanding. Surely tween an admission of a positive fact a fiction of law the positive fact t to be preferred. I concur, there- in thinking that this demurrer ought overruled.

Demurrer overruled.

tors—W. G. Stuart, for plaintiff; Lewis & Lewis, for defendant.

[IN THE COURT OF APPEAL.]

WELL, L.J.
ALLAY, L.J.
, L.J.
1881.
arch 28.
pril 11.

GATHERCOLE *v.* SMITH.

umbents' Resignation Act, 1871 (34 *Vict. c.* 44), *s.* 10—*Pension of Retired yman—Set-off—Counter-claim.*

an action brought by a retired yman against his successor in the in- ency for arrears of the pension al- l under the Incumbents' Resignation 1871, *the defendant claimed to set off st such arrears, and also to recover, by of counter-claim, a judgment debt due n from the retired clergyman*:—Held *rsing the judgment of* LORD COLE- E, C.J.), *that the pension was inalien- and therefore the defendant's claim not be set off, and the plaintiff was led to a separate and independent ment for the arrears due.* Held (*by* ALLAY, L.J., *and* LUSH, L.J.), *that the defendant's claim was in fact a set-off, and must be dismissed.* Held (*by* BRAMWELL, L.J., *dissenting*), *that the defendant's claim was a counter-claim, on which he was entitled to judgment.*

The statement of claim alleged that the plaintiff was the late and the defendant the present incumbent of the vicarage of Chatteris, in the Isle of Ely, in the county of Cambridge; that the plaintiff had resigned under the Incumbents' Resignation Act, 1871 (1), subject to a yearly pension of 450*l.* payable half-yearly out of the revenues of the benefice, and that one half-yearly payment of 225*l.* was due, which the plaintiff claimed.

The statement of defence alleged a mortgage of the advowson of the parish church of Chatteris by the plaintiff to William Hawkins; that William Hawkins signed judgment against the plaintiff on a warrant of attorney for 49,000*l.*; that a writ of *sequestrari facias de bonis ecclesiasticis* was issued against the plaintiff for the residue of the above debt; that after mesne assurances and acts in the law the sum of 24,500*l.*, or other the sum then due on the above judgment, and the said judgment, with the full benefit of the writ of *sequestrari facias*, and of the sequestration, were assigned to and became absolutely vested in the defendant, his executors, administrators and assigns; that the said judgment still remained unsatisfied to the amount of 20,000*l.*, which sum the defendant sought to set off, and also to recover by way of counter-claim.

On the 7th of June, 1878, the action came on for trial at the Guildhall, before Lord Coleridge, C.J., who ordered that an account be taken by the official referee to ascertain how much of the original debt and interest had been paid off under the sequestration or otherwise, and that judgment with costs should be entered for the defendant if a sum remained

(1) 34 & 35 Vict. c. 44. s. 10: "The pension so allowed shall be a charge upon the revenues of the benefice, and shall be recoverable as a debt at law or in equity from the incumbent of the said benefice by the retired clerk, his executors, administrators or assigns, but such pension shall not be transferable at law or in equity."

unpaid larger than the plaintiff's claim, otherwise for the plaintiff.

The official referee reported that there was due from the plaintiff to the defendant the sum of 28,122*l.*

On the 27th of May, 1880, judgment was entered "that the defendant recover against the plaintiff the sum of 27,897*l.* (being the balance of the said sum of 28,122*l.* after deducting the sum of 225*l.* the amount of the plaintiff's claim) and costs to be taxed."

This was the judgment from which the present appeal was brought.

In the meantime the plaintiff had commenced a second action in the Chancery Division to recover three other half-yearly instalments of the pension. To this action the defendant pleaded a defence and counter-claim similar to that above set out.

On the 15th of June, 1880, the Master of the Rolls gave judgment in the action in the Chancery Division in favour of the plaintiff, and dismissed the defendant's counter-claim.

The defendant appealed from this judgment, and on the 14th of July, 1880, counsel on both sides undertaking, so far as the points in the appeals were the same, to be bound in the plaintiff's appeal in the action in the Common Pleas Division by the decision on the appeal of the defendant from the judgment of the Master of the Rolls, dated the 15th of June, 1880, the Court of Appeal ordered that all further proceedings in the said action in the Common Pleas Division be stayed pending such decision.

On the 1st of March, 1881, James, L.J., Cotton, L.J., and Lush, L.J., affirmed the judgment of the Master of the Rolls (2).

On the 28th of March, 1881, the appeal from Lord Coleridge's judgment was argued by

J. W. Chitty and *Petheram* (*Wellington Cooper* and *M'Call* with them), for the plaintiff, in support of the appeal, and by *Bompas* (*Newton R. Smart* and *P. Howard Smith* with him), for the defendant.

(2) 50 Law J. Rep. Chanc. 671.

The arguments are sufficiently noticed in the judgments.

The following cases were cited: *Waring* v. *Ward* (3), *Lockhart* v. *Hardy* (4), *Palmer* v. *Hendrie* (5), *Walker* v. *Jones* (6), *Vavasseur* v. *Krupp* (7), *Stooke* v. *Taylor* (8), and *Hawkins* v. *Gathercole* (9).

Cur. adv. vult.

The following judgments (on April 11) were delivered:—

LUSH, L.J.—This is an action by the late incumbent of the vicarage of Chatteris, in the Isle of Ely, to recover 225*l.*, being the first of the half-yearly payments of the pension assigned to the plaintiff under the Incumbents' Resignation Act, 1871, out of the revenues of the benefice, upon his vacating the living under the provisions of that Act. The defendant is his successor and the present incumbent of the vicarage. The statement of defence sets up that in August, 1840, the plaintiff, being then owner of the advowson, mortgaged it to one Hawkins for 24,500*l.*, and that he secured the due payment of the amount by a warrant of attorney bearing even date with the mortgage, upon which judgment was signed; that afterwards, default being made in payment, a writ of sequestration was issued and certain amounts realised under it; that the mortgage and benefit of the judgment afterwards, and before the resignation of the plaintiff, became by assignment vested in the defendant; that the judgment to the amount of 20,000*l.* remains unsatisfied; and the defendant claims to set off the amount so due upon the judgment against the claim of the plaintiff in the action.

Lord Coleridge directed an account to be taken of how much of the original debt and interest had been paid off under the the sequestration or otherwise, and that

(3) 7 Ves. 332.
(4) 9 Beav. 349; 15 Law J. Rep. Chanc. 347.
(5) 27 Beav. 349; 28 ibid. 341.
(6) 35 Law J. Rep. P.C. 30; Law Rep. 1 P.C. 50.
(7) Law Rep. 15 Ch. D. 474.
(8) 49 Law J. Rep. Q.B. 857; Law Rep. 5 Q.B. D. 569.
(9) 6 De Gex, M. & G. 1; 24 Law J. Rep. Chanc. 332.

judgment with costs should be entered for the defendant if a sum remained unpaid larger than the plaintiff's claim. The official referee having found that no part of the original debt had been paid off, and that the sum remaining due was 28,122*l.*, it was adjudged that the defendant recover the balance after deducting the 225*l.* claimed for the half year's pension. The plaintiff appeals against this judgment.

In June, 1879, the plaintiff brought another action for the recovery of three other half-yearly payments of the pension. The defendant pleaded in that action the same defence, and claimed in like manner to set off the judgment against the said arrears. The Master of the Rolls held that under the 10th section of the Incumbents' Resignation Act, 1871, which declares that the pension shall be a charge upon the revenues of the benefice, and recoverable as a debt at law or in equity from the incumbent, by the retired clerk, his executors, administrators or assigns, but "such pension shall not be transferable at law or in equity," it could neither be assigned nor incumbered, directly or indirectly, and consequently that the judgment debt could not be set off. And his Lordship dismissed the set-off, or, as it was called in the alternative, the counter-claim, and gave judgment for the amount of the arrears, with interest, and costs, as well of the alleged counter-claim as of the action. The defendant moved by way of appeal that this judgment might be reversed so far as it directed that the defendant's counter-claim be dismissed with costs, and that judgment be entered for the plaintiff; and prayed that an account might be taken of what was due upon the judgment, and that the defendant might be at liberty to set up the account and have judgment for the balance.

The appeal came on for hearing before the Court of Appeal sitting at Lincoln's Inn, in the course of last month. Before the hearing of the appeal and upon an application by the plaintiff, and both parties undertaking, so far as the points in the appeal were the same, to be bound in the appeal in the action in the Common Pleas by the decision of the Court of Appeal in the appeal from the judgment of the Master of the Rolls, all further proceedings in the Common Pleas action were stayed pending such decision.

The Court of Appeal unanimously affirmed the judgment of the Master of the Rolls, and dismissed the appeal with costs. So that it stands upon the judgment of this Court of Appeal that the set-off is dismissed with costs, and that the plaintiff is entitled to judgment for the full arrears of the pension, and interest and the costs of the action. Notwithstanding this judgment and the undertaking I have mentioned, the defendant invites this Court to overrule that portion of the judgment of this same Court which dismisses the set-off with costs, and asks for judgment for him upon that set-off. He does not now claim to set it off against the pension, but he says that he is entitled to have judgment upon his set-off, though he can make no use of it in this action. He made the same application to the Master of the Rolls, but without success.

I am utterly unable to discover any ground upon which this Court of Appeal can be asked to give such a judgment. In the first place, it is not competent to this division of the Court of Appeal to overrule in any respect the judgment of the other division. No new facts are introduced into the appeal. It is true that, as far as my recollection goes (for I was one of the Judges who sat on that appeal), this claim to have judgment entered for him, though it could not be set off, was not specifically taken. It was taken, as I have just said, before the Master of the Rolls, and refused; whether the defendant's counsel in the Court of Appeal overlooked it or abandoned it is, I think, immaterial. So long as that judgment stands it is binding upon this Court in its entirety.

Secondly, the defendant's undertaking precludes him from raising the question. The points in the appeal, whether the pension is or is not subject to the judgment, and how the set-off pleaded is to be dealt with, are common to both cases.

Thirdly, the defence is a set-off of an unsatisfied judgment to a larger amount than the sum claimed. Calling it a

counter-claim does not make it different from what it is. It really is a claim which might have been set off under the statute 2 Geo. 2. c. 22. That Act relieved a party who owed another a debt from the obligation to pay and seek his remedy by a cross action, by enacting that when there are mutual debts one may be set off against the other. If the debt due to the defendant exceeded that due from him to the plaintiff, that Act gave him no remedy for the excess, he must have sued for that in a separate action. The Judicature Act alters this so far as to authorise the Court to give judgment for the excess. But that is all; the set-off is not an independent action, it is still a defence, and nothing more. If the plaintiff before the Judicature Act chose to discontinue his action, the defendant could not claim to have his set-off tried. It fell with the action, to which it was and still is an adjunct. Accordingly the Master of the Rolls decided in the case of *Vavasseur* v. *Krupp* (7), that a counter-claim could not be proceeded with after the plaintiff had discontinued his action. The principle is, that if there is nothing against which the matter pleaded can be set up by way of relief, the set-off falls to the ground.

I am at a loss to conceive what judgment can be given upon that set-off under the circumstances, except that it be struck out or disallowed or dismissed. It matters not what form of words is used. The meaning is that no effect can be given to it in this action. I am, therefore, of opinion that the judgment of the Court below ought to be reversed, and, in accordance with the judgment of the Court given at Lincoln's Inn, that judgment should be entered for the plaintiff for 225*l.*, with interest thereon at the rate of five per cent. per annum and costs of this action, including therein the costs occasioned by the set-off, together with the costs of this appeal. Inasmuch as Mr. Chitty was brought upon a second hearing to argue a point upon which he failed, I think the costs occasioned by his appearance ought not to be allowed.

Bramwell, L.J.—It is clear that in this case, upon the authority of the Court of Appeal at Lincoln's Inn, the plaintiff must have a separate and independent judgment to recover his 225*l.*, upon which he must be at liberty to issue execution.

The question then arises as to what is to become of the defendant's claim. He asks for judgment on it.

Now, first of all, it is said that he ought not to ask for it, because he is concluded doubly: first of all by a judgment given at Lincoln's Inn (which alone would be enough), because, if a judgment had been given at Lincoln's Inn that he was not entitled to judgment on this counter-claim or set-off, or his claim I should call it, we should not overrule that judgment; and next, if he agreed to be bound by it, that would be an extra reason why we should not overrule it. But according to the best understanding I can put on the matter, and the admission made by the learned counsel on both sides, and even by the statement by my brother Lush, the Court of Appeal never thought of deciding the question. The Master of the Rolls did not decide it. What he has, I understand (and I speak with good reason for saying so), decided was, that you are not entitled to bring successive actions, and consequently that you are not entitled to bring successive counter-claims or set-offs on one and the same judgment. Whatever he may have said on the matter, the Court of Appeal did not decide it, as I understand my brother Lush to say it was not mentioned before them. Then how are we bound by the decision of the Court of Appeal in that matter? or how is the defendant bound by any agreement that he would be bound by the decision of the Court of Appeal.

An objection was taken to the defendant's right to get judgment on his claim, which was this: The point which Mr. Chitty was brought here to argue was, that somehow or another this judgment had ceased to be binding by the way in which the property had been dealt with. We made very short work of that, because it was tolerably manifest that there really was no pretence for it in truth, and that the judgment which is the subject-matter of the appeal is still standing and still valid. So that he can still issue execution upon the old judgment, unless it was *res judicata* by the new judgment he is seeking to recover. Then it is said, setting

aside all difficulties about judgment, and suppose it was a promissory note, the defendant ought not to have judgment on it. I am afraid I may not do justice to the argument on which that is founded, for I may have misunderstood it; but if I understand it (I speak of it with very great respect, because it is my brother Lush's argument—I have not heard it from the bar), it is this, that here is what would have been a plea of set-off before the Judicature Act. It is a plea of set-off still; but set-off supposes something against which you can set it off, and that is, if the subject-matter of the claim is such that you cannot set off anything, then there is no set-off. As I understand, it would apply to a case of this sort: Action for specific performance, to grant a lease, say; plea of set-off or counter-claim; the plaintiff owes me 100*l.* for rent and occupation of the premises in question, and I deny that he is entitled to have specific performance; if the plaintiff fail to make out his title to specific performance, that the defendant would fail also, and not be entitled to judgment on his set-off; but, at all events, if the plaintiff succeed, inasmuch as you cannot set off the damages against the right of specific performance, there is no balance to be struck between the two things; you cannot set them off one against the other, you cannot have a plea of set-off or counter-claim. If I understand the argument rightly, I cannot agree with it all. In the first place, in the 7th sub-section of the 24th section of the Judicature Act of 1873, it is said that the Court shall, "in respect of any and every legal or equitable claim properly brought forward by them respectively" (and by "them" is meant any of the parties thereto), deal with it so that, as far as possible, all matters in controversy between the parties shall be decided. To my mind, the Legislature has made no distinction whatever between counter-claim and set-off. A set-off is a counter-claim and a counter-claim is a set-off. Order XIX. rule 3 says, "A defendant in an action may 'set off or set up,' by way of counter-claim against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not; and such set-off or counter-claim shall have the same effect as a statement of claim in a cross action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claim." Therefore he may set it off or set it up. In my opinion those are equivalent expressions. To my mind that means this: If the defendant had a claim upon the plaintiff, no matter what the plaintiff's claim may be, the defendant may set up his claim, and get an appropriate judgment upon it. If the character of the two claims is such as you cannot set off one against the other—that is to say, deduct the plaintiff's from the defendant's, and give the defendant a judgment for the balance, or deduct the defendant's from the plaintiff's, and give the plaintiff a judgment for the balance—if that is the condition of things, nevertheless final judgment may be given on each side. So that in this case, as it seems to me, if this had been a promissory note which the defendant set up, the plaintiff under the statute is entitled to a judgment that he recover so much of the annuity as is due to him, and he may issue execution for it, and the defendant is entitled to his judgment for the promissory note for 50*l.* or 500*l.*, or whatever it may be. Now see how that is confirmed by what follows. I think the next rule which it is worth calling attention to is Order XIX. rule 8, which says, "Every statement of claim shall state specifically the relief which the plaintiff claims, either simply or in the alternative, and may also ask for general relief. And the same rule shall apply to any counter-claim made or relief claimed by the defendant." Now, is it possible that that means, for the purpose of a set-off you need not do so, and that it is only applicable to a counter-claim? It is manifest, to my mind, that rule 8 shews that those who formed rule 3 meant set-off and counter-claim to be the same, and not that a counter-claim was one thing in species or, perhaps I should say, in genus, and the set-off another. Then if you go a little further on you will find how indifferently these expressions are used. I find in Order XX. rule 2 it says, "Where any ground of defence arises after the defendant has delivered a statement of defence, or after the time limited for his doing so has expired, the defendant may,

and where any ground of defence to any set-off or counter-claim arises after reply," the plaintiff may do so and so. It is manifest, to my mind, that these two expressions are used indifferently, and that you may in all cases set off or counter-claim in respect of anything which would be the subject-matter of an action; and if a balance cannot be struck separate judgments must be given for the two parties; but if it can be, judgment should be given that the one or the other shall recover, according as the balance is in his favour. That seems to me to be the intention of the Legislature, and I cannot understand how we are to deal with this final part of rule 3 of Order XIX., unless upon that footing; that is to say, "Such set-off or counter-claim shall have the same effect as a statement of claim in a cross action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claim."

Now how we are to deal with that unless we interpret the rule as I have done I am at a loss to see; and I can see no reason why, as I said before, if the plaintiff's claim is for specific performance, and the defendant's counter-claim or cross claim is either for assault or battery or on a promissory note for 50*l.*, he should not be at liberty to set it off, subject to the power the Court has under that rule of setting aside any proceedings which they think it inexpedient to be tried together or set up or set off. I do not at all say in this case that the plaintiff might not try the question in an interlocutory way by applying for leave to strike out this counter-claim. I do not say that he was bound to do it at all, nor that he has not adopted the best mode of raising it, but he did not do it. There is the counter-claim, and we must deal with it. If we pronounce that it is not proved in point of fact, we shall state a thing which is not; if we should pronounce that it is proved true in point of fact, but is not sufficient in law, we shall again say a thing which is not. If it is proved to us that the subject-matter of the counter-claim is good, what can we do with it except to say that the defendant must have judgment in respect of it? I do not see any other way of dealing with it. It seems to me, therefore, that we should give the defendant judgment on his counter-claim; and certainly as far as the parties are concerned it is of as little matter as anything can possibly be. I entirely agree with my learned brother Lush's view as to the way we ought to deal with the costs, not only for the reasons which he has given, but for this also, that under the statute of George 3 (probably repealed by that general clause by which all costs now are in the discretion of the Court), if an action was brought upon a judgment the plaintiff, unless for special reasons, could recover no costs of his judgment. I cannot see any special reason why the defendant should get the costs here, so that, if he did get the judgment, which I think he is entitled to, it merely would come to this. It may be, and possibly is, some advantage to him if he were to get a judgment. I suppose he would issue execution in his own name, whereas, while the judgment is in the name of Hawkins, the plaintiff in the original action, he may have to issue execution in the name of that plaintiff; therefore, perhaps he would get some benefit; but certainly it is not my desire or intention that he should get any other, for the reasons which I have named. He practically fails in it: he fails in it as a defence; and succeeding in it as a mere action on his judgment, he is by analogy to the principle of the act of George 3, to which I have referred, entitled to no costs. At the same time I agree with what my learned brother Lush says, that he should not be left to pay the costs of an ineffectual attempt to set aside the judgment of the Court, such as was made on the last occasion when this case was before us. I mean the occasion of Mr. Chitty appearing here.

BAGGALLAY, L.J.—I have felt considerable difficulty in arriving at a conclusion as to how we ought to deal with the defendant's counter-claim in this action, and that difficulty certainly has been very materially increased by the circumstance that my colleagues differ in their views on the question.

Now, I think it is important to bear in mind the character of the two actions

which have been brought—the one in the Common Pleas and the other in the Chancery Division—and also the mode in which the two actions have been dealt with in the several Courts through which they have respectively passed up to the present time. In 1877 Mr. Gathercole availed himself of the provisions of the Incumbents' Resignation Act, and thereby became entitled to a pension of 450*l.* per annum. When the first half year's pension was not paid he commenced an action in the Common Pleas Division; and by way of set-off and counter-claim to that action, Mr. Smith set up a judgment debt for something exceeding 20,000*l.*, as to which or in respect of which judgment debt he alleged that upwards of 20,000*l.* was still remaining due to him, and the object of course was to set off the judgment debt so due to him as against the sum claimed by the plaintiff by way of pension. It does not appear very clearly how the matter was argued before Lord Coleridge, whether the point that the pension was an inalienable provision for Mr. Gathercole was raised and argued before him or not—probably not—for the first order made by Lord Coleridge was merely a reference to the official referee to ascertain how much of the alleged debt and interest had been paid under the sequestration, and that judgment with costs should be entered for the defendant if a sum remained unpaid larger than the plaintiff's claim. It was directing an account based on the footing of a set-off. After the official referee had made the report as to the amount which remained due, Lord Coleridge then gave judgment against the plaintiff for the sum of 27,897*l.*, being the balance which, treating the question as a question of set-off, remained due in respect of the two claims—the claim and the counter-claim or set-off—thereby availing himself of that provision of the 10th rule of the 22nd Order which says, "Where in any action a set-off or counter-claim is established as a defence against the plaintiff's claim, the Court may, if the balance is in favour of the defendant, give judgment for the defendant for such balance."

That is the judgment from which the present appeal is brought; but after that judgment had been obtained, or, at any rate, after the earlier judgment had been obtained, another action was commenced in the Chancery Division by the same plaintiff against the same defendant, to recover the second, third and fourth instalments of the pension, which had then become due; and then again the same set-off and counter-claim were put forward by the defendant. Before the Master of the Rolls the question of the inalienability of the pension was raised, and it was held that it was inalienable, and that there could be no set-off against it, and he dismissed the counter-claim. It does not from his judgment (if the judgment be alone regarded) appear very clearly whether he gave judgment for the plaintiff on the counter-claim because he did not consider such counter-claim could be maintained, having regard to the inalienability of the pension of the plaintiff; or whether he did it because there had been already a judgment on the same subject in the action tried before Lord Coleridge. I should myself, from reading his judgment, be disposed to think his judgment against the defendant on the counter-claim proceeded on the latter of those two grounds. However, the whole question came before the Lords Justices sitting at Lincoln's Inn, and an agreement was come to between the parties that they would accept the decision of that Court in respect of any matter which might arise in this division of the Appeal Court, which substantially was the same point as was argued before the other division of the Appeal Court.

Again, I have looked very carefully through the judgment of the Lords Justices, of whom my brother Lush was one, when the appeal was heard in the Court at Lincoln's Inn, and it does not appear to me that the argument raised there was other than an argument as to the question whether the provision for Mr. Gathercole could be aliened or not. It appears to have been an argument based on the construction of the Resignation Act of 1871, and the Lords Justices there, as the Master of the Rolls had previously done, decided, as I think

we ought here, that there was no power to alienate the provision thereby made, and that, in consequence of that, no set-off should be allowed, or no judgment in the nature of set-off in favour of the defendant could be allowed, which would have the effect of depriving the plaintiff of what he was entitled to otherwise in respect of his claim. But if that was all that was argued before the Court of Appeal at Lincoln's Inn, I should have been very much disposed to think it would have been open to us, if we had thought fit, to give judgment for the defendant upon his counter-claim, even though his right to a set-off was refused. I do not quite, as at present advised (it is immaterial to consider that with a view to the expression of a more definite opinion), feel satisfied that a set-off and counter-claim are intended by the rules to be the same thing. I am disposed to think that the two things are differently regarded in those rules, but it is unnecessary to refer to the rules that have reference to it for the purpose of shewing it. I am bound to say, in my opinion, under ordinary circumstances, a set-off might be rejected and a counter-claim established in respect of the same subject-matter; but what we have to deal with here is, whether there can be judgment on a counter-claim in favour of the defendant, when the same defendant has raised the selfsame question by way of set-off, and it has been decided that when raised by way of set-off no effect can be given to it. I am bound to say that upon an examination of the pleadings in this case it appears to me that the counter-claim and set-off, or whatever it is called in this case, are substantially the same: it is really a counter-claim by way of set-off, and in that capacity alone. But I do not rest my judgment entirely upon that, because I have the information which my brother Lush has given me that the judgment on the counter-claim was refused by the Court of Appeal at Lincoln's Inn; in which case the decision on the counter-claim would be binding on us by virtue of the agreement entered into by the parties, apart from the question that this division of the Court would be very loth indeed, except under very extreme circumstances, to come to a different conclusion on the selfsame question, based on the same facts, from the other branch of the Court. However, as I said before, it does not appear from the judgment at Lincoln's Inn that the question of the right of the defendant to obtain judgment on his counter-claim—though his claim in respect of set-off was decided—was very fully argued. But, at the same time, I find (and this supports the view expressed by my brother Lush) at the close of the judgment of Lord Justice James, he says this: "The case must be decided as if a mere stranger had got a judgment against him, and was attempting by means of it to get hold of the pension. It is plain the Act would not permit that; therefore in this case the defendant cannot by a counter-claim set off against the pension the debt due to himself from the plaintiff in respect of a judgment of which he is the assignee. He cannot be allowed to do indirectly what he cannot do directly." (10). There again I am bound to admit that that expression which I have just now read is capable of two meanings, according to whether you consider the counter-claim and set-off are merely interchangeable terms; but in that view of the case, saying it could not be permitted by a counter-claim would be simply equal to saying it could not be permitted by set-off. But holding as I do that the counter-claim and set-off are not necessarily convertible terms—although perhaps they may be in this particular case—it appears to me that the decision of the Court of Appeal was a decision upon the same question that we have had raised before us.

For these reasons I think the judgment of Lord Coleridge should be reversed.

Appeal allowed. Judgment for the plaintiff. Defendant's counter-claim dismissed.

Solicitors—Venn & Woodcock, for plaintiff Parkers, for defendant.

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(10) 29 W.R. 435.

[IN THE HOUSE OF LORDS.]

1879.
Nov. 13, 14, 17.
1880.
Nov. 19, 22, 23.
1881.
March 17.
June 14.

THE COMMISSIONERS OF HER MAJESTY'S WORKS AND PUBLIC BUILDINGS *v.* ANGUS AND COMPANY. DALTON *v.* ANGUS AND COMPANY.

Lateral Support to Buildings—Ancient Messuage — Prescription — Alterations of Structure causing Increase of Burden—Open Enjoyment—Liability of Principal for Damage caused by Contractor's Negligence.

Where the owner of land builds a house on the extremity of his land, the house acquires at the end of twenty years a right to the lateral support it derives from the adjacent soil belonging to another proprietor.

Per LORD SELBORNE, L.C.: *The case falls within section* 2 *of the Prescription Act* (2 *&* 3 *Will.* 4. *c.* 71). *The dictum of* ERLE, C.J., *in* Webb *v.* Bird, *that that section is confined to rights of water, disapproved.*

Per LORD PENZANCE: "*This right to the lateral support of the soil for an ancient house stands upon the positive authority of a series of cases, and a long acceptance in the Courts of law; and the ratification of it by the House of Lords ought not to be considered as the adoption of principles which might have a wide application in analogous cases.*"

If, owing to the peculiar construction of a house, a burden is imposed on the adjoining land greater than would be imposed by a house built in the ordinary way, it is not necessary to prove that the owner of the adjoining land had notice of the peculiar construction. In the absence of fraudulent concealment on the part of the owner of the house his enjoyment of the lateral support will be deemed to be open.

If, by reason of excavations in the adjacent land, a house entitled to support from such land suffers injury, the owner of the land is not relieved from his liability for damages by the fact that he has employed a contractor to make the excavations, and bound him by contract to take all necessary precautions to avoid injury to the house.

This was an appeal from a decision of the Court of Appeal, reversing one of the Queen's Bench Division. The case is reported in the Courts below—47 Law J. Rep. Q.B. 163; 48 ibid. 225; Law Rep. 3 Q.B. D. 85; ibid. 4 Q.B. D. 162.

The plaintiffs, Messrs. Angus, brought the action for damage done to their house by excavations on the adjoining land belonging to the commissioners.

The plaintiffs' house had stood for considerably more than twenty years; and at some time more than twenty, but less than forty, years before the cause of action arose they had altered the construction of the house in the following manner: The internal walls were removed, a heavy chimney stack was built on the side adjoining the land of the commissioners, and the upper floors of the house were supported by an iron girder fixed in the chimney stack. The plaintiffs had no wall of their own on that side, but their house was built up to the wall of a house belonging to the commissioners.

The commissioners employed Messrs. Dalton to pull down and rebuild their house, and Messrs. Dalton employed a sub-contractor, who, by removing the soil from the foundations, let down the plaintiffs' house.

The case was tried at Newcastle before Lush, J., who ruled that the defendants respectively were liable for the acts of the contractors whom they employed, and that a building which has stood for twenty years is entitled to the support of the adjacent soil, whether or not the owner of the adjacent soil had notice of the burden imposed thereon. He accordingly directed a verdict for the plaintiffs without taking a finding on the question whether the burden caused by the alterations in the plaintiffs' house was such as the commissioners and their predecessors in title could be reasonably supposed to be aware of.

The plaintiffs moved in the Queen's Bench Division for judgment, but that Court (Cockburn, C.J., and Mellor, J., *dissentiente* Lush, J.) held that no right to support was acquired by mere user for twenty years, there being no grant given or to be implied. Judgment was given for the defendants.

The Court of Appeal reversed this

judgment, but directed a new trial to obtain a finding on the point whether the defendants could be taken to have notice of the additional burden imposed by the alterations in the plaintiffs' house.

The defendants appealed.

Sir J. Holker (*Shield* and *A. E. Hardy* with him) appeared for the Commissioners of Works.

The Solicitor-General (*Sir F. Herschell*) (*Wheeler* with him), for Messrs. Dalton.

Littler and *Gainsford Bruce* (*Ridley* with them), for the respondents.

The case was partly argued in November, 1879, and was then adjourned for the attendance of the Judges, in whose presence it was again argued in November, 1880. The arguments used and cases cited fully appear in the opinions of the Judges and in the judgment of the Lords.

Upon the motion of the Lord Chancellor (Lord Selborne), the following questions were put to the Judges:—

1. Has the owner of an ancient building a right of action against the owner of lands adjoining if he disturbs his land so as to take away the lateral support previously afforded by that land?

2. Is the period during which the plaintiff's house has stood, under the circumstances stated in the case, sufficient to give him the same right as if the house was ancient?

3. If the acts done by the defendants would have caused no damage to the plaintiff's building as it stood before the alterations made in 1849, is it necessary to prove that the defendants or their predecessors in title had knowledge or notice of those alterations in order to make the damage done by their act in removing the lateral support, after the lapse of twenty-seven years, an actionable wrong?

4. If so, is it sufficient to prove knowledge or notice of the fact that such alterations were made, or is it necessary also to prove knowledge of their effect, in causing the buildings so altered to require a degree of lateral support from the adjoining land, which was not before needful?

5. Was the course taken by the learned Judge at the trial, of directing a verdict for the plaintiff, correct, or ought he to have left any question to the jury?

The Judges, after taking time to consider, delivered the following opinions:—

POLLOCK, B.—The first question that your Lordships have put to the Judges is as follows: "Has the owner of an ancient building a right of action against the owner of land adjoining if he disturbs his land so as to take away the lateral support previously afforded by that land?"

In answering this question, it is necessary to bear in mind that it is not affected by any of the modern statutes whereby a prescriptive right can be gained by effluxion of time or by enjoyment; nor do I think that any useful arguments can be adduced by way of analogy from such statutes. It appears to me, however, that by a long series of decisions, and by the opinions expressed by learned Judges during a period extending over very many years, the common law affecting this question must be taken to have been settled in favour of the right.

The right to lateral support of soil by adjoining soil is a natural right which exists wherever the lands of adjoining owners are in contact. The grounds upon which it is based are fully explained in the cases of *Humphries* v. *Brogden* (1) and *Rowbotham* v. *Wilson* (2). Where the soil is encumbered by buildings it is obvious that a different question arises, although the character of the rights when acquired is in each case the same. I will now proceed to notice those cases and *dicta* which in my judgment establish the conclusion at which I have arrived.

The earliest case which has any bearing upon the question is that of *Slingsby* v. *Barnard* (3). The Court gave judgment in favour of the right of support, although the house in respect of which it was claimed was not an ancient house, but had been only recently built. This, although not referred to, must be considered to have been overruled by the case

(1) 12 Q.B. Rep. 739; 20 Law J. Rep. Q.B. 10.

(2) 6 E. & B. 593; 8 ibid. 123; 8 H.L. Cas. 348; 25 Law J. Rep. Q.B. 362; 27 ibid. 61; 30 ibid. 49.

(3) 1 Rolle, 430.

h followed it of *Wilde* v. *Minsterley* where it is said, "If A, seised in fee of hold land next adjoining land of B, a new house on his copyhold land, part of the house is erected on the nes of his land next adjoining the of B, if B afterwards digs his land to the foundation of the house of A, not touching the land of A, whereby oundation of the house and the house fall into the pit, still no action lies e suit of A against B, because this the fault of A himself that he built ouse so near to the land of B; for ould not by his act hinder B from ing the most profitable use of B's land." The cases are not of much as establishing any principle, but are not unimportant as shewing that ttention of the Courts was called to uestion at this early date, and as by affecting the value of more recent ions.

ulmer v. *Fleshees* (5) was an action he obstruction of the plaintiff's lights; he Judges in their first resolution say t if a man being seised of land leases feet to A to build a house thereon, forty feet to B for a like purpose, one of them builds a house and then other digs a cellar in his land which es the wall of the first adjoining house all, no action will lie, for everyone deal with his own to his best advage, but *semble*, that it would be rwise if the wall or house were an ent one."

Stansell v. *Jollard* (1803) (6), Lord borough directed the jury that here a man has built at the extremity is land, and has enjoyed his building e twenty years, by analogy to the as to lights, &c., he has acquired a t to support, or, as it were, of leaning s neighbour's soil, so that his neighcannot dig so near as to remove support; but it is otherwise of a e newly built." This case is referred *Selwyn's Nisi Prius* (9th ed.), upon authority of Mr. Justice Lawrence, by Mr. Smith in his Leading Cases in notes to *Ashby* v. *White*, and by Mr. Gale in his work on Easements, as from a manuscript note.

In *Hide* v. *Thornborough* (1846) (7), Baron Parke cited *Stansell* v. *Jollard* (6) as law, and ruled that if there were twenty years enjoyment by the plaintiff of the support of the house from the defendant's land, and it was known that the defendant's land supported the plaintiff's house, that is sufficient to give him a right of support. Both these cases were cited as authorities by Lord Campbell in *Humphries* v. *Brogden* (1).

In *Wyatt* v. *Harrison* (1832) (8) the plaintiff who claimed a right of support to his house was held to fail, because it was not an ancient house; but Lord Tenterden in giving judgment says, "Whatever the law might be, if the damage complained of were in respect of an ancient messuage possessed by the plaintiff at the extremity of his own land, which circumstance of antiquity might imply the consent of the adjoining proprietor, at a former time, to the erection of a building in that situation, it is enough to say in this case that the building is not alleged to be ancient, but may, as far as appears from the declaration, have been recently erected, and if so, then, according to the authorities, the plaintiff is not entitled to recover."

Partridge v. *Scott* (1838) (9) was a case in which the plaintiff claimed a right to support for two houses. As to one of these, it was not an ancient house, and the Court therefore decided against the right claimed. As to the other, it had been built by the plaintiff on ground which had been so excavated as not to afford sufficient support to the house; and therefore, as was said by the Court, the plaintiff had caused the injury to himself without any fault on the part of the defendants. The judgment, however, of the Court, which was delivered after consideration, is of importance, because, as is noticed by Lord Justice Thesiger in his judgment below, it affirmed in substance two propositions: first, that the second house, being an ancient house, would, but for the excavation of the soil upon which it stood by the plaintiff him-

2 Rolle's Abridgment, "Trespass," p. 564. Sid. 167; 1 Lev. 122; 1 Keb. 625; Com. 'Action on the case for Nuisance," C. 1 Selw. N.P. 457 (ed. 11).

(7) 2 Car. & K. 250.
(8) 3 B. & Ad. 871; 1 Law J. Rep. K.B. 237.
(9) 3 Mee. & W. 220; 7 Law J. Rep. Exch. 101.

self, have acquired an easement of support by virtue of an implied grant; secondly, that, apart from the Prescription Act, such a grant might have been inferred from an enjoyment of the house, although standing upon the excavated soil, for twenty years after the defendants might have been or were fully aware of the facts. The judgment, therefore, seems to assume that, in the case of a house standing upon soil in its ordinary condition, the servient owner has sufficient notice of the fact of support being enjoyed to raise the presumption of acquiescence, and the consequent implication of a grant by him, when the enjoyment has continued for twenty years.

In *Humphries* v. *Brogden* (1850) (1) the question of disputed right was between the occupier of land unbuilt on and the occupier of subjacent minerals; but in the considered judgment of the Court, delivered by Lord Campbell, he reviews the authorities which relate to the right of support gained by houses, and referring to the cases of *Stansell* v. *Jollard* (6) and *Hide* v. *Thornborough* (7) distinctly lays it down that, "where a house has been supported more than twenty years by land belonging to another proprietor, with his knowledge, and he digs near the foundation of the house, whereby it falls, he is liable to an action at the suit of the owner of the house."

In *Gayford* v. *Nicholls* (1854) (10), the plaintiff's houses being modern, they had gained no right of support, but in giving judgment Baron Parke assumes that had they stood for twenty years it would have been otherwise, for he says, "This is not a case in which the plaintiff has the right of the support of the defendant's soil, either by virtue of a twenty years occupation, or by reason of a presumed grant, or by a presumed reservation, where both houses were originally in the possession of the same owner, for, unless a right of support by some such means can be established, the owner of the soil has no right of action against his neighbour who causes the damage by the proper exercise of his own right."

In *Rowbotham* v. *Wilson* (1857) (2) the Queen's Bench, Exchequer Chamber, and your Lordships' House were all of opinion that the question of general right was excluded by reason of both plaintiff and defendant claiming under predecessors, whose rights were governed by the express terms of an award; but the questions before the Court involved the right to the support of houses by adjacent land, and, in dealing with this, some of the Judges seem to have considered the existence of such a right after a house has stood for twenty years as settled law. I shall have occasion to refer to what they say more fully when considering the mode in which such a right is acquired.

In *Rogers* v. *Taylor* (1858) (11) a right similar to that claimed by the plaintiff in the present case was alleged in the declaration and denied by the plea. At the trial the late Lord Chief Justice Cockburn told the jury that he thought at the end of twenty years after the house had been built, the plaintiff would have acquired a right to support, unless in the meantime something had been done to deprive him of it, and that the jury must presume that the additional burden was put upon the plaintiff's land by the assent of the adjoining owner, and a grant by such owner of a right of support. He left it to the jury to say whether the plaintiff had enjoyed the support of the foundation of his house for twenty years. The jury found that the plaintiff had enjoyed the right of support for his house on the foundations on which it stood without interruption for twenty years. This finding was treated as a verdict for the plaintiff and both the ruling and the verdict were upheld by the Court of Exchequer upon the ground that the plaintiff's house had stood for more than twenty years.

The most recent and the most important of the decided cases bearing upon the subject is undoubtedly that of *Bonomi* v. *Backhouse* (1858) (12), which came before the Court of Queen's Bench upon the argument of a Special Case, whereby it appeared that certain messuages and buildings in the declaration mentioned

(10) 9 Exch. Rep 702; 23 Law J. Rep. Exch. 205.

(11) 2 Hurl. & N. 828; 27 Law J. Rep. Exch. 203.

(12) E., B. & E. 622; 9 H.L. Cas. 503; 28 Law J. Rep. Q.B. 378; 34 ibid. 181.

had been in existence for more than forty years without sustaining injury, that they were firmly supported by mines, earth, and soil underground, contiguous and near to and under the land of the plaintiff, and that the defendant, who had become the occupier of coal mines under and immediately adjoining the plaintiff's buildings, had so worked the coal as to remove pillars under land distant about 280 yards from the plaintiff's property, whereby the roof of the defendant's mine fell down and subsided so as to produce a thrust, the effect of which gradually extended laterally to the land upon which the plaintiff's houses were built, and whereby they were ultimately let down and injured. The main question, which was decided by the Exchequer Chamber and by your Lordships' House in favour of the plaintiff, was, that with reference to the Statute of Limitations the plaintiff's right of action accrued not when the coal was extracted by the defendant from underneath his own land, but when the plaintiff's buildings were first injured. The plaintiff's right of support for his buildings was, however, clearly raised by the case as stated, and was considered and dealt with by the Judges who heard the arguments, and also by some of the noble and learned Lords before whom the appeal came in this House. Mr. Justice Wightman, in the Court of Queen's Bench, says, "Upon consideration of all the cases, it appears to me that the cause of action in such a case as the present is founded upon a breach of duty on the part of the defendant by so using his own property as to injure that of his neighbour, and not upon any right of the plaintiffs to an easement in, upon or over the land of their neighbours. Where ancient buildings are standing upon the plaintiff's land, the defendant must take care not to use his own land in such a manner as to injure them. The language used in some of the cases is not very clear, but it appears to me that the cases of *Wyatt* v. *Harrison* (8), *Chadwick* v. *Trower* (13), *Partridge* v. *Scott* (9), *Roberts* v. *Read* (14), and the older cases of *Slingsby* v. *Barnard* (3), *William Aldred's Case* (15); and the opinions expressed by the Judges in giving their judgment in the case of *Rowbotham* v. *Wilson* (2) in the Exchequer Chamber at the sittings after last Trinity term, are authorities to shew that the right claimed by the plaintiffs is not a right founded upon the presumption of a grant or easement, but is the common right of an owner of land not to be injured in his property by the way in which the defendant uses his, according to the two maxims of the law, 'Prohibetur ne quis faciat in suo quod nocere possit alieno,' and 'Sic utere tuo ut alienum non lædas.'"

Mr. Justice Willes, in delivering the judgment of the Court of Exchequer Chamber, said, "The right to support of land, and the right to support of buildings stand upon different footings as to the mode of acquiring them, the former being *prima facie* a right of property analogous to the flow of a natural river or of air—*Rowbotham* v. *Wilson* (2); though there may be cases in which it would be sustained as matter of grant—see *The Caledonian Railway Company* v. *Sprot* (16)—whilst the latter must be founded upon prescription or grant, express or implied, but the character of the rights, when acquired, is in each case the same."

In the House of Lords the plaintiff's right to recover, subject to the Statute of Limitations, seems to have been taken for granted; and that the interference with the house, as well as with the land, was present to the minds of the noble and learned Lords who were present, is obvious from what fell from them. The Lord Chancellor (Lord Westbury) in giving judgment says, "I think it is abundantly clear, both upon principle and upon authority, that when the enjoyment of the house is interfered with by the actual occurrence of the mischief, the cause of action then arises." Lord Cranworth also said, "It has been supposed that the right of the party whose land is interfered with is a right to what is called the pillars or the support. In

(13) 6 Bing. N.C. 1; in Exch. Chamber, reversing *Trower* v. *Chadwick*. 3 ibid. 334.
(14) 16 East, 215.
(15) 9 Rep. 57*b*.
(16) 2 Macq. Sc. App. 449.

truth his right is a right to the ordinary enjoyment of his land." And Lord Wensleydale adds, "I think it is perfectly clear that the right in this case was not in the nature of an easement, but that the right was to the enjoyment of his own property, and that the obligation was cast upon the owner of the neighbouring property not to interrupt that enjoyment."

If these cases and *dicta* are dealt with individually, and subjected to a close criticism, many of them are no doubt open to objections such as that in some the facts are not so fully stated as might now be desired; in others, the exact character of the legal right said to be acquired and the mode of its acquirement are not fully or accurately dealt with, nor is the right always based upon the same grounds. But in considering these objections it must be remembered that the difficulties presented are essential to the gradual growth and development of all our unwritten law, of which this is only an instance, and, further, that the enjoyment of every right which is established, not by statute, but by a long course of judicial decisions and *dicta*, would be open to attack if such a remark were allowed unduly to prevail. The substance and practical effect, therefore, of all that has gone before must be kept in view, especially in a case in which it is obvious that, having reference to the subject-matter with which the Courts were dealing, and to the rights of the parties affected, the law laid down from time to time must have practically influenced the position of all who were interested in buying, selling, leasing or building upon land within or near to towns and elsewhere, wherever the land was available for building purposes, all of whom might well act, and, in many cases, must have acted upon the supposition that they had acquired rights in accordance with the law so expounded.

Two points relating to this part of the cases were strongly urged on behalf of the defendants: First, it was said that the right which is claimed in the present case for the support of a house had never been treated as a natural right, such as exists where soil unbuilt on is supported by the soil of an adjoining owner; and, secondly, that failing any natural right, there are only three modes known to the law whereby such a right can be created, namely, by express grant, by prescription, evidenced by acquiescence, or by an implied grant, the latter of which has commonly been presumed in those cases in which the right claimed has been long enjoyed. These two questions may properly be dealt with together, because, in truth, the considerations which affect the nature of the right, and the mode by which it may be acquired in law are necessarily interwoven; and here it may be well to advert to the language used by Mr. Justice Lush in his ruling at the trial, where he does not lay down that the right claimed by the plaintiff is a natural right, as in the case where soil is supported by soil, but he uses this language: "I think it has become absolute law that, where a building has stood for twenty years supported by adjacent soil, it has acquired a right to the support of the soil." On behalf of the plaintiff it was argued before your Lordships that this must be taken as a rule of law not resting upon fiction or upon implied grant, but as a right of property, namely, an enjoyment of support which, after twenty years, becomes indefeasible in the same manner as the occupier of land may, by bare possession for a sufficient period of time, acquire a good title; and, further, that the right which is acquired by the plaintiff as attaching to his house is a right which restricts his neighbour, not from using or moving his own land, but from so using or moving it as to injure the plaintiff's house.

The proposition thus asserted appears to me to put the right of the plaintiff upon a reasonable foundation, and if affirmed by your Lordships it would lay down an intelligible rule of law freed from difficulties which obviously present themselves whenever, with a view consistently to uphold what, after all, is merely technical, it has been endeavoured to rest the right in question upon a supposed actual grant which has been lost, or upon the production of evidence, great or small in degree, tending to shew a supposed *de facto* acquiescence in the building of the house by the neighbour whose land sup-

ports it, either of which involves a supposition so improbable as to make it repugnant to good sense, and therefore one upon which it is most undesirable that Judges and juries should act.

There is, however, authority in support of the view which I have taken. Not only is it said by Mr. Justice Willes in *Bonomi* v. *Backhouse* (12) that the character of the right of the owner of a house to support when acquired is the same as the right of the owner of soil unbuilt upon, but in *Humphries* v. *Brogden* (1), Lord Campbell, in delivering the judgment of the Court, says, "Although there may be some difficulty in discovering whence the grant of the easement in respect of the house is to be presumed, as the owner of the adjoining land cannot prevent its being built, and may not be able to disturb the enjoyment of it without the most serious loss or inconvenience to himself, the law favours the preservation of enjoyments acquired by the labour of one man, and acquiesced in by another who has the power to interrupt them, and as, on the supposition of a grant, the right to light may be gained from not erecting a wall to obstruct it, the right to support for a new building erected near the extremity of the owner's land may be explained on the same principle." Baron Parke also, in the passage which I have already cited from his judgment in *Gayford* v. *Nicholls* (10), treats the right of support gained by a house which has been built for twenty years as depending upon something distinct from such a right gained by a presumed grant or reservation. So also in *Rowbotham* v. *Wilson* (2), Baron Bramwell, during the argument, asserts that after a house has stood for twenty years it acquires a right to support from the adjoining land; upon which Serjeant Hayes, *arguendo*, says, "That is an incident which the law then annexes, it is sometimes said to be founded on a presumed grant, but that after all is a mere fiction;" and Mr. Justice Cresswell adds: "I always thought that would turn out to be a matter of positive law, like the light acquired by constructing a window."

In the same case Mr. Baron Watson, commencing by dealing with the right to support of soil by soil, says, "If, by digging, the adjoining land is let down, the right to compensation is on the ground that the adjoining owner could not use his own land to the prejudice of his neighbour, not on the ground of the disturbance of an easement (2 Rol. Abr. 564, "Trespass" (I.), pl. 1). The course of precedents shews this, for it is not necessary to allege, in such case, that the plaintiff had the right to support (*Earl of Lonsdale* v. *Littledale* (17), and the declaration and judgment in *Humphries* v. *Brogden* (1)), with this distinction, that the right to support to a building upon the land is acquired by twenty years existence, whereas the land is entitled to support in its original state." The observations of Mr. Baron Bramwell in his judgment, if they are to be considered as referring to the plaintiff's houses as well as to his land, are to the like effect. In confirmation of this view I would refer also to those portions of the judgments in *Bonomi* v. *Backhouse* (12) which I have already cited.

If I am right in supposing that the proposition which I have asserted in answer to your Lordships' question is established by legal decisions, it would not be necessary at this period of time to scan very closely the reasons upon which those decisions were based; but when the subject-matter is looked at from a point of view which considers the rights of the community as well as those of individual owners, the grounds in favour of allowing a right of support to be acquired by building appear to me to preponderate over those that can be urged to the contrary. It was said by Mr. Justice Willes in *Bonomi* v. *Backhouse* (12), "The law favours the exercise of dominion by everyone upon his own land and his using it for the most beneficial purpose to himself." In *Rogers* v. *Taylor* (11), to which I have already referred, Mr. Baron Martin, in the course of the argument, asks, "Has not a man reasonably using land a right to support for it?" In my judgment, such a right may and ought to attach to the ownership of all land, it being no more than

(17) 2 H. Black. 267.

the right of the owner to adapt his land to one of the common and usual requirements of mankind.

In the arguments of counsel and also in the judgments in the Courts below, the cases which deal with the right gained by prescription for ancient lights were referred to and fully discussed. I forbear to follow these; partly because all that can be said with respect to them appears to have been thoroughly exhausted, and also for this further reason, most of all cases which relate to the doctrine of lights were decided upon the Prescription Acts; and even where this is not so, the right which is gained by the owner of a house in respect to lights is of so peculiar a character that it does not appear to me to afford much useful analogy when dealing with the right to support. Two observations, however, with regard to the case of lights have some bearing upon the present question. It is said that no right can ever be gained except where the owner of the servient tenement could prevent the act done by the owner of the dominant tenement, whereby the right is alleged to have been acquired, or could have brought an action in respect of it, and that it is the forbearing to interfere with the exercise of the right or to bring an action in respect of it which leads to the inference of acquiescence, whence an implied grant may be presumed. In cases of affirmative easements, such as the user of a footpath, this is undoubtedly true. If, however, it is attempted to apply the same rule to the case of lights where the right acquired is of a negative character, considerable difficulty arises, because, although in many cases the owner of a house or land may prevent his neighbour acquiring a right to lights by blocking them without putting himself to any great expense or inconvenience, there are other cases, such as where the windows are at a great height from the ground, in which the expense or inconvenience of blocking windows would practically be as great or almost as great as would attend upon the excavating of land in such a manner as to prevent a neighbour who builds acquiring a right of support; and looked at from this point of view such analogy as does exist between the two cases appears to me rather to favour the view of the plaintiff when he asserts that such a right as he claims may be obtained without any actual acquiescence by the defendant; and it is quite clear that in case of lights the right is not the less gained by the owner of the dominant tenement because the owner of the servient tenement has forborne any right of action against him, for although the owner of the servient tenement may in some cases prevent the growth of the right by blocking the windows, in no case could he bring an action against his neighbour because they had been opened.

The second observation which points to the same conclusion is, that the mode of acquiring a right to light cannot be properly compared to the mode by which a right of way is acquired. The latter can from its very nature only be acquired by user, accompanied with the consent of the owner of the land over which the right of way is claimed. The former is acquired by mere occupancy. This was pointed out by Mr. Justice Littledale in his judgment in *Moor* v. *Rawson* (18), and the distinction which he draws has been frequently acquiesced in, and was mentioned with approval by Mr. Justice Willes in *Bonomi* v. *Backhouse* (12), and by Mr. Justice Wightman in *Webb* v. *Bird* (19).

If but little assistance can be gained by referring to the rights which the law has affirmed in favour of ancient lights, still less in my opinion is afforded by reference to the cases cited by counsel for the defendant of *Webb* v. *Bird* (19), where the owner of a windmill which had been erected more than twenty years claimed the right of the passage of air to it uninterrupted by his neighbours; and *Bryant* v. *Lefever* (20), in which the owner of a chimney complained of the owner of adjoining land for rebuilding a wall of greater height than it had been for twenty years, and

(18) 3 B. & C. 339.

(19) 10 Com. B. Rep. N.S. 268; 13 ibid. 841; 30 Law J. Rep. C.P. 384; 31 ibid. 335.

(20) 48 Law J. Rep. C.P. 330; Law Rep. 4 C.P. D. 172.

thereby causing him annoyance by smoke. There is really no parallel between those cases and that before your Lordships, and the view I take of the present case is in no way affected by them. I notice them only to shew that they have not been overlooked.

The second question which your Lordships have put is this: "Is the period during which the plaintiff's house has stood, under the circumstances stated in the case, sufficient to give him the same right as if the house was ancient?"

The period during which the plaintiff's house has stood will be found in paragraph 4 of the respondent's case, where the effect of the evidence at the trial is given as follows: "It was proved that both the factory of the plaintiffs, and the house pulled down by the defendants, were ancient buildings, both of which had been formerly, and for a period long exceeding twenty years before 1849, used as dwelling-houses, that there was no party wall between them, but that they were divided by a wall which belonged to the house pulled down by the defendants, nor was there any cellar under the latter; that since the year 1849 there had been no alteration in the plaintiff's premises, but that in that year their predecessors openly, notoriously and without concealment converted the same into a coach factory, in which their business has been since that time so openly carried on." Under these circumstances, I am of opinion that the period during which the plaintiff's house had stood at the date of the acts done by the defendants which are complained of by the plaintiff, was sufficient to give him the same right as if the house was ancient.

The law upon this point cannot be more clearly summarised than it was by Mr. Justice Lush in his judgment in the Court below, where, starting with a period down to James 1, he says, "Theoretically, an ancient house at this period was a house which had existed from the time of Richard 1. Practically, it was a house which had been erected before the time of living memory, and the origin of which could not be proved. But it afterwards came to be settled law that an uninterrupted possession of light, water or any other easement for twenty years afforded a ground for presuming a right by grant, covenant or otherwise, according to the nature of the easements; and, if there was nothing to rebut the presumption, a jury might and should be directed to act upon it." This view is amply borne out by the note of Serjeant Williams in 2 *Saunders*, p. 174, and the cases there cited, and by the other authorities which are alluded to by Mr. Justice Lush in his judgment below.

The presumption arising from twenty years enjoyment cannot, no doubt, be treated as conclusive—that is, as a *presumptio juris et de jure*, which is not to be rebutted by evidence; it is conclusive only when the evidence of enjoyment is uncontradicted and unexplained. Thus it might be shewn that no grant could have been legally made by the owner of the servient tenement, as was the case in *Barker* v. *Richardson* (21), where lights had been enjoyed for more than twenty years over land which during part of that time had been glebe land. It was held there that a grant could not be presumed, inasmuch as the rector, being only tenant-for-life, was incompetent to grant such an easement. In the present case, however, no evidence appears to have been offered on the part of the defendants to contradict or explain the user by the plaintiff which ought to have been submitted to the jury. For the reasons which I have already given, evidence which merely shewed that there had been no actual acquiescence by the defendants would have been irrelevant.

The third question submitted by your Lordships is as follows: "If the acts done by the defendants would have caused no damage to the plaintiff's building as it stood before the alterations made in 1849, is it necessary to prove that the defendants or their predecessors in title had knowledge or notice of those alterations in order to make the damage done by their act in removing the lateral support, after the lapse of twenty-seven years, an actionable wrong?"

In answer to this question, I say that it is not necessary to prove that the

(21) 4 B. & Ald. 579.

defendants or their predecessors in title had knowledge or notice of the alterations in order to make the injury to the plaintiff's building by removing the lateral support after the lapse of twenty-seven years an actionable wrong. The alterations made by the plaintiff in 1849 amounted merely to the conversion of that which had been a dwelling-house into a coach factory, and no evidence was adduced to shew that these alterations had been done otherwise than openly, and in the usual manner of building applicable to such an object. It appears to me, therefore, that what was done by the plaintiff was that which he might lawfully do for the purpose of improving his premises and using them in the manner most advantageous to his business; and that, therefore, the relations between himself and the defendants in respect to such alterations and any additional weight or further *onus* upon the defendants occasioned by them, are to be looked at in precisely the same light as if the building of the plaintiff had been originally constructed as a coach factory, and not as a dwelling-house; or as if in 1849 the plaintiff had pulled down his dwelling-house and built a coach factory on its site; or as if, there having been no dwelling-house or building until 1849, the plaintiff had built for the first time a coach factory in the form in which it stood after the alterations that were made by him at that date. Under these circumstances it becomes unnecessary for me to deal with the arguments which were addressed to your Lordships' House at the bar, arising out of the distinction which was taken between the original dwelling-house and the alterations that were made in 1849.

The mode in which I have answered the third question renders it unnecessary for me to answer the fourth question.

In conclusion, I answer the fifth question submitted to us by your Lordships by saying that the course taken by the learned Judge at the trial of directing a verdict for the plaintiff was correct, and that he ought not to have left any question to the jury. Had any question been raised by the defendants at the trial with regard to the facts which were given in evidence, it would have been the duty of the learned Judge to have taken the opinion of the jury upon these facts, but no such question was raised, and the facts were substantially admitted by both sides. Under these circumstances the only matter which remained for decision was, what was the proper legal result of those facts; and, assuming the view which I have taken to be right, the course adopted by the learned Judge of directing a verdict for the plaintiff was correct and in accordance with what has usually been done by Judges on similar occasions, with this exception, that, instead of resorting to fiction and directing the jury that they ought to find a lost grant of support, as a matter of fact, Mr. Justice Lush told them that the plaintiffs were entitled to the verdict as a matter of law, and directed them to find accordingly.

FIELD, J.—I answer your Lordships' first question in the affirmative.

I think that the owner of a building who has uninterruptedly enjoyed the support of it by the adjacent land of his neighbour for the period required by law to make it an "ancient" building has acquired a right to the degree of support thus afforded, and that its absolute withdrawal so as to cause injury to the building is an actionable wrong. I also think that this right rests upon uninterrupted enjoyment and does not require for its foundation any actual or implied grant or covenant by the adjoining owner. The right seems to me to arise thus: So soon as the surface of the land becomes divided, either vertically or horizontally, into separate and exclusive tenements, one of the first and clearest principles applicable to each separate holding is that the owner has the right given to him by implication of law to use his property as best he likes, provided that he does not by such user injure the rights of his neighbour. If neither he nor his neighbour have built on or dealt with their respective portions, and the latter are in their natural state and condition, it is clear that each owner has as against the other a right to have his soil supported by the soil of his neighbour, whe-

ther adjacent or below, and any act done by one which destroys that support so that the land of the other falls is an actionable wrong, and that is so although the act complained of is not done by him maliciously, but simply in the exercise of his own right to use his own property. Although, therefore, either of them may dig in his own soil as deep and as near to his own boundary or to the surface as he chooses, this right is subject to one limitation from the very first, namely, that he cannot dig so deep and so near as to cause his neighbour's land to sink unless he substitute some other sufficient support — *Wilde* v. *Minsterley* (4), *Humphries* v. *Brogden* (1), *Rowbotham* v. *Wilson* (2). This limitation, however, upon his right is accompanied by a like limitation of his neighbour's right, so that the advantage and burden are mutual in quality, although they may vary in degree.

It is clear that these rights and burdens come into existence by implication of law at the very moment of severance. They are unquestionably known as "natural rights," and require no age to ripen them.

The same origin is, I think, to be ascribed to rights and burdens of a similar character existing in respect of flowing water. It happens that land allotted in severalty is bounded by a natural river, and when that is the case the implied terms are imposed upon the owner of that land and upon all other owners of other lands bounded by the same stream, that each one is entitled to have the flow continue in its natural course and channel for the natural use and benefit of all, and is subject to the like burden of not interfering with that flow to the prejudice of any.

Besides and in addition to these rights the owner of the land in its natural state has also of course the absolutely necessary enjoyment of the free passage of light and air in its natural state over and from his neighbour's land to and over his own. But unlike the right of support of soil by soil and of the flow of water in a defined course, the owner in the case of light and air has originally no right of enjoyment which can prevail against his neighbour's right to make any use of his land he may like, although such use will interfere with the natural transmission of the light and air.

But if the owner of the land wishes to erect a building with openings for the admission of light and air he may proceed to do so by building (as he has a right to do) his wall with the windows in it close to the very verge of his own land, so that it owes of necessity its support in part to the neighbour's adjacent soil, and the windows receive their light and air directly from it. He has thus taken into his own enjoyment and, as it were, into his own occupation the soil of his neighbour, and also the light and air transmitted to him by his neighbour by a confinement and enjoyment of it in a particular definite channel.

But although his doing this is a perfectly lawful act requiring no grant, licence or assent from the adjoining owner, it does not at first confer any right as against his neighbour, either of support of the wall or of transmission of light or air, or impose any burden in those respects on his neighbour. The latter may at first and until the lapse of a definite period of enjoyment use his own soil by digging or otherwise, or build a wall up to the very edge of his own ground, notwithstanding that by so doing respectively he causes his neighbour's building to fall or obstruct the passage of the light and air through the window. Neither building nor window has yet become "ancient." For these propositions I refer to *Palmer* v. *Fleshees* (5), *Wyatt* v. *Harrison* (8), *Partridge* v. *Scott* (9).

But if he do not by some act of interruption prevent it the open continuance of this enjoyment by the adjoining owner for the requisite period of time makes the building or windows to be "ancient," and converts the *de facto* enjoyment into a right, an injury to which thenceforth by any rise of the neighbour's land is an actionable wrong. Interruption of the enjoyment is the only mode by which the acquisition of this right can be prevented; nothing short of it is of any avail, and no actual assent is required to convert the lawful enjoy-

ment into a right. This is laid down by Justice Bayley in *Cross* v. *Lewis* (22), and by Justice Littledale in *Moor* v. *Rawson* (18).

These propositions are the result, I think, of the authorities cited and analysed by my brother Pollock in the opinion which he has just expressed to your Lordships. I do not propose to go through those authorities in detail, but merely to add such observations as seem to me to support the conclusion at which he and I have arrived.

As was remarked by the late Lord Chief Justice in his judgment below, the cases to be found in the books relating directly to the right of lateral support of "buildings" by adjacent "soil" are comparatively few, but there are found in the books a vast number of authorities in reference to other rights of a more or less analogous character which seem to me to bear upon the question. Those authorities may be divided generally into four classes according as they relate to—first, vertical or lateral support of land or buildings; second, light and air; third, water; and, fourth, way or common, or rights of that nature.

In the cases relating to the rights of the first class, I find it clearly laid down that by the uninterrupted enjoyment in fact of lateral support of an "ancient" building the right to the support is acquired. In *Wilde* v. *Minsterley* (4) and in *Palmer* v. *Fleshees* (5) the words used to cover the existence or non-existence of the right are "ancient" or "new" messuage, and I find the proposition stated substantially in the terms which I have used by Lord Ellenborough in *Stansell* v. *Jollard* (6), by Baron Parke in *Hide* v. *Thornborough* (7) and again in *Gayford* v. *Nicholls* (10), by Justice Cresswell and Baron Bramwell in *Rowbotham* v. *Wilson* (2), and lastly and most elaborately and unequivocally in the judgment of Mr. Justice Wightman in *Bonomi* v. *Backhouse* (12), in which he distinctly treats the actionable wrong in such a case as founded upon the breach of duty in one man's using his property so as to injure that of his neighbour; not as founded on any presumption of grant or easement but the common right of an owner of land not to be injured in his property by the wrong of his neighbour. In this view Lord Chief Justice Campbell and Mr. Justice Coleridge and Mr. Justice Erle all concur, and I conceive it to have been the view entertained by some of the noble and learned members of your Lordships' House who advised the House upon the judgment on the appeal. I am well aware that it has been doubted whether this assertion of the law in the last case is to be considered as an authority applicable to the one now before your Lordships, but I am unable to share in that doubt for the reason stated by my brother Manisty.

Besides these cases which involved the right of "lateral" support of buildings, there is also one relating to "vertical" support in a case where the subjacent strata had been severed from the surface. The right of support of the surface soil in such a case is analogous to the right of "lateral" support; indeed, so much so that in the case of *Humphries* v. *Brogden* (1), in which the right of the owner of the surface to have it supported by the subjacent severed minerals was first directly asserted, that right was deduced from the previous authorities cited above as to the right of "lateral" support, and in the case of support of surface by the minerals below, there is now no question but that the right is a natural one.

In *Rogers* v. *Taylor* (11), the case to which I refer, the plaintiff's house had been built in 1824 upon land, the quarries underlying which had been expressly excepted from the conveyance to him and had become therefore a separate tenement, and the stone under the house had been got by the owner of the excepted quarries in 1840, leaving supports of the house at that time sufficient. In 1853 the defendant, the owner of the quarries and also of adjacent land, in quarrying cut away the supports under the plaintiff's house and it fell. At the trial before the late Lord Chief Justice Cockburn it was contended on behalf of the defendant that in order to make out a title to have the house supported by

(22) 2 B. & C. 686.

the subjacent soil the plaintiff was bound to shew a continuous enjoyment for the required period "as of right," and that there had, in fact, been none such, but only a contentious enjoyment. But the direction of the Lord Chief Justice was that at the end of twenty years after having built the house the plaintiff acquired the right of support unless something had been "done" to deprive him of it, and the question he left to the jury was whether the plaintiff had enjoyed the support for the foundation of his house for twenty years. The jury found that he had done so, adding the words "without interruption," and the ruling and verdict were upheld.

I cite this case for the purpose of the precise language of the Lord Chief Justice in his ruling and direction. At the same time there is no doubt but that the Court of Exchequer, in supporting the direction and verdict, were inclined to place the right of vertical support of a house in the category of easements requiring prescription or presumed grant for its foundation, and they adopted the same view as to "lateral" support in *Partridge* v. *Scott* (9), whilst in *Solomon* v. *The Vintners' Company* (23), a case of support of building by building, they went further and expressed doubts as to the authority of *Stansell* v. *Jollard* (6), *Hide* v. *Thornborough* (7), and the observations of Lord Campbell in reference to this subject in *Humphries* v. *Brogden* (1).

In order to appreciate the correctness or otherwise of this view it is, I think, desirable to refer a little more in detail to the case of *Partridge* v. *Scott* (9), for the reasoning of the Court in that case shews that they were ready to affirm the existence of the right after the lapse of the requisite period of enjoyment, although they entertained a different view from that expressed in the decisions I have referred to as to its origin and mode of acquisition. The material facts in *Partridge* v. *Scott* (9) were, that there were two houses in respect of injury to which the action had been brought. One had existed more than thirty years, and was admittedly "ancient;" the other was admittedly "new;" and both were at the time of action brought found to be on excavated ground, so that at some time or other the surface had been deprived in part of what otherwise would have been its natural support. There was no evidence to shew when this had happened, but it is obvious that in this state of things the owner of the houses had ever since that time been *de facto* enjoying a greater degree of support by and was throwing upon the neighbouring soil a greater burden than if his underlying soil had been in its natural position. The fact of the excavation was also unknown to both parties, and, as beyond all question the acquisition of the right depends upon the non-interruption of the enjoyment by the neighbour only where he has the knowledge or means of knowledge that it is being had, and all he knew in that case was the inference which he was bound to draw from the known fact of the house being built, and of necessity deriving support from his soil, the Court of Exchequer held that no right of support had been gained of either house; of one because it was "new," and the other because the underlying strata might have been removed within twenty years. The inference to be drawn from this case seems to me to be that but for that fact the right would have been acquired.

It was pointed out by Mr. Justice Littledale in *Moor* v. *Rawson* (18) (a case of light), and by Mr. Justice Fry in *Hall* v. *The Lichfield Brewery Company* (24), that such a right is not properly the subject of "grant," but that the implication of law to be made in support of it is a covenant not to interfere with the enjoyment, which seems to me to be merely an alternative mode of stating the right to depend (as put by Mr. Justice Wightman) upon the maxim of "Sic utere tuo ut alienum non lædas."

It is, I know, thought by some, for whose opinions I have the highest respect, that, thinking as they do that the right rests upon a presumed grant, it can

(23) 4 Hurl. & N. 585; 28 Law J. Rep. Exch. 370.

(24) 49 Law J. Rep. Chanc. at p. 656.

only exist where all the circumstances are such as would have existed if there had been in fact such a grant made, and that it is unjust and inequitable to hold that such a right can be gained in cases like this where the servient owner has, as is admittedly the case, no power of preventing the enjoyment which is to found it.

It is, however, clear that where the surface and subjacent strata have been divided horizontally into separate tenements, a house built by the owner of the surface, and which has, *de facto*, enjoyed the support of the subjacent mineral for more than twenty years, has acquired the right of support of that mineral, unless, as in *Rowbotham* v. *Wilson* (2), there is evidence to the contrary; and in *Partridge* v. *Scott* (9) the right would have been extended by the Court of Exchequer to lateral support if the enjoyment there known had existed for twenty years. But what power has the servient owner in those cases to "prohibit" otherwise than by actual interruption of the *de facto* enjoyment?—he cannot prevent the building; he cannot bring any action in respect of it; he can do nothing but interrupt the enjoyment.

In the analogous case of light there is the same limitation of the power of prohibition, and yet the right admittedly exists; and in the cases as to water, to which I shall hereafter advert, in which the absence of the power of prohibiting was referred to, some of the Judges who decided them (including, I think, one of your Lordships) declared that the decision in those cases was without prejudice to the determination of the question now raised for decision by your Lordships' House.

Moreover, the foundation of a right upon mere long uninterrupted possession, as a matter of public convenience, is of very general application. Statutes of limitation have no other origin, and it is upon this principle that Mr. Justice Story in his well-known judgment in *Tyler* v. *Wilkinson* (25), puts rights of this kind, for he says, "Twenty years uninterrupted enjoyment is held upon principles of public convenience a conclusive presumption of a 'grant,' or a 'right'" (expressly asserting the alternative) "amounting to a presumption, *juris et de jure*, wherever by a possibility a right may be acquired in a manner known to the law."

But whatever may be the correct view as to the origin of the right, all the authorities seem to agree that after twenty years enjoyment the right is acquired; in the one case the view being that it arises from a presumption of origin by grant to be made in each particular case from long uninterrupted possession, in the other case that it has become an universal settled rule of law that the open enjoyment uncontradicted and unexplained is sufficient by itself, and that there is in modern times, at least, no necessity for presuming in each particular case a thing which everybody knows is a mere fiction.

That in any view the enjoyment must not be *clam* is clear; for to hold that a man is bound by a right of the growing acquisition of which he had neither knowledge, nor the means of knowledge, would be unjust and inequitable. Upon this absence of the means of knowledge of the enjoyment the cases of *Partridge* v. *Scott* (9) and *Solomon* v. *The Vintners' Company* (23) may well stand, and indeed the judgment of Lord Justice Bramwell in the latter case is expressly based upon it.

I now proceed to consider whether the authorities upon which I rely are fortified, or otherwise, by the authorities which relate to the rights as to light and air, between which and the right now under discussion a close analogy, in my judgment, exists. They both have their *de facto* origin in the same lawful use of land for habitation, and the necessity of light and air for its enjoyment. That such analogy has been thought to exist is clear.

In the earlier books the right of light is asserted in conjunction with, and as mutually illustrating, or illustrated by, the right of support. In *Palmer* v. *Fleshees* (5) the assertion of the then apparently well-understood right of support

(25) 4 Mason, 401; cited in *Gale on Easements*, 249.

of an "ancient" building was made, as tending to shew the existence of the right to the enjoyment of an "ancient" window. In *Stansell* v. *Jollard* (6), Lord Ellenborough *e converso* fortified his ruling, that a *de facto* enjoyment for above twenty years of support gave the right to it by referring to light as analogous; and so also the Court of Queen's Bench, in the case of *Humphries* v. *Brogden* (1), and Justice Cresswell, in his observations during the argument in *Rowbotham* v. *Wilson* (2), resort to the same analogy.

If, then, that analogy exist, it will I think be found, on reference to the authorities on the subject of light, that they affirm the conclusion arrived at from the consideration of those relating to support.

In *Moor* v. *Rawson* (18) the question to be decided was whether the dominant owner had lost a right to "ancient" windows which at a former time he unquestionably had possessed, and it was held that he had lost it by a mere abandonment of the enjoyment; and that result was arrived at by the application to the question of extinguishment of the principle upon which the right had originally been acquired. In his judgment in that case Justice Bayley says, "The right to light, air or water is acquired by enjoyment," adding latter on, "I think that according to the doctrine of modern times we must consider the enjoyment as giving the right." Justice Littledale says, "According to the present rule of law a man may acquire a right of way or a right of common." "But there is a material difference between the mode of acquiring such rights and a right to light and air. The latter is acquired by mere occupancy, the former can only be acquired by user accompanied with the consent of the owner of the land." "But it is otherwise as to light and air; every man on his own land has a right to all the light and air which will come to him, and he may erect, even on the extremity of his land, buildings with as many windows as he pleases. In order to make it lawful for him to appropriate to himself the use of the light he does not require any consent from the owner of the adjoining land; he therefore begins to acquire the right to the enjoyment of the light by mere occupancy. After he has erected his building the owner of the adjoining land may afterwards, within twenty years, build upon his own land, and so obstruct the light which would otherwise pass to the building of his neighbour. But if the light be suffered to pass without interruption during that period to the building so erected, the law implies from the non-obstruction of the light for that length of time that the owner of the adjoining land has consented that the person who has erected the buildings upon his land shall continue to enjoy the light without obstruction."

That this right arises from the mere uninterrupted enjoyment is, I think, further shewn by two cases decided in 1761 and 1768. In the first case—*Lewis* v. *Price* (26), which was an action on the case for stopping and obstructing the plaintiff's lights, Mr. Justice Wilmot said, that "where a house has been built forty years, and has had lights at the end of that time, if the owner of the adjoining ground builds against them so as to obstruct them, an action lies; and this is founded on the same reason as when they have been immemorial, for this is long enough to induce a presumption that there was originally some agreement between the parties." And in the second case—*Dougal* v. *Wilson* (27), where the defendant proposed to shew the non-existence of the windows at a period within the time of legal memory—Wilmot, then Chief Justice, said, "If a man has been in possession of a house with lights belonging to it for sixty years no man can stop them up."

In another case—*The Wells Harbour* (28)—Mr. Justice Butler cited the language of the presiding Judge thus: "I think twenty years uninterrupted possession of windows is a sufficient right for the plaintiff's enjoyment of them."

It has indeed been supposed that the decisions of Chief Justice Wilmot were disapproved of in the subsequent case of *Darwin* v. *Upton* (29), but I cannot

(26) 2 Wms. Saund. 175*a*.
(27) Ibid.
(28) Ibid. 175*c*.
(29) Ibid.

share in that view. That case was tried at *nisi prius* before Mr. Justice Gould. It appeared that the lights had been in existence for twenty-five years, and the defendants offered to prove that they had had no earlier existence. Mr. Justice Gould thought that the possession for twenty-five years, if unanswered, was sufficient, but if the defendant could offer anything to explain the possession and shew that it was in any way limited or modified or was bad in its commencement he might do so. No evidence of that kind having been offered, a verdict was given for the plaintiff, with leave reserved to move. On the motion a rule was granted upon the counsel's allegation that Mr. Justice Gould had told the jury that the possession was an "absolute" bar, instead of leaving the question to them as a presumptive bar, and upon that supposition the rule was in the first instance made absolute, but was afterwards discharged on the report of the Judge that this was an error. On the argument of the rule Lord Mansfield said that enjoyment of light with the defendant's acquiescence was such a decisive presumption of right by grant "or otherwise" (specifically mentioning, as Lord Ellenborough, Mr. Baron Parke, and Mr. Justice Story did, the alternative origin) that unless contradicted or explained a jury ought to believe it.

And this view was affirmed by the Court of Queen's Bench in the subsequent case of *Cross* v. *Lewis* (22). In that case the lights had been in existence for thirty-eight years, during twenty of which the premises had been in the possession of Percy as tenant, and there was no evidence that the reversioner, or his family, had ever been near the place. At the trial Mr. Justice Holroyd held the lights to be "ancient," and directed the jury to find a verdict for the plaintiffs. A rule was then moved for on the ground of misdirection in not leaving it to the jury to say whether they believed that notice of the enjoyment had or had not been given to the servient owner, which is the question raised by the defendants in the case now before your Lordships. The Court, however, upheld Mr. Justice Holroyd's ruling, Mr. Justice Bayley saying that it had been always held since *Darwin* v. *Upton* (29), that in the absence of any evidence to rebut the possession of twenty years, a presumption of right arose "and that a jury should be directed to act upon it." He adds that if the neighbour objects to the windows he may put up an obstruction, but that is his only remedy; if he allows them to remain unobstructed for twenty years, that is a sufficient presumption of an agreement not to obstruct them. Mr. Justice Holroyd says they are "ancient lights," and the plaintiffs have a right by law to enjoy them. He adds, it is not a question to be determined by the jury unless there is evidence to contradict their being "ancient lights." At first they may be obstructed, but if no interruption is offered, the owner of them may prescribe for them as "ancient windows."

The result which I deduce from these authorities is that the *de facto* enjoyment is the origin of the right, and if that be not contradicted or explained, the jury may and should be directed to act upon it.

The cases relating to water, to which I have referred as of the third class, were greatly relied upon on the argument before your Lordships as shewing that no right at all could exist in the case of support, one of the reasons given for not implying any grant in those cases being that there could be no resistance on the part of the servient owner. They were cases of percolating water—*Chasemore* v. *Richards* (30)—which had not yet been confined and accustomed to run in a definite channel, or of air unconfined not having been taken into and enjoyed in a tenement through a definite aperture—*Webb* v. *Bird* (19), and smoke—*Bryant* v. *Lefever* (20). These cases seem, however, to me to be so essentially different from the case before your Lordships that it is unnecessary to consider them in detail. The principle which underlies them all I conceive to be that, until defined and confined, there is in those cases, as in light and air in its natural state, no subject-matter capable of being

(30) 7 H.L. Cas. 349; 29 Law J. Rep. Exch. 81.

the subject of a lawful grant, nor from the very nature of them can there be any definite occupation or enjoyment.

There remains only to be considered the last class of cases, namely, those relating to rights of way and common and easements of that description. But the distinction between such easements and the right to air and light was pointed out, as I have already said, by Mr. Justice Littledale in *Cross* v. *Lewis* (22), and again in *Moor* v. *Rawson* (18), which latter judgment was referred to with approval by the Court of Exchequer Chamber in *Webb* v. *Bird* (19). Such rights are unlawful in their origin. The first of the acts is a trespass; whereas, in the case of light and support, the acts are in themselves lawful acts, done in the lawful occupation and user of a man's own land, and I do not think it useful to trouble your Lordships with any observations upon them.

I answer your Lordships' second question in the affirmative.

As has been repeatedly stated, the enjoyment, which was originally necessary to found the presumption of right, must have had its commencement before the time of legal memory; but upon principles of public convenience, this period of antiquity has been clearly departed from, and the necessary limit has by successive stages been reduced to an enjoyment of twenty years, which is clearly sufficient to make a building or window "ancient."

I answer your Lordships' third question in the negative.

If it be, as I think, absolutely settled law that the right depends upon the *de facto* enjoyment known to both parties, and acquiesced in by the servient owner, the measure of that right will not be such enjoyment as he may be able to prove to the satisfaction of a jury that the servient owner of the inheritance had actual notice of, but at least the actual enjoyment known and acquiesced in by the servient owner during the requisite period of enjoyment, or perhaps such enjoyment by the owner of the dominant building as the owner of it may be entitled to have for any purpose to which he may already have or may thereafter lawfully put it.

The case of *Partridge* v. *Scott* (9) shews that, in order to confer the right, the enjoyment must be of such a nature as to indicate to the servient owner that the acquisition of a right of support is in progress, the Court of Exchequer holding that the right was not gained in that case because, although the existence of the house was patent, it was not known that it had excavated soil for its vertical support only.

In the case of light also a similar measure of enjoyment prevails. The rule in that case is, that the extent of light acquired is proportionate to the actual amount of enjoyment had—*Martin* v. *Goble* (31), *Lanfranchi* v. *Mackenzie* (32). There are, however, several authorities enlarging this right, and tending to shew that the dominant tenement has a right, not merely to the light actually enjoyed for the twenty years during which it had been accruing, but to all the light and air which will come through the window, and which may be necessary for any ordinary and lawful purposes for which the building has been, or at any future time may be, used, and this view has recently been adopted by the Queen's Bench Division in the case of *Moore* v. *Hall* (33). Whether this view is consistent with the principles upon which the acquisition of the right of light and air depends, and the earlier authorities, it is not necessary now to consider, for the limitation of the right to that degree of enjoyment which has been had during the twenty years is sufficient for the determination of the present case. In the present case it is admitted that the actual enjoyment of the plaintiff's building in its altered state has existed for more than that period, and the only question therefore that it is necessary to determine is whether that enjoyment was or might have been known by the defendant's predecessors in title so as to indicate to them that the right was being acquired.

In the case of light all that the servient

(31) 1 Campb. 320.

(32) 36 Law J. Rep. Chanc. 518; Law Rep. 4 Eq. 421.

(33) 47 Law J. Rep. Q.B. 334; Law Rep. 3 Q.B. D. 178.

owner knows or has the means of knowing is the area of the apertures through which the light passes. He has no notice of the size of the rooms, or of their distribution, or the objects for which the light is required. It may be that the light is used for a hall or kitchen requiring the most ordinary degree of light, but it may be (as in *Lanfranchi* v. *Mackenzie* (32)) used for a room for examining samples—purposes requiring a special degree or quality of light; and yet if the servient owner obstruct the light necessary for such user, although it is more than or different in quality from that which is required for the ordinary purposes of a house, he will be liable to an action; in other words, he is violating a right acquired by his neighbour's actual enjoyment.

It has been said that in this case the defendant and his predecessors in title did not see, and could not know, the quantity of support required by the plaintiff's house after the alterations. But the enjoyment in fact of the support was known, or might be known, to everybody, and I think that under such circumstances the servient owner must be held upon presumption of public convenience to know that the support which is being enjoyed is that of the weight of such a building constructed and used for any ordinary purpose of pleasure or business for which it is calculated. Whether the alterations in the plaintiff's premises had the effect of throwing more weight upon the defendant's soil than the original structure did is a matter, no doubt, which might be open to contest; and if those alterations had been made at any time within the last twenty years, a different question might have arisen from that now before your Lordships. But, assuming that the messuage had been built in the mode to which it is now altered, could it have been said that it had not become "ancient"; and as it has stood in that state for twenty-seven years why is it not in its altered state "ancient"? These alterations were openly made, and the premises have been as openly enjoyed as (or probably, from the particular nature of the business, more openly enjoyed than) other buildings with a capacity for enjoyment for like purposes.

In the case of any house which openly enjoys the support of the neighbouring land, does the neighbour ever know, even approximately, what extra weight his land has to bear beyond the weight of the soil which it is bound as of right to bear? By what process would a neighbour, in any ordinary case, know how far he might safely dig so as not to let down the soil of the adjoining owner, and yet dig just as far as he wished without bringing down the building? If every owner of a building were required, in cases where the enjoyment has been had for long periods (and be it recollected there is no other dividing line after you have passed twenty years until Richard the First is reached), to prove the existence of all the circumstances which would go to make up a grant binding upon the owner of the neighbouring inheritance, in how many cases could he support the burden, and what would be the number of now existing houses in England the owners of which would not find themselves liable to have their enjoyment of support put an end to? To leave the questions which would be involved in such cases to juries instead of letting the solution of them depend upon a clear and absolute settled rule of law would in my judgment introduce great uncertainty in title and much real injustice. In truth the burden imposed upon the servient owner is not a very heavy one. Before it could exist he had twenty years in which to make any lawful use of his own property. He has the correlative right of support of his own property, and all that he has to do if he wants to alter the state of the property is to leave sufficient soil to support the wall. Or if he wishes to remove all the soil he has but to provide temporary strutting and supports whilst the well-understood process of underpinning is being carried on. When the extensive substitution of enormous for smaller buildings which has within the last thirty years under the law as now understood been going on is considered, and that so little litigation has ensued upon it, it does not appear to me that there can be any great injustice or hardship in leaving the rule as it is.

In answer to your Lordships' fifth

question I think that the direction of the learned Judge was right.

The plaintiff had given affirmative evidence of the actual enjoyment by his building in its altered condition for twenty-seven years, and it was in no way proposed to offer any denial, explanation or modification of this actual enjoyment. It is unnecessary, therefore, to consider the question what rebutting evidence (if any) might or might not in cases similar to the present be given; it is enough to say that no such was suggested here.

The learned Judge offered to admit proof that the wall would not have fallen if it had not been for the weight imposed upon it, but that offer was declined, and for the reasons I have stated the right does in my judgment not depend upon whether the owner of the tenement has or has not had actual notice of the degree of support required, or of the precise circumstances upon which that depends. In the present case, as in *Darwin* v. *Upton* (29) and *Cross* v. *Lewis* (22), I think the jury were bound to act upon the "decisive" presumption thus afforded of the existence of the right, and that the learned Judge was right in so holding. I am unable to see what necessity there was for or what advantage could have been gained by his leaving any question to them. They would either have done their duty and given their verdict in accordance with the presumption as directed, or they would have found a verdict in defiance of this direction. In the former case the result now arrived at would have directly followed the verdict. In the latter case the Court, if they considered the direction right as I do, and the verdict wrong, would under Order XL. rule 10 (Rules under the Judicature Act), having all the materials before it, have declined to act upon the verdict and have entered judgment for the plaintiff.

LINDLEY, J.—The first question put to us by your Lordships must, in my opinion, be answered in the affirmative. The current of authority on this point from *Palmer* v. *Fleshees* (5) down to the present time is unbroken. No trace of any doubt about it can be found; and no Judge by whom this particular case has hitherto been considered has questioned it.

The second question cannot be so easily answered. It appears to me to depend on the view a jury might take of the facts of this particular case, and, in particular, of the peculiar construction of the plaintiff's house.

The following legal propositions bearing on this question appear to be settled beyond controversy:—

First. The owner of an ancient building—that is, of a building so old that the non-existence of it cannot be proved—has a right of action against the owner of land adjoining if he disturbs his land so as to take away the lateral support previously afforded by that land.

Secondly. The owner of a building which has in fact been supported by his neighbour's land for twenty years has *prima facie* at all events a right of action against the owner of the adjoining land if he disturb that land so as to take away the support afforded by it. This proposition is I conceive only open to doubt on the ground that it is not wide enough; but to the limited extent here stated all the authorities seem in accord, and no Judge has questioned it. The authorities to which I refer are *Stansell* v. *Jollard* (6), *Wyatt* v. *Harrison* (8), *Partridge* v. *Scott* (9), *Hide* v. *Thornborough* (7), *Humphries* v. *Brogden* (1), *Gayford* v. *Nicholls* (10), *Rowbotham* v. *Wilson* (2), *Rogers* v. *Taylor* (11), *Solomon* v. *The Vintners' Company* (23), *Hunt* v. *Peake* (34), *Bonomi* v. *Backhouse* (12). These cases will all be found examined and discussed by the Queen's Bench Division and the Court of Appeal, and I forbear, therefore, to trouble your Lordships with more than their names.

Thirdly. The owner of a newly erected building has no such right of support unless his neighbour has conferred it upon him. This proposition is, in my opinion, as clearly settled as the other two. The authorities in support of it are *Wilde* v. *Minsterley* (4), *Wyatt* v. *Harrison* (8), *Partridge* v. *Scott* (9), *Humphries* v. *Brogden* (1), *Gayford* v. *Nicholls* (10), all of which are commented on in the judgment of Lord Justice Brett.

(34) Johnson, 705.

From the first and second of the above propositions it follows that a right to lateral support in respect of buildings may be acquired by English law, and may be acquired in modern times; whilst from the third proposition it follows that the right is not a mere incident to the ownership of land. *Bonomi* v. *Backhouse* (12) is said to be opposed to this view, but I cannot so regard it; for in that case the plaintiff's house was an ancient house, his land was let down, and nothing turned on the pressure exerted by the house itself. The plaintiff clearly had and was assumed to have a right of action; and the only question raised and decided was when his right of action accrued.

Combining these same propositions and having regard to the language of the decisions which support them, it further follows that lapse of time is essential to the acquisition of a right to have a building supported by the land of another person, and that such right is by English law an easement, or a right in the nature of an easement.

A little reflection, however, will suffice to shew that the easement of lateral support is of a peculiar kind; it is not a purely negative easement like the right to light, for support, even when lateral, involves pressure on and an actual use of the laterally supporting soil. Further, the actual enjoyment of lateral support is incapable of interruption by physical means except by the removal of the soil which affords the support; or, in other words, by the destruction more or less of the servient tenement. Notwithstanding the first peculiarity, no trace is to be found in our law books of any action at law or suit in equity based upon any wrong done to the owner of the servient tenement; and the general opinion certainly is that in the absence of actual damage to the soil no such action or suit could be maintained. Upon principle, I confess I do not see why this should be so. If a person builds so near the edge of his own land as to use his neighbour's land to support his house without his neighbour's consent, I do not see why such neighbour should have no cause of action. The enjoyment of light coming across adjoining land and the enjoyment of the use of such land for support are in some respects entirely different; for no use is made of a man's property by opening a window on other property near it; and a right not to be overlooked is not recognised by our law. At the same time in every case in which the right to lateral support is alluded to it is treated as analogous to the right to light, and the difference to which I have drawn attention has not been dwelt upon or treated as material. Nevertheless, whatever my own opinion would be, looking at the matter theoretically, I am not prepared to say that an action for damages or an injunction could be maintained in such a case as I have supposed. The authority against it, although purely negative, would, in my judgment, be considered as too strong to be got over. If, however, your Lordships should be of a different opinion, I apprehend that it would follow that the Prescription Act (2 & 3 Will. 4. c. 71. s. 2) would apply to and include an easement of lateral support; and the law upon this important subject would then be contained in the provisions of that statute. But all the Judges before whom this case has come concur in holding the Prescription Act not to apply; and, in the absence of authority to the contrary, I am not prepared to differ from them.

As regards the practical possibility of physically obstructing the use of one's land by another for the support of his own house it is to be observed—

First. That in a literal, that is, merely mechanical, sense, such obstruction is always possible.

Second. That it is possible only by a removal of the soil used for support.

Third. That such removal may or may not be convenient to its owner; he may or may not require to remove it for purposes of his own.

Fourth. That if he does not require to remove it for his own purposes, a law which renders it necessary for him to remove it in order to preserve his unrestricted right to do so at some future time does not commend itself to common sense; for if his land is itself already built upon such a law would impose upon

him the necessity of removing part of his own property, and of destroying, or incurring great expense in order to avoid destroying, more in order to preserve his rights intact. In these respects the power of preventing the acquisition of a right to light, and the power of preventing the acquisition of a right to lateral support are very different; but notwithstanding these differences every authority on the subject treats the right to such support as capable of being acquired in the same way as the right to light. *Stansell* v. *Jollard* (6), *Hide* v. *Thornborough* (7), *Gayford* v. *Nicholls* (10), *Partridge* v. *Scott* (9), *Rowbotham* v. *Wilson* (2), *Rogers* v. *Taylor* (11) and *Humphries* v. *Brogden* (1) all support this view, and are inconsistent with any other. In the face of this current of authority I am unable to come to the conclusion that the physical difficulty of obstruction brings the right to lateral support within the cases of *Webb* v. *Bird* (19), *Chasemore* v. *Richards* (30) and *Sturges* v. *Bridgman* (35); for, if those cases applied, the right to lateral support could not be acquired at all by mere enjoyment, however long continued; and in my opinion the authorities to which I have referred clearly establish that it can be so acquired under circumstances to which I propose now to allude.

The authorities already referred to appear to me to establish that a right to lateral support, although not within the Prescription Act, and although in many respects unlike a right to light, can be acquired in the same way and under the same circumstances as a right to light could be acquired before that Act passed. A careful study of those authorities has driven me to this conclusion, from which I see no escape.

Without going over the cases so exhaustively examined and discussed in the Courts below it will be sufficient, after the observations already made, to say that the view taken by Lords Justices Cotton and Thesiger on the mode of acquiring a right to light independently of the Prescription Act appears to me to be more correct than the views taken by Mr. Justice Lush on the one side, and by the Lord Chief Justice Cockburn, Mr. Justice Mellor and Lord Justice Brett on the other. The absence in fact of a grant, meaning thereby a deed under seal, cannot in my opinion be conclusive against the plaintiff. An agreement for valuable consideration, though not under seal, is sufficient to create a right to an easement, and for the purpose of creating a lawful user is as good as a deed. Again, assent or acquiescence on the part of the defendants to the erection of the plaintiff's building with a knowledge of its peculiar mode of construction would, in the absence of any deed under seal, entitle the plaintiff to maintain this action — see *Brown* v. *Windsor* (36).

The theory of an implied grant was invented as a means to an end. It afforded a technical common law reason for not disturbing a long-continued open enjoyment. But it appears to me contrary to the reason for the theory itself to allow such an enjoyment to be disturbed simply because it can be proved that no grant was ever in fact made. If any lawful origin for such an enjoyment can be suggested the presumption in favour of its legality ought to be made. Nor am I aware of any instance in the equity reports in which it has been held that an easement openly and uninterruptedly enjoyed for twenty years has been destroyed simply by proof that no grant under seal was ever in fact made. The theory of an implied grant, as distinguished from a legal presumption of some lawful origin, is, in my opinion, untenable and practically misleading, especially now that principles of equity as well as of law have to be applied both to trials with juries and to trials without.

I feel a difficulty in saying that acquiescence on the part of the defendant is essential to the acquisition by the plaintiff of a right to support. No one can be properly said to acquiesce in what he cannot prevent; and it rarely happens that the use of land for lateral support can be practically prevented. Express dissent—that is, an express protest—would

(35) 48 Law J. Rep. Chanc. 785; Law Rep. 11 Ch. D. 852.

(36) 1 Cr. & J. 20.

no doubt negative assent; and, if acquiescence by the owner of the servient tenement is essential to the acquisition of a right to lateral support, a protest by him ought to be sufficient to prevent its acquisition. But I can find no trace of any authority to the effect that a protest would suffice for the purpose in this case any more than in other cases more or less similar; and I understand *Cross* v. *Lewis* (22) to be an authority against the sufficiency of a protest in a case of light. Further, it is difficult to see why a protest should be required to preserve a right which is not being infringed. A protest is evidence of dissent, but nothing more, and until it is shewn that assent is important, dissent cannot be of any avail.

The only way in which I can reconcile the authorities on this subject is to hold that a right to lateral support can be acquired in modern times by an open uninterrupted enjoyment for twenty years, and that if such an enjoyment is proved the right will be acquired as against an owner in fee of the servient tenement, unless he can shew that the enjoyment has been on terms which exclude the acquisition. Whether he has assented or not, even if he has dissented, appears to me immaterial, unless he has disturbed the continued enjoyment necessary to the acquisition of the right. In the absence of uninterrupted open enjoyment the right cannot be acquired, and the answer to your Lordships' second question appears to me to turn on whether the enjoyment in this particular case was open; and this again appears to me to be a question of fact which ought to have been left to the jury. The learned Judge who tried the case considered that as the plaintiff's building was openly built and enjoyed, it followed that he had openly enjoyed the support which he in fact had had. I do not think that this is a necessary inference; for the building was very peculiarly constructed, and I agree with the Lords Justices Cotton and Thesiger that the jury should have had their attention called to this point, and have been asked whether the plaintiff had in fact openly enjoyed the support, the right to which he claimed. My answers to the third, fourth and fifth questions will shew more fully what I mean here to convey.

Open enjoyment of the lateral support, a right to which is claimed, is in my opinion a condition of the acquisition of the right, because by English law a right to lateral support for a building is treated as an easement; and easements cannot be acquired unless their enjoyment has been open. The necessity for open enjoyment in cases of lateral support is stated in or to be inferred from the language of the decisions in *Hide* v. *Thornborough* (7), *Gayford* v. *Nicholls* (10), *Partridge* v. *Scott* (9) and *Humphries* v. *Brogden* (1). Moreover the reason for requiring open enjoyment exists, although it is not so cogent or obvious in the case of lateral support as it is in the case of other easements, the acquisition of which can be more easily prevented.

In answer to your Lordships' third and fourth questions, for the reasons already given I am of opinion that it is incumbent on the plaintiff to prove an open enjoyment of the right he claimed. But if he proves such open enjoyment it is not, in my opinion, necessary for him to adduce further evidence to prove that the defendants or their predecessors in title had knowledge or notice of the alterations made in 1849, or of the effect of such alterations, in order to make the damages done by their act in removing the lateral support after the lapse of twenty-seven years an actionable wrong. What is proof of open enjoyment will appear from my answer to the next question.

In answer to your Lordships' fifth question, for the reasons already stated I am of opinion that the course taken by the learned Judge at the trial in directing a verdict for the plaintiff was not correct. He ought to have left the jury to decide the question of open enjoyment by the plaintiff of the right he claimed. In order to make this question intelligible to a jury they should be told that they ought to consider that the plaintiff had openly enjoyed all that support which any reasonably competent person, seeing the ground and the plaintiff's building (but knowing nothing of its peculiarities), would infer it required when used for the

purposes for which it was apparently constructed and adapted; but any support which in fact the building might require beyond this ought not to be considered as openly enjoyed, unless the necessity for such additional support was in fact known to the defendants or their predecessors in title. In the great majority of cases the existence and nature of the building will render it unnecessary to investigate such a question as this; for it is only in cases of an unusual character that a building requires more support than any competent person seeing it would suppose. But in my opinion the plaintiff's building in this case was so peculiarly constructed as to render it quite possible for the defendants to prove, first, that the plaintiff had enjoyed more support than anyone would infer from the nature and character of his building; and, secondly, that the building fell by reason of the withdrawal of such extra support, which, although enjoyed in fact, had not been enjoyed openly or to the knowledge of the defendants or their predecessors in title. If the defendants had succeeded in proving these points they would in my judgment have been entitled to a verdict; and it is because they had no opportunity of giving such proof that I think there ought to be a new trial.

A direction to the jury to the effect above mentioned would not only be in accordance with law, as I understand it, but would also, I think, be free from practical difficulties or objections; for it comes to this, that, speaking generally and excluding cases of settled estates and other anomalous cases, the owner of a house which has existed for twenty years is entitled to such support as anyone acquainted with building can see the house requires, but not to more unless he can shew actual notice of enjoyment of more.

LOPES, J.—My answers to the questions put to me by your Lordships are the same as those contained in the judgment of my brother Lindley, and I give them after having carefully perused and considered the opinion he has read to your Lordships, and for the reasons stated in it.

MANISTY, J.—I concur in the opinions expressed by my learned brothers Pollock and Field in answer to all the questions submitted by your Lordships to the Judges. Nevertheless I think it right to make some supplementary observations of my own with reference to the first, second, and fifth questions, each of which ought, in my opinion, to be answered in the affirmative. I found that opinion on the following propositions:—

First. That the right to lateral support for buildings from adjacent soil is not the right to an easement in or over that soil, but is a right of property, namely, the right of the owner of the buildings to enjoy his property free from interruption by his neighbour, even though that interruption be caused by acts done by his neighbour in his own land which are in themselves lawful.

Second. That this is not a natural right but a right of property, which when acquired is of the same character as a natural right.

Third. That a house, or building, which has stood for upwards of twenty years, is in the eye of the law an "ancient" house or building.

Fourth. That the law presumes, until the contrary is proved, that the owner of an ancient house, or building, who has enjoyed it free from interruption by a neighbouring proprietor for upwards of twenty years, has acquired the right so to enjoy it for the future.

Fifth. That the contrary may be proved, as I shall afterwards shew; but the presumption of law cannot be rebutted by merely proving that no grant of support was in fact ever made by the neighbouring proprietor.

In support of these propositions I shall consider in the first place what is the true character of the right in question, because it seems to me that this goes to the root of the case. And in this I am fortified by what Lord Justice Brett said in giving judgment in the Court of Appeal in the case now under consideration. His Lordship is reported to have said, "The first question to be determined is whether the right claimed is a right of property, for if it is it is unnecessary to enquire further in this case, the plaintiff being clearly entitled to succeed." His

Lordship having expressed that opinion proceeded to consider whether the right claimed was a right of property or a right to an easement, and came to the conclusion that it was the right to an easement. From that conclusion I venture respectfully to differ. No doubt for many years the right of lateral support for buildings from adjoining soil was considered and treated as the right to an easement, and consequently in order to maintain the right the fiction of a lost grant was resorted to, and juries were directed that they ought to find as a fact that which they and everyone else knew was not the fact.

The right was sometimes called an "easement" *simpliciter*, sometimes a "negative easement," but in 1857, in the case of *Rowbotham* v. *Wilson* (2), in the Exchequer Chamber, Justices Cresswell and Williams, and Barons Martin and Watson, expressed a strong opinion that it was one of the ordinary rights of property and not an easement. Baron Bramwell said, "After a house has stood for twenty years it acquires a right to support from adjoining land."

The case of *Bonomi* v. *Backhouse* (12) was decided by the Court of Queen's Bench in the following year (1858). The right claimed in that case and the mode of acquiring it were in all material circumstances identical with those in the present case, and the four eminent and learned Judges who heard it were unanimously of opinion that the right of lateral support for an ancient house from neighbouring soil is not an easement acquired by grant, but a proprietary right, which may be acquired by uninterrupted enjoyment for upwards of twenty years. Lord Campbell, in giving judgment, said, "I agree in the opinion that the right of support which the plaintiffs claim is a natural right of property to be presumed till, as in *Rowbotham* v. *Wilson* (2), evidence is given to rebut that presumption, and that such a right is not to be considered an easement or servitude arising from grant." Mr. Justice Coleridge said, "It seems to me that the interest which the plaintiffs allege in themselves, and to have been injured by the defendant, is in the nature of a right growing out of ownership, or incident to the ownership, of land, and not an easement on the land of another arising from grant or in any other way." Mr. Justice Erle said, "Upon the facts as stated by my brother Wightman I am of opinion that the right to support is one of the ordinary rights of property, and not an easement or right acquired by grant or otherwise." Mr. Justice Wightman said, "Upon consideration of all the cases it appears to me that the cause of action in such a case as the present is founded upon a breach of duty on the part of the defendant, by so using his own property as to injure that of his neighbour, and not upon any right of the plaintiffs to an easement in or upon or over the land of their neighbours. When ancient buildings are standing upon the plaintiffs' land, the defendant must take care not to use his own land in such a manner as to injure them."

The learned Judges, though unanimous as to the character of the right claimed and the mode of acquiring it, differed as to the effect of the Statute of Limitations, three of them being of opinion that the statute began to run from the time when the adjacent soil was removed; the fourth (Mr. Justice Wightman) holding that it did not begin to run till the plaintiffs' house was injured, and accordingly judgment was given for the defendants. The case was taken upon appeal to the Exchequer Chamber. It was argued before Justices Willes and Byles, and Barons Martin, Bramwell and Watson, the three Barons being three of the Judges who expressed the opinion to which I have already adverted in *Rowbotham* v. *Wilson* (2). The Court unanimously gave judgment for the plaintiffs, affirming the judgment of the Queen's Bench as to the plaintiffs' right to support, but reversing it on the ground that the Statute of Limitations was not a bar to the action, as it would have been if the right claimed had been that of an easement. In delivering the judgment of the Exchequer Chamber Mr. Justice Willes said, "The right to support of land and the right to support of buildings stand upon different footings as to the mode of acquiring them . . . ; but the character of the rights when acquired is in each case the same."

Bonomi v. *Backhouse* (12) came before this House by way of appeal in 1869. The judgment of the Exchequer Chamber was affirmed. In giving judgment Lord Wensleydale said, "I think it perfectly clear that the right in this case is not in the nature of an easement, but that the right was to the enjoyment of his own property, and that the obligation was cast upon the owner of the neighbouring property not to interrupt that enjoyment."

But for opinions expressed to the contrary by very learned and eminent Judges in the Courts below, in the case now under consideration, I should have thought that the character of the right claimed and the mode of acquiring it were settled and conclusively established by the cases of *Rowbotham* v. *Wilson* (2) and *Bonomi* v. *Backhouse* (12); and I cannot help thinking that the opinions of the two very learned Judges (the late Lord Chief Justice of England and Lord Justice Brett) who delivered judgments in favour of the defendants in the present case must have been founded upon a misconception of the facts which existed in the case of *Bonomi* v. *Backhouse* (12). I proceed to state my reasons for thinking so.

In *Angus* v. *Dalton* the late Lord Chief Justice Cockburn is reported to have said, "The mining cases, such as . . . . *Rowbotham* v. *Wilson* (2) and *Bonomi* v. *Backhouse* (12), are not at all in point. The right of support there claimed was not of lateral but of vertical support, and was not in the nature of an easement but of a proprietary right, the right of the owner of the surface land to have the support of the strata below as of absolute right independently of user or of right acquired by enjoyment. This distinction was expressly pointed out by Lord Wensleydale when the case of *Bonomi* v. *Backhouse* (12) was before the House of Lords." Now in *Rowbotham* v. *Wilson* (2) the plaintiff claimed the right of both adjacent and subjacent support. The instrument under which he acquired the surface shewed that he was not entitled to either, and judgment was given against him upon that ground, but the *dicta* of the Judges are in point.

In *Bonomi* v. *Backhouse* (12) the right claimed was, as I have already said, identical with that claimed in the present case. It was not a claim to vertical support as supposed by the late Lord Chief Justice, but a claim to lateral support. It was not a claim by the owner of the surface land to have the support of the strata below as of absolute right independently of user or of right acquired by enjoyment; but it was a claim to lateral support of a house and outbuildings from the soil of the neighbouring proprietor acquired by user and enjoyment for forty years and upwards. In giving the judgment of the Exchequer Chamber in *Bonomi* v. *Backhouse* (12), Mr. Justice Willes summed up the whole case in these words: "The plaintiff was owner of the reversion of an ancient house. The defendant, more than six years before the commencement of the action, worked some coal mines 280 yards distant from it. No actual damage occurred until within the six years. Question, Is the Statute of Limitations an answer to the action?" and the Court held unanimously that it was not. It was in view of, and with reference to, the facts as found by the arbitrator, and stated by Mr. Justice Willes, and not of the facts as stated by the late Lord Chief Justice, that Lord Wensleydale made the observations which the late Lord Chief Justice, strangely as it seems to me, relies upon as shewing that the case of *Bonomi* v. *Backhouse* (12) is not in point.

Lord Justice Brett in giving judgment in the present case said, "The judgments there in *Bonomi* v. *Backhouse* (12) are to be applied to excavations which would let down the plaintiffs' land though not built upon." His Lordship founds that assumption on the circumstance that there is no reference in the facts stated by the arbitrator or in the arguments of counsel to any distinction between the support necessary for the land, if it had been unbuilt upon, and that necessary for the buildings. The reason why no such reference was made (and this I know for a fact, having been counsel for the plaintiffs from the commencement to the conclusion of the case) was that the findings of the arbitrator and the arguments of counsel were confined to the

case made by the plaintiffs, namely, that they were entitled to have their ancient buildings supported. There is not a trace in the pleadings, or in the findings of the arbitrator, or in the arguments of counsel, of a claim to have the soil on which the house stood supported by the adjacent soil. Their case from first to last was that their buildings were ancient—that is to say, upwards of twenty years old—and that by reason of uninterrupted enjoyment during that period they had by law acquired the right to enjoy them free from interruption caused by acts done by their neighbours in the adjacent land. I am at a loss to understand why the judgments in *Bonomi* v. *Backhouse* (12) should be applied to a claim which was never made, and to facts which were not found, rather than to the claim which was made and the facts which were found.

It only remains for me to say a few words with reference to the fifth question submitted by your Lordships to the Judges. Assuming the right claimed to be a right of property such as I have endeavoured to shew it is, and in the absence of any evidence to the contrary, the law presumes it to have been acquired by uninterrupted enjoyment for twenty years and upwards, the question arises, How may the contrary be proved? To this I answer, By evidence explanatory of the user, shewing affirmatively that the owner of the buildings holds his property subject to the right of the owner of the subjacent or adjacent soil to take away the support. Such was the evidence given in *Rowbotham* v. *Wilson* (2), *The Duke of Buccleuch* v. *Wakefield* (37), *Aspden* v. *Seddon* (38), and other cases which might be cited to the like effect.

It may be that the presumption might be rebutted in some other way, such as by shewing that the owner of the adjacent or subjacent soil was under disability during the time when the right of support was alleged to have been acquired. It is unnecessary to express any opinion on that point, as no such question arose in the present case. If the presumption be one of law, it follows that neither positive acquiescence, nor a grant of support as a matter of fact, by the owner of the neighbouring soil is requisite for the acquisition of the right in question.

If the view I take of the case be correct, then the long-recognised right of the owner of an ancient house to enjoy it free from interruption by his neighbour will be preserved, and it will henceforth be based upon fact and a sound principle of law, instead of, as heretofore, upon fiction and unseemly verdicts of juries.

FRY, J.—Before specifically replying to the questions propounded by your Lordships, I think it desirable to express the views which I entertain upon the general subject of the right of the owner of a building to lateral support for that building by the land of an adjoining proprietor.

Such a right may be created by an actual instrument between the two owners. The right being not to a thing to be done or used in the neighbour's soil, but to a limitation of the user of that soil by the neighbour himself, does not lie in grant, but would be created by a covenant by the neighbour not to use his own land in any manner inconsistent with the support of the adjoining buildings—see the judgment of Mr. Justice Littledale in *Moor* v. *Rawson* (18); and such a covenant might either be express or might be inferred from the object and purport of the instrument, as in *The Caledonian Railway Company* v. *Sprot* (16).

Leaving the consideration of the right as constituted by actual contract between the parties, questions of great difficulty arise; and, in respect to these, I have most unwillingly arrived at the conclusion that principle and authority are in direct opposition to one another.

On principle it appears to me that it might well be held that every man must build his own house upon his own land, and that he cannot look to support from the land of adjoining proprietors. Such a principle would prevent the owner of a house from ever acquiring a right to lateral support except by actual contract. An opposite view might be taken, for

(37) 39 Law J. Rep. Chanc. 441; Law Rep. 4 H.L. 377.

(38) 44 Law J. Rep. Chanc. 359; Law Rep. 10 Chanc. App. 394.

which also much reason could be given. The right of soil to support by adjoining soil is given by our law as a natural right, and it might well have been held that this natural right to support carried with it a right to the support of all those burthens which man is accustomed to lay upon the soil. On this principle, the right to support would arise as soon as the house was built, and would exist independently of user, consent or contract. It might thus, it appears to me, be reasonable to hold that a house should never have the right of support, or that it should always have it. But I am unable to find any principle upon which to justify the acquisition of the right to support by a house independently of express covenant or grant. For casting aside all technicalities, I think that the only principle upon which rights of a kind like the one in question can be acquired is that of acquiescence. But I further think that, as he who cannot prevent cannot acquiesce, and as the owner of adjoining land cannot prevent his neighbour from erecting a house upon his own land, he can never be said to have acquiesced in the construction of that house, or in the burthen which thence results.

Such are the conclusions to which I should be driven by a consideration of this question on principle.

When I turn to the authorities of our law bearing on the subject, I find, as it appears to me, that it has been decided that an ancient house does possess the right in question; that a new house does not possess this right; and, consequently, that the right is one which may be acquired independently of express covenant. All the efforts which I have made to find some principle upon which to justify the authorities have to my own mind entirely failed.

I must now consider somewhat more in detail the views which I have thus briefly expressed. In the absence of express stipulation, rights of the kind to which the one now in question belongs, can, in my opinion, arise in law only from one or other of two sources, namely, either as incidents attached to property by nature herself, or as incidents attached to property by the force of long-continued user under circumstances importing acquiescence in such user.

There is no doubt on the authorities that as the support of soil by soil is in fact a result of nature, so the right to such support is given by the law as *ex jure naturæ*, and as a proprietary right. It arises in all its force the moment two adjoining pieces of land are held by different owners and has no connection with the user of the land—*Humphries* v. *Brogden* (1), *Rowbotham* v. *Wilson* (2). But it is equally clear on the cases that the right to support of buildings by land is not a right *ex jure naturæ*, but must arise by grant, or, as I think, more accurately speaking, by covenant. "Rights of this sort," said the Court of Exchequer, in reference to the right of support of a house, "if they can be established at all, must, we think, have their origin in grant." See *Partridge* v. *Scott* (9), and to the like effect are the judgments of the Queen's Bench in *Humphries* v. *Brogden* (1), and of the Exchequer Chamber in *Bonomi* v. *Backhouse* (12).

That the right in question may be acquired, even where no instrument creating it is shewn, is established as a matter of positive law by a series of authorities which appear to determine, first, that the owner of an ancient building has a right of action against the owner of land adjoining, if he disturb his land so as to take away the lateral support previously afforded by that land; and secondly, that the owner of a new building has no such right. The cases on these points are so fully cited and discussed by Mr. Justice Lush in the Queen's Bench Division, and by Lord Justice Thesiger in the Court of Appeal, that it will be sufficient to refer to these judgments for their details. Suffice it to add that the authorities, commencing in the year 1803, include rulings at *nisi prius* by Lord Ellenborough, Lord Wensleydale and the late Lord Chief Justice of England; an expression of opinion by Lord Blackburn, and judgments by the Courts of Exchequer and Common Pleas which assert or involve the propositions referred to; and, though no clear authority of an earlier date is found, the distinction between a new and an old house as regards

the rights to support appears to be hinted at in the cases of *Wilde* v. *Minsterley* (4) and of *Palmer* v. *Fleshees* (5).

These cases constitute a body of authority which, in my opinion, must be regarded as conclusive that, according to the law of England, an ancient house possesses a right to support from the adjoining soil; and, therefore, I answer your Lordships' first question in the affirmative.

From what I have said it follows that a right to support may, according to our law, be acquired independently of express contract; and, in order to answer your Lordships' second question, it becomes essential to enquire on what principle, in what time and under what circumstances it may be so acquired. Mere lapse of time can never, it appears to me, on any intelligible principle, confer a right not previously possessed; though lapse of time accompanied by inaction, where action ought to be taken, may well have such a result. "Mere lapse of time," said Chief Justice Dallas in *Gray* v. *Bond* (39), "will not of itself raise against the owner the presumption of a grant. When lapse of time is said to afford such a presumption, the inference is also drawn from accompanying facts." Strictly speaking, the right in question cannot, I think, be prescribed for; for it is common learning that prescription can only be for incorporeal hereditaments, "and cannot be for a thing which cannot be raised by grant" (*Blackstone's Commentaries*, bk. ii. c. 17); and, as I have already shewn, the right in question does not, in my opinion, lie in grant.

But leaving such technical questions aside, I prefer to observe that in my opinion the whole law of prescription and the whole law which governs the presumption or inference of a grant or covenant rest upon acquiescence. The Courts and the Judges have had recourse to various expedients for quieting the possession of persons in the exercise of rights which have not been resisted by the persons against whom they are exercised, but in all cases it appears to me that acquiescence and nothing else is the principle upon which these expedients rest. It becomes then of the highest importance to consider of what ingredients acquiescence consists. In many cases, as, for instance, in the case of that acquiescence which creates a right of way, it will be found to involve, first, the doing of some act by one man upon the land of another; secondly, the absence of right to do that act in the person doing it; thirdly, the knowledge of the person affected by it that the act is done; fourthly, the power of the person affected by the act to prevent such act either by act on his part or by action in the Courts; and, lastly, the abstinence by him from any such interference for such a length of time as renders it reasonable for the Courts to say that he shall not afterwards interfere to stop the act being done. In some other cases, as, for example, in the case of lights, some of these ingredients are wanting; but I cannot imagine any case of acquiescence in which there is not shewn to be in the servient owner—first, a knowledge of the acts done; secondly, a power in him to stop the acts or to sue in respect of them; and thirdly an abstinence on his part from the exercise of such power. That such is the nature of acquiescence and that such is the ground upon which presumptions or inferences of grant or covenant may be made appears to me to be plain, both from reason, from maxim and from the cases.

As regards the reason of the case, it is plain good sense to hold that a man who can stop an asserted right or a continued user and does not do so for a long time may be told that he has lost his right by his delay and his negligence, and every presumption should therefore be made to quiet a possession thus acquired and enjoyed by the tacit consent of the sufferer. But there is no sense in binding a man by an enjoyment he cannot prevent, or quieting a possession which he could never disturb.

"Qui non prohibet quod prohibere potest, assentire videtur" (2 *Coke Institutes*, 305), *per* Parke, B., in *Morgan* v. *Thomas* (40); "Contra non valentem agere, nulla currit prescriptio" (*Pothier*,

(39) 2 B. & B. 670.

(40) 8 Exch. Rep. 302; 22 Law J. Rep. Exch. 152.

Traité des Obligations, pt. iii. c. viii. art. 2, § 2; *Broom's Maxims* (5th ed.) 903), —are two maxims which show that prescription and assent are only raised where there is a power of prohibition.

And again, the cases of *Chasemore* v. *Richards* (30), *Webb* v. *Bird* (19) and *Sturges* v. *Bridgman* (35), have established a principle which was stated by Mr. Justice Willes in *Webb* v. *Bird* (19) in these terms: After alluding to the law relative to lights as exceptional, he proceeded: "In general a man cannot establish a right by lapse of time and acquiescence against his neighbour, unless he shews that the party against whom the right is acquired might have brought an action or done some act to put a stop to the claim without an unreasonable waste of labour and expense." "Consent or acquiescence," said Lord Justice Thesiger, in delivering the judgment of the Court of Appeal in *Sturges* v. *Bridgman* (35), "of the owner of the servient tenement lies at the root of prescription and of the fiction of a lost grant, and hence the acts or user which go to the proof of either the one or the other, must be, in the language of the civil law, 'nec vi nec clam nec precario,' for a man cannot, as a general rule, be said to consent to or acquiesce in the acquisition by his neighbour of an easement through an enjoyment of which he has no knowledge, actual or constructive, or which he contests and endeavours to interrupt, or which he temporarily licenses. It is a mere extension of the same notion, or rather it is a principle into which by strict analysis it may be resolved to hold that an enjoyment which a man cannot prevent raises no presumption of consent or acquiescence."

Assuming such to be the true grounds and principles of acquiescence, I next enquire how they can be applied to the question of the right of a house to be supported by the adjoining land.

It has been argued at your Lordships' bar that the doctrine applies in its simplest form to the right in question; for it has been contended that the act of building a house on one piece of land which derives lateral support from the adjoining soil of a different owner is both actionable and preventible, and that, therefore, time constitutes a valid bar. Is such a building actionable? I think not. The lateral pressure of a heavy building on soft ground which causes an ascertainable physical disturbance in a neighbour's soil would no doubt be trespass; but no one ever heard of an action for the mere increment caused by reason of a new building to the pre-existing lateral pressure of soil on soil, producing no ascertainable physical disturbance. If that were the law no one could rightly build on the edge of his land, unless he built upon a rock; and yet the building of walls and other structures on the borders of land is universally recognised as lawful. Nay more, any erection of a house would give a right of action not only to the adjoining neighbours, but to every owner of land within the unascertainable area over which the increase of pressure must, according to the laws of physics, extend. Such an increase of pressure when unattended with ascertainable physical consequence is, in my opinion, one of those *minima* of which the law takes no heed. The distinction between the principles applicable to water collected into visible streams and that running in invisible ones through the ground, affords a very good analogy to the distinction which I draw between the pressure of an adjoining house which produces a visible displacement of the soil, and that which produces no visible or ascertainable result, but is only a matter of inference from physical science or subsequent experiment.

Is the support of the house by the adjoining soil preventible? I think not. It is of course physically possible for one man so to excavate his own soil as to let down his neighbour's building, and a man may or may not have occasion to excavate his own land for his own purposes, but such an excavation for the sole purpose of letting down a neighbour's house is of so expensive, so difficult, so churlish a character, that it is not reasonably to be required in order to prevent the acquisition of a right. In fact, in the case of adjoining houses, it would be to require a man to destroy his own property in order to protect his rights to it.

In the case of air, it is physically possible for the adjoining owners to build a lofty wall round a windmill and shut out the access of air; and in the case of underground water it would, at least in some cases, be physically possible to construct a water-tight barrier through all the water-bearing strata of the soil; but such acts would require such an unreasonable waste of time and money that the not doing of them has been held to import no acquiescence in the flow of air and water respectively—*Chasemore* v. *Richards* (30) and *Webb* v. *Bird* (19).

If the building of a house by one man which derives support from the adjoining land is neither actionable nor preventible by the owner of the adjoining soil, it seems difficult to see on what principle a covenant as to the user of his own soil can be inferred against the man who can do nothing.

The right to support and the rights to the access of light and air are very similar the one to the other, and are broadly distinguished from most other easements or analogous rights. They are negative as contrasted with affirmative easements. They are analogous with *servitutes ne facias* in the civil law. Such rights when they arise spring not from acts originally actionable or unlawful on the part of the dominant owner, but from acts done on his own land and within his own rights; they confer on the dominant owner not the right to use the subject, but a right to forbearance on the part of the owner from using the subject—that is, they create an obligation on the owner of the servient tenement not to do anything on his own land inconsistent with a particular user of the dominant tenement—2 Austin, 836 (3rd ed.). They rest on a presumption or inference not of a grant by the neighbour of a right to do something on the grantor's land, but of a covenant by the owner not to do something on his own land.

It is difficult in principle to see how such rights can arise from the doing of lawful acts on the dominant tenement, except in the few cases where the owner of the servient tenement can both lawfully and with reasonable ease interfere to prevent the continued user by his neighbour.

The close likeness between the right to support and to light has been much pressed on your Lordships as a reason for inferring a right to support by analogy with the cases which before the Prescription Act established the right to light. The peculiarity of these cases is that the Courts required the servient owner to submit to the acquisition of the right by his neighbour or to signify his dissent by putting up an actual obstruction. "If his neighbour objects to them" (that is, to the windows), said Mr. Justice Bayley in *Cross* v. *Lewis* (22), "he may put up an obstruction, but that is his only remedy." This rule as to light appears to have arisen without any full discussion in the Courts of the principle on which it rests. But it is plain that the erection of an obstruction was thought so slight a matter that it might reasonably be demanded of the servient owner to negative acquiescence on his part. This rule I consider to be an anomaly, and therefore as not furnishing any principle which ought to be extended. "It is going very far," said Lord Wensleydale in *Chasemore* v. *Richards* (30) in your Lordships' House, "to say that a man must be at the expense of putting up a screen to window lights to prevent a title being gained by twenty years enjoyment of light passing through a window." "These cases," said Mr. Justice Willes in *Webb* v. *Bird* (19), "as compared with the general law are anomalous." "The case of a right to light before the statute stood on a peculiar ground," said Lord Blackburn, in the same case, in the Exchequer Chamber. "Anyone," said Lord Justice Bramwell in *Bryant* v. *Lefever* (20), "who reads the cases relating to the acquisition of a right to light will see that there has been great difficulty in establishing it on principle."

Accordingly, in *Chasemore* v. *Richards* (30), your Lordships' House declined to apply the analogy drawn from lights to water passing through the earth in unascertained courses, and the Courts of Common Pleas, Exchequer Chamber, and Appeal have declined to apply it to the

cases of air—*Webb* v. *Bird* (19), *Bryant* v. *Lefever* (20)—and of noise—*Sturges* v. *Bridgman* (35).

Lastly, the way in which the Prescription Act deals with the right to light is significant of its anomalous character. It deals, on the one hand, with easements of an affirmative character which are capable of interruption by the servient owner. It deals, on the other hand, not with negative easements generally, but with the right to light alone of all the class to which it belongs. I believe that this argument, derived from the law of lights, has exercised a great influence on the establishment of the right to support, but I consider that in principle it affords no justification for the establishment of such a right.

In order that acquiescence may arise there must, in my opinion, be the power to prevent; and this I conclude, for the reasons I have given, is wanting in the case of the support of buildings by adjoining soil. But there is, in my humble opinion, equally wanting another element, namely, knowledge in the owner of the servient tenement.

No doubt the owner of property knows or must be taken to know what occurs openly and visibly on his estate or in its immediate neighbourhood, but not that which takes place underground or in a secret manner. Hence he is justly charged with knowledge that his neighbour walks habitually over his land or has erected a house with windows deriving light over his fields; but he would not be affected with knowledge of the user of a gangway or gallery constructed in the course of secret mining operations. Now the question whether a building does or does not derive any practical support from the neighbouring land is one which it appears to me often extremely difficult to answer even for the building owner, and far more difficult to answer for the adjoining owner, who may be ignorant of the nature of the structure erected behind a hoarding—of the incidence of its burthen on the soil—of the depth and character of the foundations, whether extending to the rock or resting on the surface soil—and of the nature of the subsoil itself. He may indeed excavate his own land and probably answer the last of these questions; but on the other topics he has no certain means of information, except by a trespass or an impertinence. It is evident that where the building is on the outcrop of strata or where the beds have been intersected by dykes or disturbed by faults, it would be difficult or impossible to tell what is the incidence of the burthen created by a house except by actual excavation and experiment. The circumstances of the case render it, in my opinion, unjust to impute to a neighbour that plain knowledge of what is going on in his neighbourhood which can alone justify the depriving a man of a right to use his own land in a lawful manner.

In the case of *Solomon* v. *The Vintners' Company* (23) the question was as to the right of support of one house by another not immediately adjoining, on the ground of thirty years' enjoyment of such support; and there Baron Bramwell made some observations which seem very relevant to the present enquiry. Supposing such a right to exist, "it must," said the learned Judge, "be either as a matter of absolute right, or as a matter of prescription, or under the Prescription Act, or as founded on some supposed lost grant. In any of these cases it can only exist if the benefit was one that was enjoyed as of right, which cannot be unless it was openly and visibly enjoyed. An enjoyment must neither be *vi*, *precario* nor *clam*, it must be open. Now when one house visibly leans towards another, a person may make a tolerably shrewd guess that it is partly supported by the other, but it will be only a conjecture." . . . "In fact it is impossible to say which house is being supported. It is true that in this case when the defendant's house was removed the plaintiff's house fell in; but probably nobody who saw the block of buildings would have guessed that such a result would have followed. If anyone had done so, it would have been but a matter of conjecture. Therefore, supposing that the plaintiff for more than twenty years had an enjoyment which he says now ought to continue, it was an enjoyment *clam*, not open, and consequently not as of right;" . . . consequently "no title

was gained under any of the different ways in which it has been surmised it might have been gained."

On principle I conclude, therefore, that acquiescence does not apply to the right in question.

Another argument in favour of the acquisition of the right in question has been based upon an analogy with the operation of the Statute of Limitations. "It seems to me," said Mr. Justice Lush, "to be the necessary consequence of the Limitation Act that such an easement (that is, an easement not within the Prescription Act) should be gained by a length of enjoyment commensurate with that by which a title to the house is gained. It would be a strange anomaly to hold that a title to the house should be acquired, and not a title to that which is essential to its existence; that the law which bars the owner from recovering the tenement itself after he has acquiesced in a usurped ownership by another for twenty years, yet leaves him at liberty, if he happens to be adjoining owner, to let it down and destroy it altogether, by taking away that which has been its natural support during the whole period, I cannot help thinking that the revolting fiction of a lost grant may now be discarded in view of the necessary effect of the Limitation Act upon such an easement as this."

To the extent of holding that, if the right is to be acquired at all by lapse of time, twenty years is a reasonable period to confer the right, I think that the analogy is sound; but beyond that it appears to me not to go. The Statute of Limitations presupposes a right of action and takes it away if not put in force for twenty years; that furnishes no reason for casting a new burthen upon a man where he has no capacity to bring an action or to create a physical obstruction to the exercise of the alleged right. To take away a right of action, if not put in force within a reasonable time is one thing; to take away a man's right in his property because he does not bring an action which he cannot bring, seems to be quite another thing.

The authorities which establish this existence of the right in question afford no distinct statement of the principle upon which it reposes, but there are to be found in them references to the open character of the user, to the knowledge of the servient owner, and to the lapse of time, which seem to show that some notion of acquiescence was in the minds of the learned Judges; but when I ask myself what difference it makes whether the user be open or secret to a man who cannot stop such user, what is the value of knowledge to a man who cannot act on it, and what is the effect of a lapse of time in the course of which nothing can be done, I find myself unable to answer these enquiries; and I think that the circumstances under which the building has been erected and the support enjoyed are immaterial. I regard the right as resting not on any principle, but solely on a series of authorities which disclose no clear ground for their existence; but as it has been established that the right in question may be acquired by the lapse of time, I think that the period of twenty years may and ought to be held a sufficient one to confer the right.

The period of twenty years was that limited by the statute 21 James 1. c. 16 for bringing possessory actions and making entries. It was applied by the Judges to cases of prescription, so that before the Prescription Act the uninterrupted enjoyment of an easement for that length of time was constantly held to afford a ground for presuming the necessary grant or covenant. It has been referred to in *Stansell* v. *Jollard* (6), before Lord Ellenborough, in 1803, in *Dodd* v. *Holme* (41), and in other of the authorities relative to this very right as sufficient to confer it; and it may well be maintained as reasonable in itself. I therefore answer your Lordships' second question in the affirmative.

I have already shewn that I view the right in question as the result of an artificial rule of law, with which knowledge and acquiescence have nothing to do. I therefore answer your Lordships' third question by saying that in my opinion if the acts done by the defendants would have caused no damage to the plaintiff's

(41) 1 Ad. & E. 493.

building as it stood before the alterations made in 1849, it is not necessary to prove that the defendants or their predecessors in title had knowledge or notice of those alterations in order to make the damage done by their act in removing the lateral support after the lapse of twenty-seven years an actionable wrong.

For the reasons already given I submit (in answer to your Lordships' fifth question) my opinion that the course taken by the learned Judge at the trial of directing a verdict for the plaintiffs was correct, according to the law of England as it now stands. His conclusion involves the proposition that, by the mere act of his neighbour and the lapse of time, a man may be deprived of the lawful use of his own land—a proposition which shocks my notions of justice, and against which I have struggled but have struggled in vain; because, as I repeat with regret, I can find no reasonable proposition on which to rest the long line of decisions on the question before your Lordships. It would be presumptuous in me to enquire how far your Lordships will be bound by this long catena of authorities, or free to act on reason and principle, and I therefore humbly submit to your wisdom the conflict which appears to me to exist in this important case between the two governing principles of our law.

BOWEN, J.—It appears to be established by an irresistible weight of authority that an ancient house is entitled to such support from the adjacent soil as it has immemorially enjoyed. The first question put to us by your Lordships must, therefore, be answered in the affirmative. Before replying to the rest, I propose to state my view as to the nature of this right of support and the mode of its acquisition.

It has been urged upon your Lordships that the support from the adjoining land to which an ancient house is entitled is a natural right of property. In one aspect, but in one aspect only, it may be viewed as such, in so far, namely, as it arises out of the lawful use by a man of his own land. But in truth it also involves something beyond the natural use of a man's soil, namely, a collateral burden upon his neighbour, limiting, after a defined interval of time, the otherwise lawful use of the neighbour's own property. Under this aspect it is a right which cannot be natural, but must be acquired.

Nor is it necessary in order to account for its existence to invent the pretext of an imaginary positive law conferring the privilege as an exceptional boon on houses built before memory began. "Entia non sant multiplicanda praeter necessitatem." A simpler explanation will suffice. That a right of support for buildings may have a lawful origin at any moment is clear, for it can be created by agreement made in due and binding form with an adjoining owner. All that the law, therefore, seems in the case of support for ancient buildings to do is to repeat the operation it performs so constantly in the case of other immemorial user. It assumes some possible lawful origin for the enjoyment, prior to the dawn of legal memory. So long as the Courts of common law were hampered by the barriers between law and equity, this doctrine was stated in a necessarily narrow way, as if it were some "legal" origin that ought to be presumed. At the present day, when law and equity are fused, the proposition may with advantage be recast in a more liberal form, namely, that the law will presume any lawful and not merely any legal origin consistent with the circumstances of the case.

A binding and irrevocable concession on the part of some adjoining owner made in bygone days, or else an arrangement effected expressly or by implication upon the separation of one property into two parcels, is the source to which reason turns for the requisite lawful origin of all immemorial rights which either burden a neighbour's land or curtail his natural use of it. This is the theoretical beginning of prescriptive affirmative easements. To this initial source is ascribed the ancient window light—*Aldred's Case* (15). To a similar commencement by a parity of reason and not without the sanction of authority may be referred the right of an "ancient" house to its immemorial support — *Partridge* v. *Scott* (9), *Wyatt* v. *Harrison* (8) and *Humphries* v. *Brogden* (1).

Your Lordships, however, in the present appeal have to consider the character and limits of a presumption in favour of the right of support for a modern building which has been held to arise after a much shorter period of user, namely, user for twenty years. Unquestionably, in the case of affirmative easements and of window lights, after twenty years user of a special kind, a presumption of right has been sanctioned by the Courts independently of and before the Prescription Act. I propose to examine its principle and nature, and, having done so, to consider whether a title by twenty years user in the case of support for buildings is merely an illustration of the same rule applied to distinct subject-matter, or a rule based on any different grounds and accompanied with any other limitations.

First, then, as to affirmative easements and window lights. When enjoyment of a certain kind has existed from time immemorial, the law infers for it, as we have seen, any possible lawful origin. But user of a shorter period may well be surrounded with circumstances which will point, unless explained, to the conclusion that such user is only the enjoyment of a right. "This is founded," says Chief Justice Wilmot, speaking of the special case of window lights—*Lewis* v. *Price* (26)—"on the same reason as when the lights have been immemorial; for this" (that is, the shorter period) "is long enough to induce a presumption that there was originally some agreement between the parties."

For a considerable period in the history of English law, there may probably have been no hard and fast line as to the length of user short of the date of legal memory which would be sufficient in the case of an alleged easement to authorise the inference of a right. It is at all events certain that the twenty years limit did not make its appearance in our law till a comparatively recent date. In the reign of Queen Elizabeth, when *Bury* v. *Pope* (42) was decided, it had not been introduced so far as window lights were concerned, nor is there any trace of its existence up to this time in the case of any easement affirmative or negative. But in the year 1623 the statute of 21 James 1. c. 16 was passed, by which entry into lands was prohibited, except within twenty years after the accruer of the right, and, as a necessary corollary, an adverse enjoyment of lands for twenty years became a bar to any action of ejectment. Easements were not and could not be treated as within the statute; but the idea of twenty years was apparently borrowed by the Courts as a *quasi*-Parliamentary standard, for the use of Judges and juries, by which to mete out a reasonable measure of time. In the case of affirmative easements the twenty years rule obviously thus began — 2 Wms. Saund. 175. It was in the same manner that the twenty years rule was applied by very slow degrees to window lights — *Lewis* v. *Price* (26), *Dougal* v. *Wilson* (27) and *Darwin* v. *Upton* (29). It was not a positive proprietary law, for the rule at the date of *Bury* v. *Pope* (42) was not a part of the common law, and the Judges have no power to engraft new laws on old. In truth it was nothing but a canon of evidence. In *Read* v. *Brookman* (43), Mr. Justice Buller speaks of it "as a rule which has been laid down respecting the length of time which shall be sufficient to raise a presumption."

Similar specimens of Judge-made rules of proof are to be found in other passages of the law of evidence. If seven years elapse after a traveller has crossed the four seas without his being heard of, the presumption of the continuance of his life ceases and a counter presumption arises that he is dead. This seven years rule has been said to be adopted by the Courts in analogy to the statute 19 Charles 2. c. 6 with respect to leases dependent upon lives, and 1 James 1. c. 11 with respect to bigamy. Traces, on the other hand, of some such limitation appear earlier than these statutes in the books; but whether the Judge-made rule upon the subject of the continuance of life be imitated or not from the statutes of the realm, it is at best a mere maxim of evidence recommending an inference which it is for the jury to find and which may

(42) Cro. Eliz. 118.

(43) 3 Term Rep. 159.

be rebutted. The original presumption that after twenty years a bond had been satisfied by payment, was in like manner a rule of evidence, first introduced, it is said, by Lord Hale, and accepted slowly and reluctantly by the Courts—*Oswald* v. *Legh* (44). The presumption that after thirty years a document produced from the proper custody has been duly executed is another instance of such rules. In all these, the inference of which the Courts approve must be drawn not by the Court, but by the jury; in none of these is the inference conclusive.

The form in which the presumption built upon a twenty years enjoyment has usually been framed is that of a lost grant or covenant, according as the right claimed is to an affirmative or a negative easement. At the time when the twenty years rule was first promulgated by the Courts, a document under seal was the only specific mode known to the common law in which an incorporeal hereditament could be created. But there are many cases in which equitable rights in the nature of an easement arise without any deed at all. There may be a binding agreement for valuable consideration not under seal. There may be stipulations which would not otherwise run against the land, but which will bind a purchaser with notice. Or there may be conduct or inaction on the part of an adjoining owner which will in equity preclude him from denying that a right in the nature of an easement has been acquired against himself. Any of these suppositions under appropriate circumstances may conceivably furnish a lawful origin of which Courts of law, released in these later times from the narrow confines of a limited jurisdiction, may properly take cognisance. Even at a time when a deed was the only origin for an easement known to the common law, language is found in the judgments of the law Courts suggestive of the notion that this lost deed was merely the specific form in which the lawful origin had taken shape.

It is further to be noted that the exact inference recommended by the law was not, in the case of affirmative easements, that the consent of the adjoining owner had been first given during the twenty years user, but that some lawful origin preceded the earliest act of enjoyment. The lost grant was in theory anterior to the user; it was not the shape in which the submission of the servient owner was supposed during the twenty years to mould itself—see *Doe* v. *Reed* (45), *Moor* v. *Rawson* (18). In this sense it is inaccurate to speak of such rights as arising from the twenty years acquiescence of the servient owner. His acquiescence for twenty years, in the case of affirmative easements, was evidence that the right had existed previously.

It appears to be manifest, in spite of some inexact expressions of earlier Judges, that this presumption of a lost grant or covenant was nothing more than a rebuttable presumption of fact. This view is supported by a chain of authorities, the earliest of which are collected in 2 Wms. Saund. 175*a*, and all of which have been examined and discussed in the judgments of Lord Chief Justice Cockburn and Lords Justices Brett and Thesiger. It must at the same time be conceded that the Courts exhibited a disinclination to treat the presumption as an ordinary one. They preferred to leave it in a logical cloud, and juries were encouraged, for the sake of quieting possession, to infer the existence of deeds in whose existence nobody did believe—*Eldridge* v. *Knott* (46). Some metaphysical industry indeed has been expended with the view of explaining how a presumption of fact might yet be hedged round with an artificial authority and prestige which would allow it to be treated as something more than a mere presumption of fact. Thus it has been argued that the imaginary deed was legal machinery only, the only question being, as was said, whether the legal consequences really incident to a valid grant were well annexed to the state of facts disclosed by the twenty years user (*Starkie*, vol. iii. p. 928, ed. of 1842). The embarrassment of the Courts and of the profession appears from the judgment of Baron Parke, delivered shortly after the passing of the

(44) 1 Term Rep. 270.

(45) 5 B. & Ald. 232.

(46) 1 Cowp. 215.

Prescription Act, in *Bright* v. *Walker* (47), and from the report of the real property commissioners which preceded the passing of that statute.

But it seems a contradiction in terms to maintain that this rebuttable presumption of the existence of a grant would not at any time have been necessarily counteracted by actual proof that no such grant ever had been made. No case, it is true, occurs in which the presumption is recorded as having been displaced in this manner at *nisi prius*, though proof that no such deed could be efficacious in law was acknowledged to put an end to the presumption. But the reasoning of Lord Justice Brett in the Court of Appeal seems to me to shew what would, before the recent fusion of law and equity, have been the necessary result of positive disproof of the supposed deed, though I think, with deference, that he overlooks the altered condition of the problem due to the modern recognition in Courts of law of equitable rights. And with regard to the law as it formerly existed, the fact that the presumption, in the reign of Queen Elizabeth, was unknown, proves, I submit, to demonstration, that it is at most an artificial canon of evidence and nothing more. In *Darwin* v. *Upton* (29) Mr. Justice Gould explains its nature by the illustration of a demand and refusal which, in an action in trover, are evidence of a conversion, but not the conversion itself. It has always been the law that this evidence of conversion is for the jury, and that if a jury find simply a demand and refusal, the Courts have no power as a matter of law to infer a conversion—*Vaughan* v. *Watt* (48), *The Chancellor of Oxford's Case* (49), *Starkie*, vol. iii. 1160.

The question, so far as lost grants and lost covenants are involved, seems to me to have lost much of its practical importance, owing to recent changes in the law. It would not now be sufficient to disprove a legal origin, unless the possibility of an equitable origin were negatived as well.

(47) 1 Cr. M. & R. 211.
(48) 6 Mee. & W. 492; 9 Law J. Rep. Exch. 272.
(49) 10 Rep. 57.

Such is the history and character of the twenty years rule as applied to affirmative easements, and further to the negative casement of the window light. Is there any valid reason to doubt that such also is its history and explanation as applied to the claim of support for modern buildings? The presumption raised in cases of support to buildings by the shorter user of twenty years is modelled upon the presumption growing out of immemorial enjoyment. The one presumption is the echo at a distance of the other. The distinction is, that the shorter period gives rise to a rebuttable, the longer to an irresistible inference. What necessity is there for inventing the hypothesis of some positive law in virtue of which in some special way a house after twenty years user is to be clothed with an absolute right to support as if it were an ancient house? The objection to this theory always is the same. Such a positive law apparently did not exist prior to the statute of James. Judges have had no power to create it since.

There are unquestionably certain broad differences between affirmative easements and the negative easement of a window light. There are differences between the window light and the right of a modern house to support from the adjoining soil. In the first place it is true that the window light, unlike a right of way, does not begin in acts of enjoyment which are *prima facie* an encroachment upon the neighbour's soil. "It is acquired," says Mr. Justice Littledale—*Moor* v. *Rawson* (18)—"by occupancy." It is acquired, that is to say, by occupancy upon one's own soil as distinct from user upon another's and without any necessity, therefore, to assume that the occupancy is preceded by a grant. But a consensual origin at one time or another, in the case of a title to window lights, the law still implies—*Lewis* v. *Price* (26), *Cross* v. *Lewis* (22).

The right to support for buildings from the neighbouring land is more allied in some ways than the window light to the class of affirmative easements. The man who uses his neighbour's soil for the support of his house affects his neighbour's land more tangibly than the man

who opens a window to overlook it. In the instance of the building which is supported, we have a direct lateral pressure upon the adjoining soil. There is certainly no case which decides that this pressure gives rise to a right of action on the neighbour's part, and practical reasons of convenience may be adduced against such a surmise, although it might perhaps be argued that an action ought on principle to lie against, and an injunction be obtainable to restrain, the man who is actually availing himself of his neighbour's soil and using it in a manner which in twenty years will be evidence of the acquisition of a right so to do. But assuming from the silence of the books that no right of action is created by the adverse enjoyment of support for buildings, the right to support may none the less be a negative easement like light, and capable of a similar origin. It is on the theory of agreement made at some time or another between the neighbours that the right to support is based in the case of an ancient house. Borrowing the argument used as to lights by Chief Justice Wilmot we may say that the twenty years rule is "founded on the same reason" as the immemorial title.

If, however, authority be needed in support of reason for the view that some neighbour's presumed consent is the foundation of the modern as well as the ancient title to support for buildings, it will be found in the language of the Courts in various cases—*Partridge* v. *Scott* (9), *Humphries* v. *Brogden* (1) and *Bonomi* v. *Backhouse* (12).

Nor can I admit that any reason exists why in the case of support to buildings the same doctrines should not regulate the quality and nature of the user required as apply to the mode of acquisition of affirmative easements and of light. Some conditions there surely must be determining the character of the enjoyment. If it be otherwise, the case of support to buildings, so far from being analogous to the case of lights, as Lord Ellenborough and others have called it, is an anomaly without parallel in English law. For mere possession is, as a rule, inadequate to create by lapse of time an adverse right which is to limit a neighbour's enjoyment of his property. "Mere lapse of time," says Chief Justice Dallas —in *Gray* v. *Bond* (39)—"will not of itself raise against the owner the presumption of a grant. When lapse of time is said to afford such a presumption, the inference is also drawn from accompanying facts." Such, too, was the principle of the Roman law. The cantilena "Nec clam nec vi nec precario" is a doctrine not peculiar to affirmative easements, though we are chiefly familiar with it in that chapter of the law of England. It seems in truth a natural condition of any inchoate user which is to mature by length of time and apart from statute into the presumption of a right acquired at a neighbour's expense. Whatever may be the peculiarities of the right to support to buildings as contrasted with ordinary easements—and I admit that such exist—why should the generic maxim "Nec vi nec clam nec precario" be discarded as inappropriate when we come to deal with support to buildings?

It is no doubt urged that the right of such support differs from all other acquired rights in this, that the enjoyment of support by a building cannot be reasonably interrupted. This cannot be true always, even if it is true at times. There may be circumstances in which any interruption of the modern building's support would be attended with great expense and even danger to the property of the servient owner. But is there any distinction in this respect between the window light and the right of support except what may be called a distinction of degree? In some instances it is easy to interrupt the enjoyment of both. In some it will be difficult to interfere with either. Circumstances may be conceived in which it would be as serious an enterprise to block out a light as to withdraw the support of the house. Yet there can scarcely be an instance in the case of either in which the interruption would not be physically possible if it were worth the necessary trouble and expense. The difficulty of interrupting percolating water is of a wholly different kind, and far more insurmountable. But admitting that physical possibility or impossibility of interruption may not be the test, and

that no right of support ought to arise by lapse of time where interruption is not practically feasible, it follows, not that a right of support for buildings can never be acquired as ordinary easements are, but merely that a right of support for buildings cannot always and under all circumstances be acquired. In like manner our law has distinguished between that access of air, light and wind which is definite and can be interrupted, and that access of air, light and wind which is indefinite, incapable of interruption, and which accordingly never grows into a right.

If, indeed, the law recognised no such thing as the right of support to buildings as it recognises no rights to the access of percolating subterranean water, there might be good grounds for saying that the possibilities of interrupting a building's support were possibilities of which the law took no account; but the contrary is the case. The law of England treats the right of support for buildings as a right perfectly susceptible of acquisition, and it does so, I conceive, upon the very ground that the enjoyment can usually, as a fact, be interrupted, even though interruption may be very inconvenient. "Although," says Lord Campbell, in *Humphries* v. *Brogden* (1), "there may be some difficulty in discovering whence the grant of the easement in respect of the house is to be presumed, as the owner of the adjoining land cannot prevent its being built, and may not be able to disturb the enjoyment of it without the most serious loss or inconvenience to himself, the law favours the preservation of enjoyments acquired by the labour of one man, and acquiesced in by another who has the power to interrupt them; and as on the supposition of a grant the right to light may be gained from not erecting a wall to obstruct it, the right to support for a new building erected near the extremity of the owner's land may be explained on the same principle." This is a considered judgment of Lord Campbell and Justices Patterson, Coleridge and Erle. They distinctly refer the right of support for the modern building to the hypothesis of a modern covenant, and do so on the express ground that the adjoining owner can, in fact, interrupt the user, expensive or inconvenient as the interruption may be. To assume, indeed, that interruption in such cases is out of the question, and that a right nevertheless is gained by user, would be to make the right of support for buildings a right at variance with all the principles of English law. Nor would the difficulty be avoided by calling it a law of property. This would be only creating for its benefit a new class in the category of rights, of which it will be a solitary member. To say, on the other hand, that the Courts have created such a doctrine without rhyme or reason, is to do scant justice to the great authority of the common law Courts of past ages. Surely it is simpler to believe that the law deals with support to buildings as with light, considers it an enjoyment capable on the whole of interruption, and capable therefore of ripening into a right where interruption does not occur. It might, perhaps, be added with some shew of reason that the user ought, if the analogy of lights and other easements were to be followed, to be neither violent nor contentious. The neighbour, without actual interruption of the user, ought perhaps, on principle, to be enabled by continuous and unmistakable protests to destroy its peaceable character, and so to annul one of the conditions upon which the presumption of right is raised—see *Eaton* v. *The Swansea Waterworks Company* (50).

I am aware that this view is not one that has been laid down in any decided case. On the contrary, it has been said that in the case of window lights the only manner in which enjoyment could be defeated before the Prescription Act was by physical obstruction of the light. But for the language of some of the Judges, one might well hesitate with Lord Wensleydale, in *Chasemore* v. *Richards* (30), in accepting this statement of the law as reasonable. Such was not the doctrine of the civil law, nor the interpretation which it placed upon the term *non vi*; but the difficulty at any rate is

(50) 17 Q.B. Rep. 267; 20 Law J. Rep. Q.B. 482.

not greater with respect to the right of support than that which might easily, up to the passing of the Prescription Act, have occurred in the analogous case of a window. If in any particular instance interruption is impracticable, and if perpetual protests in such instance are also legally useless, there is no necessity that I know of, in law or in sense, to assert that any right will in that special instance be the consequence of non-interruption. I am not, however, aware that in the case of *Angus* v. *Dalton* which is now before your Lordships it ever was, or could be, suggested that the enjoyment of support was in any degree incapable of interruption.

Finally, why should not the condition be recognised in cases of support for buildings which prescribes that the user must be open? In the negative easement of the window light the condition is no doubt almost necessarily fulfilled. The adjoining owner, if he is a person capable in law of being affected by adverse user, has notice either by himself or his agents of the construction of the window. Probably with respect to support the character of the building and the nature of the soil often afford an equal notice to the adjoining owner of the enjoyment, out of which a right is developing; but I do not regard actual notice to the adjoining owner as the crucial point—see *Cross* v. *Lewis* (22). The publicity or openness of the enjoyment seems to me the real test. Without this publicity the quality of the user cannot be such as is uniformly required to raise the inference of an acquired right. If there be peculiarities in the construction of the building which render the enjoyment secret, the user is not strictly adverse. It is said that it would be an idle ceremony to acquaint a neighbour with the fact of an user which he cannot reasonably prevent. I have already stated what seems to me to be the real value of the argument drawn from the supposed difficulties of interruption. It must not, however, be forgotten that the real question is, What is the quality of the user? Has it been an enjoyment in the face of day which reasonable neighbours might see and understand? If so, the presumption arises that it is of right, whether such right has been conceded during the twenty years user or at any previous time.

It has been asked whether a man, whenever he increases the internal weight of portions of his house, is bound to give notice to his neighbours. But if, by the increased weight, he is seeking to acquire additional rights against the neighbour, the analogy of all law would appear to demand that his enjoyment should be open. There is no abstract difficulty in leaving it to the jury to say whether the conditions of publicity have in fact been fulfilled. Your Lordships have been told, indeed, in argument at the bar that to submit such questions to the jury would be to render titles of adjacent owners insecure and dependent on matters of much nicety. The danger would not be so great as is assumed, for in most of such cases a right to some support will *ex hypothesi* have been acquired, and adjoining owners will not be able easily to do wanton mischief. Nevertheless, the suggested danger, if it exists at all, ought not to be overlooked. But it can readily be cured by legislation. All that is needed is to bring into the existing Prescription Act the omitted case, if omitted it really has been, of a claim to support for buildings, and to deal with it as window lights have been dealt with.

If the user complies with the necessary conditions, the presumption, after twenty years, of some lawful origin will arise. A case thus *prima facie* established may be met in two ways. The defendant may disprove the user or its quality; or in the last resort he may, if he can, while admitting the user, attempt to answer the presumption of some lawful origin—a task which he will find difficult in practice, inasmuch as mere proof of the absence of any covenant under seal, for the reason I have above indicated, will not any longer, since the fusion of law and equity, cover the necessary ground.

The above, I submit, is a fair account of the law as regards the claim to support for a modern house, and of the application to such a claim of the twenty years rule. The adaptation of the twenty

years rule to the case of support to buildings has no doubt been slow. It has been accepted gradually and with hesitation—a fact which of itself bears testimony to the soundness of the view that it is no part of the positive law of property. Its application to the case of lights was equally gradual, for the rule as to lights had not become stereotyped up to the beginning of the reign of George 3—see *Lewis* v. *Price* (26). The twenty years rule as to the presumed satisfaction of bonds also grew into force by slow degrees. But I think that there is an ample weight of authority to shew that in cases of support to buildings such a rule now at last prevails, and that it can be applied in substantial accordance with the general principles of the law of easements. Yet even if the case of support for buildings differs materially from all easements, affirmative or negative, if it stands alone by itself as a separate species of *pseudo*-easement, can it on the other hand be doubted that the twenty years rule as found in connection with it is really the same presumptive rule which governs easements in general, and that it is the doctrine applicable to the acquisition of easements which the law of England has chosen to adapt to the special and in some ways the anomalous case of support to a modern building.

Against the above view has been placed the language of Lord Wensleydale and Lord Cranworth in the case of *Bonomi* v. *Backhouse* (12). "I think it perfectly clear," says Lord Wensleydale, "that the right in this case was not in the nature of an easement, but that the right was to the enjoyment of his own property, and that the obligation was cast on the owner of the neighbouring property not to interrupt that enjoyment."

I have already considered to what extent and in what sense the right to support for buildings is a right to use a man's own property; to what extent it also involves a collateral title to impede the neighbour in the natural use of the neighbour's own. It is to this important distinction between the case of support to houses and the case of an ordinary affirmative easement that Lord Wensleydale and Lord Cranworth appear to me to be referring, and a similar criticism applies to like expressions which at times have fallen from other Judges. *Bonomi* v. *Backhouse* (12) was in any event a case which proceeded on the basis of the existence in that special instance of the full right under discussion. The arbitrator had found all and every lawful origin which in law could create it. Whether the right when created arose from the presumption of a grant or from some imaginary law of property was not therefore necessarily in question.

In *Stansell* v. *Jollard* (6) the character of the user does not seem to have been disputed nor the presumption challenged. Lord Ellenborough indeed places the origin of support and lights on the same footing. He merely held that "where, as in the case before the Court, a man had built to the extremity of his soil, and had enjoyed his building above twenty years, by analogy to the case of lights, he had acquired a right to support." If the right of support is indeed analogous to the right to a window light, then the law would seem to be such as I have argued that it is.

Nor in *Hide* v. *Thornborough* (7) did any question apparently occur as to the quality of the user, nor was any attempt made to disprove the presumption. Here, again, the right was taken as having arisen, if it was a right acknowledged by the law. "If," said Baron Parke, "there was twenty years enjoyment by the plaintiff of the support of his house from the neighbour's land, and it was known that the defendant's land supported the plaintiff's house, that is sufficient to give him a right of support." This is but recognising the proposition that the user must be open. In *Partridge* v. *Scott* (9) the right is ascribed to the idea of a grant which ought not, at common law, says Baron Alderson, to be inferred from any lapse of time short of twenty years after the defendants might have been or were fully aware of the facts. I abstain from reviewing at length the other cases which bear on this point, as they have been abundantly

examined by Lord Justice Thesiger in the Court of Appeal below.

I now proceed to apply the above reasoning to the questions put by your Lordships.

1. This question I have already answered in the affirmative.

2. The period during which the house had stood was sufficient to give the plaintiff the same right as if his house was ancient, provided the enjoyment fulfilled the conditions I have described, and provided it was not shewn by the defendant that the right had no lawful origin.

3. It was necessary to prove that the defendant had openly enjoyed the additional support rendered necessary by his alterations. It would of course be an open enjoyment if the defendants or their predecessors in title had express knowledge or notice of the alterations and of their character. But the enjoyment of the additional support would also be open if the appearance of the altered building was such as to afford a reasonable indication to the adjoining owner of the alterations that had taken place. Except to this extent it was not necessary, in my opinion, to prove either knowledge or notice to the adjoining owner.

4. If the alterations were openly enjoyed, I do not think it would be necessary also to prove knowledge of the effect of the alterations.

5. The course taken by the learned Judge seems to me to have been wrong. It should, I submit, have been left to the jury to find whether the enjoyment was in fact open. I may add that I consider this would be the correct ruling at *nisi prius*, whether the right acquired after twenty years user be a right of property or a right acquired as I have described, for I do not regard the doctrine "Nec vi nec clam nec precario" as necessarily peculiar to the law of affirmative easements. The law as to the quality of the user required to raise the presumption, and as to the rebuttable character of the presumption when raised, should, I submit, be laid down as I have indicated. The exact forms of the questions for the jury would depend on the issues arising out of the defendant's case. I think that the learned Judge was premature in assuming that no issues under the circumstances were likely to arise. One already had arisen upon the admitted facts, namely, whether the user was open or the reverse.

LORD COLERIDGE, C.J.—In this case I have had the great advantage of reading the printed judgments prepared by my noble and learned friend the Lord Chancellor and by my noble and learned friend opposite (Lord Blackburn). I had prepared a judgment of my own, but have found that it would add nothing to what is about to be said, and much better said, by my noble and learned friends. I, therefore, content myself with saying that I entirely concur in the conclusions at which they have arrived, and in the reasons which they have given for them. I have to thank my noble and learned friend on the woolsack for allowing me to say this at once, as I have to be elsewhere.

THE LORD CHANCELLOR (LORD SELBORNE).—Your Lordships are much indebted to the learned Judges by whom you have been assisted in this case for their careful and valuable opinions, in which the authorities have been fully examined. I do not myself propose to refer to those authorities, except so far as they seem to me to bear upon principles which have been brought into controversy, and as to which the learned Judges (even when they concur as to the practical result) are not agreed.

The questions upon these appeals may be reduced, shortly, to two: The first, whether a right to lateral support from adjoining land can be acquired by twenty-seven years uninterrupted enjoyment for a building proved to have been newly erected at the commencement of that time; the second, whether (if so) there was anything in the circumstances of this case, as appearing in the evidence, sufficient either to disprove the acquisition of such a right or to make it dependent upon some question of fact which ought to have been submitted to the jury.

There was another point, made by both the petitions of appeal, which I only mention lest it should appear to have been overlooked. The action was brought by reason of the falling of the plaintiffs' house through the excavation of the adjoining land of the commissioners, in the course of certain works executed for them by the appellant Dalton, under a contract, and for Dalton by sub-contractors. The commissioners disputed their liability for the acts of Dalton, and Dalton disputed his liability for the acts of his sub-contractors. The same point arose under very similar circumstances in *Bower* v. *Peate* (51), and was decided adversely to the contention of the appellants. It follows from that decision (as to the correctness of which I agree with both the Courts below) that, if the plaintiffs are entitled to recover at all, they are entitled to recover against both the commissioners and Dalton.

I proceed to consider the principal questions in the case.

In the natural state of land, one part of it receives support from another, upper from lower strata, and soil from adjacent soil. This support is natural, and is necessary, as long as the *status quo* of the land is maintained; and, therefore, if one parcel of land be conveyed, so as to be divided in point of title from another contiguous to it, or (as in the case of mines) below it, the *status quo* of support passes with the property in the land, not as an easement held by a distinct title, but as an incident to the land itself, *sine quo res ipsa haberi non debet*. All existing divisions of property in land must have been attended with this incident, when not excluded by contract, and it is for that reason often spoken of as a right by law; a right of the owner to the enjoyment of his own property, as distinguished from an easement supposed to be gained by grant; a right for injury to which an adjoining proprietor is responsible, upon the principle, *sic utere tuo, ut alienum non lædas*. This is all that I understand to be meant by those passages of the judgments in *Humphries* v. *Brogden* (1), *Rowbotham* v. *Wilson* (2), *Bonomi* v. *Backhouse* (12), to which some of the learned Judges who assisted your Lordships have referred.

In these cases, or in some of them, there were buildings upon the land; but no separate question was raised as to the support necessary for the buildings, as distinguished from that necessary for the land; and the doctrine laid down must, in my opinion, be understood of land without reference to buildings. Support to that which is artificially imposed upon land cannot exist *ex jure naturæ*, because the thing supported itself does not so exist; it must in each particular case be acquired by grant, or by some means equivalent in law to grant, in order to make it a burden upon the neighbour's land, which, naturally, would be free from it. This distinction (and at the same time its proper limit) was pointed out by Mr. Justice Willes, in *Bonomi* v. *Backhouse* (12), where he said, "The right to support of land and the right to support of buildings stand upon different footings, as to the mode of acquiring them; the former being *prima facie* a right of property, analogous to the flow of a natural river, or of air—*Rowbotham* v. *Wilson* (2)—though there may be cases in which it would be sustained as matter of grant—see *The Caledonian Railway Company* v. *Sprot* (16)—whilst the latter must be founded upon prescription or grant, express or implied; but the character of the rights, when acquired, is in each case the same." Land which affords support to land is affected by the superincumbent or lateral weight, as by an easement or servitude; the owner is restricted in the use of his own property in precisely the same way as when he has granted a right of support to buildings. The right, therefore, in my opinion, is properly called an easement—as it was by Lord Campbell in *Humphries* v. *Brogden* (1); though when the land is in its natural state the easement is natural and not conventional. The same distinction exists as to rights in respect of running water: the easement of the riparian landowner is natural; that of the millowner on the stream, so far as it exceeds that of an ordinary

(51) 45 Law J. Rep. Q.B. 446; Law Rep. 1 Q.B. D. 321.

riparian proprietor, is conventional—that is, it must be established by prescription or grant.

If at the time of the severance of the land from that of the adjoining proprietor it was not in its original state, but had buildings standing on it up to the dividing line, or if it were conveyed expressly with a view to the erection of such buildings, or to any other use of it which might render increased support necessary, there would then be an implied grant of such support as the actual state or the contemplated use of the land would require, and the artificial would be inseparable from, and (as between the parties to the contract) would be a mere enlargement of, the natural right. If a building is divided into floors or "flats," separately owned (an illustration which occurs in many of the authorities), the owner of each upper floor or "flat" is entitled, upon the same principle, to vertical support from the lower part of the building, and to the benefit of such lateral support as may be of right enjoyed by the building itself—*The Caledonian Railway Company* v. *Sprot* (16).

I think it clear that any such right of support to a building or part of a building is an easement; and I agree with Mr. Justice Lindley and Mr. Justice Bowen that it is both scientifically and practically inaccurate to describe it as one of a merely negative kind. What is support? The force of gravity causes the superincumbent land or building to press downwards upon what is below it, whether artificial or natural; and it has also a tendency to thrust outwards, laterally, any loose or yielding substance, such as earth or clay, until it meets with adequate resistance. Using the language of the law of easements, I say that, in the case alike of vertical and of lateral support, both to land and to buildings, the dominant tenement imposes upon the servient a positive and a constant burden, the sustenance of which by the servient tenement is necessary for the safety and stability of the dominant. It is true that the benefit to the dominant tenement arises, not from its own pressure upon the servient tenement, but from the power of the servient tenement to resist that pressure, and from its actual sustenance of the burden so imposed. But the burden and its sustenance are reciprocal and inseparable from each other, and it can make no difference whether the dominant tenement is said to impose, or the servient to sustain, the weight.

Lord Campbell in *Humphries* v. *Brogden* (1) referred to the servitude *oneris ferendi* (applied in the law of Scotland to a house divided into "flats" belonging to different owners) as apt to illustrate the general law of vertical support. The servitude so denominated (*ut vicinus onera vicini sustineat*) in the Roman law was exclusively "urban"—that is, relative to buildings, whether in town or country; and the instances of it given in the *Digest* refer to rights of support acquired by one proprietor for his building, or part of it, upon walls belonging to an adjoining proprietor. (*Inst.* lib. 2, tit. 3; *Dig.* lib. 8, tit. 2, ll. 24, 25, 33; also tit. 5, ll. 6, 8.) But in principle the nature of such a servitude must be the same, whether it is claimed against a building on which another structure may wholly or partly rest, or against land from which lateral or vertical support is necessary for the safety and stability of that structure.

These principles go far, in my opinion, to establish, as a necessary consequence, that such a right of support may be gained by prescription. Some of the learned Judges appear to think otherwise and to doubt whether it could be the subject of grant. For that doubt I am unable to perceive any sufficient foundation. Mr. Justice Littledale in *Moor* v. *Rawson* (18) spoke of the right to light as being properly the subject, not of grant, but of covenant. If he had said (which he did not) that a right to light could not be granted, in the sense of the word "grant" necessary for prescription, I should have doubted the correctness of the opinion, notwithstanding the great learning of that eminent Judge. Although the general access of light from the heavens to the earth is indefinite, the light which enters a building by particular apertures does and must pass over the adjoining land in a course which, though not visibly defined, is really certain, and, in that

sense, definite. Why should it be impossible for the owner of the adjoining land to grant a right of unobstructed passage over it for that light in that course? The term "ancient" light seems to me itself to imply that such a right might be acquired by prescription. But, however this may be, the opinion of Mr. Justice Littledale is stated by him in words which (unless I misunderstand the true nature of support) do not apply to that easement. "A right of common" (he says), "or a right of way, being a privilege of something positive to be done or used in the soil of another man's land, may be the subject of legal grant; yet light and air, not being to be used in the soil of the land of another, are not the subject of actual grant; but the right to insist upon the non-obstruction and non-interruption of them more properly arises by a covenant, which the law would imply, not to interrupt the free use of light and air." The pressure of the dominant tenement, in the case of support is upon the soil of another man's land, and I can see no material difference between this and "something positive done or used in the soil of another man's land." Mr. Justice Willes in *Bonomi* v. *Backhouse* (12), when delivering the unanimous judgment of the Court of Exchequer Chamber, said that "the right to support of buildings" not only "might" but "must be founded upon prescription or grant expressed or implied." Baron Bramwell in *Rowbotham* v. *Wilson* (2) said, "I am of opinion that it is competent to the owner of land, on or after the severance of the mines, to grant to the grantee of the mines the right to damage the surface. I cannot see how, if there may be a grant of mines, and of the right to enter, sink shafts and work, there may not be such a grant as that contended for here" (that is, the right to take away support from the surface), "nor can I see how, if a grant of unobstructed light and air, or of support of the soil, to an adjoining owner would be good, a grant of such a right as claimed here would not be. My brother Hayes said presumed grants of windows and of support were idle fictions, which ought never to have been invented. Perhaps so, but the fact that they were shews that the inventors and everybody else supposed that real grants of such a nature would be good." The rule as to prescription is thus stated in Sir Francis North's argument in *Potter* v. *North* (52): "The law allows prescriptions, but in supply of the loss of a grant. Ancient grants happen to be lost many times, and it would be hard that no title could be made to things that lie in grant but by shewing of a grant; therefore, upon usage, *temps dont*, &c., the law presumes a grant and a lawful beginning, and allows such usage for a good title; but still it is but in supply of the loss of a grant; and, therefore, for such things as can have no lawful beginning, nor be created at this day, by any manner of grant, or reservation, or deed that can be supposed, no prescription is good." Mr. Justice Ashurst in *Lord Pelham* v. *Pickersgill* (53) laid it down as the general rule that "every prescription is good, if by any possibility it can be supposed to have had a legal commencement." Be the theory what it may, its true foundation in point of fact is that which the Romans called "usucaption," under the conditions defined by Sir Edward Coke. "Both to customs and prescriptions, these two things are incidents inseparable, namely, possession or usage, and time. Possession must have three qualities: it must be long, continual and peaceable (longa, continua et pacifica); for it is said, 'transferuntur dominia, sine titulo et traditione, per usucaptionem, scil. per longam, continuam, et pacificam, possessionem. Longam, i.e. per spatium temporis per legem definitum. . . . Continuam dico, ita quod non sit legitime interrupta. Pacificam dico, quia si contentiosa fuerit, idem erit quod prius, si contentio fuerit justa. . . . Longus usus nec per vim, nec clam, nec precario'" (1 *Inst.* 113 *b.* The Latin is from Bracton). All these conditions are capable, in my judgment, of being fulfilled as to the right of support to buildings, and, when they are fulfilled, I am unable to understand why the right should not be held to be prescriptively established.

(52) 1 Vent. 383; 1 Saund. 347; 1 Lev. 268.
(53) 1 Term Rep. 660.

The policy and purpose of the law, on which both prescription and the presumptions which have supplied its place, when length of possession has been less than immemorial, rest, would be defeated, or rendered very insecure, if exceptions to it were admitted on such grounds as that a particular servitude (capable of a lawful origin) is negative rather than positive; or that the inchoate enjoyment of it before it has matured into a right is not an actionable wrong; or that resistance to or interruption of it may not be conveniently practicable. I assume for the present purpose that a man who places on his own land, where it adjoins that of his neighbour, a weight which increases its pressure upon his neighbour's land, is not thereby guilty of an actionable wrong. If this be so the reason probably is that the act is lawfully done upon his own land, and that the owner of the adjoining land suffers no actual or appreciable damage from the increased amount of pressure which it has to bear, except so far as the continuance of that pressure, if uninterrupted, may tend to ripen into a right, and so to enlarge the servitude to which this land was previously subject. But against this he has his own remedy if he chooses to prevent and interrupt it. That power of resistance by interruption does and must in all such cases exist, otherwise no question like the present could arise. It is true that in some cases (of which the present is an example) a man acting with a reasonable regard to his own interest would never exercise it for the mere purpose of preventing his neighbour from enlarging or extending such a servitude. But on the other hand it would not be reasonably consistent with the policy of the law in favour of possessory titles that they should depend in each particular case upon the greater or less facility or difficulty, convenience or inconvenience, of practically interrupting them. They can always be interrupted (and that without difficulty or inconvenience) when a man wishes and finds it for his interest to make such a use of his own land as will have that effect. So long as it does not suit his purpose or his interest to do this, the law which allows a servitude to be established or enlarged by long and open engagement against one whose preponderating interest it has been to be passive during the whole time necessary for its acquisition, seems more reasonable and more consistent with public convenience and natural equity than one which would enable him at any distance of time (whenever his views of his own interest may have undergone a change) to destroy the fruits of his neighbour's diligence, industry and expenditure.

The law of ancient lights, as it stood before the Prescription Act, was a stronger example of the application of these principles; the easement in that case being more purely negative. I cannot agree with those who think that law too exceptional and anomalous to furnish an analogy, or exemplify a principle, applicable to any other case. The servitude *non altius tollendi ne luminibus officiatur* was as well known to the Roman jurisprudence as the servitude *oneris ferendi*, or any other; and, if natural and not only technical reasons are to be regarded, it is difficult to conceive anything more needful for the comfort of life and enjoyment of house property than the unobstructed enjoyment of light. There is no actionable wrong done by opening new lights which overlook a neighbour's land; and to obstruct them by building or erecting hoards on that land, when there is no other motive for doing so than to prevent them from ripening into an easement, is as seldom likely to be conveniently practicable as the obstruction of the vertical or lateral support of buildings by excavation or otherwise. But these have not been regarded as sufficient reasons why the right to lights should not be gained by an enjoyment and user for more than twenty years.

From the view which I take of the nature of the right of support—that it is an easement not purely negative, capable of being granted, and also capable of being interrupted—it seems to me to follow that it must be within the 2nd section of the Prescription Act (2 & 3 Will. 4. c. 71), unless that section is confined (as Sir William Erle in *Webb* v. *Bird* (19) appears to have thought) to rights of way and rights of water. The opinion

to that effect expressed by that eminent Judge was not necessary for the decision of *Webb* v. *Bird* (19), nor can I perceive that any concurrence in it was expressed by Justices Willes and Byles, who agreed in the decision. The point then determined (as I understand it) was that a claim to have free access for all the winds of heaven to the sails of a windmill was too large and indefinite in its nature to be acquired by use, or to be capable of interruption, within the meaning of the 2nd section of the Prescription Act. That determination I assume to have been correct. But I do not think it possible, without a degree of violence to the express terms of the Act, for which neither its context nor its policy (as expressed in the preamble) affords any justification, to restrict the operation of the 2nd section to "the two descriptions of easements therein specified, namely, the right to a way or watercourse." The expressed policy of the Act is large and general; it is to prevent claims of prescription from being defeated by shewing a commencement within time of legal memory. Why should not this extend to other easements besides ways and water rights, and lights which (by the 3rd section) are specially provided for, and exceptionally favoured? In terms the 2nd section extends to every claim which could "be lawfully made at the common law by custom, prescription or grant to any way, or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over or from any land or water." The interjection of the words "or other easement," between "ways" and "watercourses" may seem singular, but I cannot think that they ought therefore to be reduced to silence or arbitrarily limited. If any explanation of the place in which they occur is necessary, it may (I think) be found in the separate mention which follows of "land" and "water." *Reddendo singula singulis*, the words (as it seems to me) may be read thus: "Any way or other easement to be enjoyed or derived upon, over or from any land, or any watercourse, or use of water to be enjoyed or derived upon, over or from any water." So reading them, they would include (unless there is something else in the statute to exclude it—and I find nothing) the easement of support.

I am not insensible to the probability that there may be some error in an opinion which seems to be opposed to that of all the learned Judges in both the Courts below, and of most of those by whom your Lordships have been assisted on this occasion. They did not all advert to the Prescription Act, but, of those who did, Mr. Justice Lindley was, I think, the only one who expressed any doubt. The opinions of those learned Judges may possibly have been, in some degree, influenced by what was said by so distinguished a Judge as Sir William Erle, in the case of *Webb* v. *Bird* (19), which was cited for this purpose by Mr. Justice Lush. To those who considered that the right of support was not an easement, or that it was of so purely negative a character as to be incapable of being granted, or of being interrupted within the meaning of the statute, the conclusion that the statute did not apply to it would naturally follow. I have already stated my reasons for not assenting to those premises. The point may probably not now require decision, because the same practical conclusion may be reached by your Lordships (as it has been by all the Judges, except the late Lord Chief Justice of England, Mr. Justice Mellor and Lord Justice Brett) by a different road. But, having regard to its possible importance in other cases, I have not thought it right to withhold the expression of the opinion which, after much consideration, I have myself formed upon it.

Assuming the statute to apply, what would be its effect? The late Lord Chief Justice of England thought it would be nugatory. "It was passed" (his Lordship said) "with the view of putting an end to the scandal on the administration of justice which arose from forcing the consciences of juries" to find that there had been a lost grant, when "the presumption was known to be a mere fiction." But he nevertheless concluded that, except in the case of light, "as regards the effect of twenty years user or enjoyment in the matter of easements by

presumed grant, the law stands exactly as it did before the passing of the Act;" a conclusion extending as much to those rights of way, &c., which are expressly mentioned in the 2nd section, as to "other easements."

It is undoubtedly true, that under the 2nd section there is an important difference between a forty years and a twenty years user. Forty years user has the same effect which (under the 3rd section) twenty years user has as to light: it makes the right absolute and indefeasible, unless it is shewn to have been enjoyed by consent or agreement in writing. But twenty years user, under the 2nd section, may be defeated "in any other way in which it was previously" (that is, before the 1st of August, 1832) "liable in law to be defeated," except that it can no longer be defeated or destroyed "by shewing only that" it "was first enjoyed at any time prior to such period of twenty years." The effect of this, as I understand it, is to apply the law of prescription, properly so called, to an easement enjoyed as of right for twenty years, subject to all defences to which a claim by prescription would previously have been open, except that of shewing a commencement within time of legal memory. To allege that there was no evidence from which a grant could be presumed, or that there was evidence by which it ought to be inferred that there was, in fact, no grant, would not (as I understand the law) have been before the 1st of August, 1832, a competent mode of defeating or destroying any claim to an easement by prescription, and no jury would have been directed to find a grant in any such case, when there was no proof of a commencement within time of legal memory. The section, therefore (assuming it to apply), would in the present case be sufficient to establish a title by prescription to the right claimed by the plaintiffs, unless it had been enjoyed *vi*, or *clam*, or *precario*. Of *vi* or *precario* there is here no question.

Supposing, however, that the 2nd section of the Prescription Act ought not to be held to apply to the easement of support, the same result would practically be reached by the doctrine, that a grant, or some lawful title equivalent to it, ought to be presumed after twenty years user. As to this, I think it unnecessary to say more than that I agree with the view of the authorities taken by Mr. Justice Lush, by the majority of the Judges in the Court of Appeal, and by all the learned Judges who attended this House (unless Mr. Justice Bowen, who preferred to rely upon the equitable doctrine of acquiescence, is an exception) in their answers to the two first questions proposed to them by your Lordships.

Upon the other three questions proposed to the learned Judges, which involve the doctrine of *clam*, as applied to the easement of support, there has been much difference of opinion; four of the learned Judges being in the plaintiffs' favour, and the other three thinking that the jury were not properly directed on that point.

The enquiry on this part of the case is as to the nature and extent of the knowledge or means of knowledge which a man ought to be shewn to possess, against whom a right of support for another man's building is claimed. He cannot resist or interrupt that of which he is wholly ignorant. But there are some things of which all men ought to be presumed to have knowledge, and amongst them (I think) is the fact, that, according to the laws of nature, a building cannot stand without vertical or (ordinarily) without lateral support. When a new building is openly erected on one side of the dividing line between two properties, its general nature and character, its exterior and much of its interior structure, must be visible and ascertainable by the adjoining proprietor during the course of the erection. When (as in the present case) a private dwelling-house is pulled down, and a building of an entirely different character, such as a coach or carriage factory, with a large and massive brick pillar and chimney-stack, is erected instead of it, the adjoining proprietor must have imputed to him knowledge that a new and enlarged easement of support (whatever may be its extent) is going to be acquired against him, unless he interrupts or prevents it. The case is, in my opinion, substantially the same as if a new factory had been erected where no building stood before.

Having this knowledge, it is, in my judgment, by no means necessary that he should have particular information as to those details of the internal structure of the building on which the amount or incidence of its weight may more or less depend. If he thought it material, he might enquire into those particulars, and then, if information were improperly withheld from him, or if he received false or misleading information, or if anything could be shewn to have been done secretly or surreptitiously, in order to keep material facts from his knowledge, the case would be different. But here there was no evidence from which a jury could have been entitled to infer any of these things. Everything was honestly and (as far as it could be) openly done, without any deception or concealment. The interior construction of the building was, indeed, such as to require lateral support, beyond what might have been necessary if it had been otherwise constructed. But this must always be liable to happen whenever a building has to be adapted to a particular use. The knowledge that it may or may not happen is, in my opinion, enough, if the adjoining proprietor makes no enquiry. I think, therefore, that in this case the kind and degree of knowledge which the adjoining proprietor must necessarily have had was sufficient; that nothing was done *clam*, and that the evidence did not raise any question on this point which ought to have been submitted to the jury.

My opinion, therefore, upon the whole case is in favour of the respondents, the plaintiffs in the action, and against the appellants; and the motion which I have to make to your Lordships is, that the judgment of the Court below be affirmed, and the appeal dismissed with costs. The effect of this will be, that judgment will stand for the plaintiffs for 1,943*l.*, the amount of damages assessed by the special referee; the defendants not having elected to take a new trial within the time allowed them by the order of the Lords Justices, which option was more than, according to the view which I take of this case, they were entitled to.

LORD PENZANCE.—In dealing with the questions of law to which the present case gives rise, it is material to bear in mind that the exact proposition which the appellants call upon your Lordships to repudiate or affirm is to be found in the ruling at the trial given by the learned Judge. It is in these words: "The authorities oblige me to hold that when a building has stood for twenty years it has acquired a right to the support of the adjacent land, and I do not think it at all depends upon whether the opposite or adjacent neighbour had notice or not of what was done, or what weight was put upon it; nor does it rest on the fact of there being an implied grant. I think it has become absolute law, that when a building has stood for twenty years, supported by the adjacent soil, it has acquired a right to the support of the soil; and no one has a right to take away that soil without putting an equivalent to sustain the building. That is the ruling which I must lay down here, because that is upheld by many authorities." Your Lordships have now to say whether this view of the authorities is a correct one, and, with some reluctance, I feel constrained to say that, in my opinion, it is so. I say with some reluctance, not because I think that the support which the plaintiff claims for his house is unreasonable or inequitable, but because the circumstances under which the claim is held to arise are, so far as I am able to discover, incapable of giving rise to it in accordance with any known principle of law.

It must be borne in mind both what the claim is and what it is not. It is not a claim asserted for the support of a house by the adjacent soil as soon as that house is built, but a claim that when the house has stood "for twenty years, supported by the adjacent soil, it has by absolute law acquired a right to the support of the soil," and this not by reason of any implied grant, and quite independent of whether "the opposite or adjacent neighbour had notice or not of what was done or what weight was put upon" the ground to which the lateral support was required.

It is this sudden starting into existence of a right which did not exist the day

before the twenty years expired, without reference to any presumption of acquiescence by the neighbour (to which the lapse of that period of time without interruption on his part might naturally give rise), which I find it impossible to reconcile with legal principles. I find myself, therefore, in entire accord with the opinion which Mr. Justice Fry has offered to the House; and he has so fully and ably illustrated his views on the subject, which are also mine, that I have little to add.

If this matter were *res integra*, I think it would not be inconsistent with legal principles to hold that where an owner of land has used his land for an ordinary and reasonable purpose, such as placing a house upon it, the owner of the adjacent soil could not be allowed so to deal with his own soil by excavation as to bring his neighbour's house to the ground. It would be, I think, no unreasonable application of the principle *sic utere tuo ut alienum non lædas*, to hold that the owner of the adjacent soil, if desirous of excavating it, should take reasonable precautions, by way of shoring or otherwise, to prevent the excavation from disastrously affecting his neighbour. A burthen would, no doubt, be thus cast on one man by the act of another done without his consent. But the advantages of such a rule would be reciprocal; and, regard being had to the practicability of shoring up during excavation, the restriction thus placed on excavation would not seriously impair the rights of ownership.

But the matter is not *res integra*. It has been the subject of legal decisions, and those decisions leave it beyond doubt that such is not the law of England. On the contrary, it is the law, I believe I may say without question, that at any time within twenty years after the house is built the owner of the adjacent soil may, with perfect legality, dig that soil away, and allow his neighbour's house, if supported by it, to fall in ruins to the ground. This being so, and these being his legal rights (the rights incident to his ownership), it seems to me that these rights must remain to him, or those who come after him, for all time, unless he or they have done something by which these rights have been divested, restricted or impaired. I find it impossible to conceive, within the application of any legal principles, that mere lapse of time can divest him or them of the rights they once had. Legal rights do not perish by lapse of time, but rather grow confirmed. What I mean to express is this, that the right to excavate the neighbouring soil not being impaired or restricted by the house being built, anything which afterwards impairs or restricts it must proceed from those who possess that right, and cannot come about, all things remaining unchanged, by the mere efflux of time.

In all the cases in which lapse of time is held to stand in the way of the assertion of rights attaching to the ownership of property, it is not the lapse of time itself which so operates, but the inferences which are reasonably drawn from the continuous existence of a given state of things during that period of time. These inferences are inferences of acquiescence or consent, and they are drawn from the fact that the person against whom the right is claimed has for a length of time failed to interrupt or prevent an enjoyment by his neighbour which he might have interrupted had he so pleased. In *Chasemore* v. *Richards* (30) the language held puts this beyond doubt. Mr. Justice Wightman said that no presumption could be raised from non-interruption, unless the person against whom the right is claimed might have prevented it; and Lord Wensleydale, in addressing your Lordships, distinctly relied upon the fact that the defendant was not able to prevent the enjoyment which, after a lapse of years, had been claimed as a right against him. In the more modern case of *Sturges* v. *Bridgman* (35) it was distinctly determined that no easement could be created by lapse of time, unless the defendant might have interrupted it. "Qui non prohibet quod prohibere potest, assentire videtur" is the legal maxim upon which, in my opinion, all the cases of easements, of whatever kind, acquired by length of time, substantially rest.

The question, therefore, in each par

ticular case, must be, Could the defendant have interrupted the enjoyment in question? Now if these words are taken literally, all cases are alike, and the question is no question at all. For an action for the disturbance of the enjoyment claimed involves the possibility of its being disturbed, and the fact that the defendant has at last interrupted the plaintiff's enjoyment (say of support to his house), which constitutes his cause of action, is a very simple proof, except under special circumstances, that the enjoyment was capable of interruption at an earlier period. The defendant's power of interruption, therefore, in my opinion, means something very different from the mere physical possibility of interrupting. It involves knowledge that the necessity for support existed, and the possibility of withdrawing that support without the expenditure of so much labour or money, or the incurring of so much loss or damage, as a man could not reasonably be expected to incur.

There is direct authority for this proposition to be found in the case of *Webb* v. *Bird* (19), in which Mr. Justice Willes states the principle which is to be extracted from the previous cases, in the following language: "In general a man cannot establish a right by lapse of time and acquiescence against his neighbour, unless he shews that the party against whom the right is acquired might have brought an action, or done some act, to put a stop to the claim, without an unreasonable waste of labour and expense.

Nor is any other view of this matter, as it seems to me, consistent with the terms in which a right to be gained by prescription or lapse of time is defined. A claim by prescription to a right of this character is said only to arise when a right or benefit, enjoyed over a length of time, has been enjoyed "*nec vi, nec clam.*" What is the meaning and bearing of these qualifications? or what place could they have in such a definition, unless they point to the fact that the benefit claimed after a lapse of years as a right, is one the existence of which the person against whom it is claimed had the means of knowing, and the enjoyment of which he had the power to stop? And of what importance are these matters except that they lay the foundation, where the right or benefit has not been interfered with, for presuming that he who might have interfered with them has granted or consented that they should be undisturbed in future?

Continuous enjoyment without interruption is surely insisted upon as the basis of the right for some reason, and for what reason except that it is the evidence of assent? The physical power to interrupt, if accompanied, as I have above suggested, by a knowledge that the enjoyment of support existed, and by the means of exercising that power of interruption without extravagant and unreasonable loss or expense, may well give ground for an implied assent if it be not exercised for so long a period as twenty years. But, if unaccompanied by these qualifications, the fact of non-interruption appears to lead to no conclusion whatever, and the restrictions insisted upon, that the enjoyment must be "open" and not sustained by "force," cease to have an intelligent place in the definition. In the present case it is obvious that a power to interrupt is one which, although it has existed, and been physically possible, ever since the plaintiffs' house was built, could only be exercised by measures which no man in his senses would take. It would indeed be an unreasonable state of the law which should enforce upon the defendant, if he wished to retain his original right to excavate his own soil at such time as his interests might require him to do so, that he should pull his own house down, and drag his neighbour's to the ground with it at a time when his interest did not require it, and when it could be nothing but a grievous loss and injury to all parties concerned.

For these reasons I am unable to support the conclusion that a right such as that here in question could be gained by the plaintiff by anything in the shape of prescription or lost grant; but if I am mistaken in this, I think it is clear that in the present case the question should have been submitted to the jury whether the enjoyment of the support to the house was an "open" enjoyment at all. The house was built in an exceptional manner,

and that which, seen from the outside, would appear to be nothing more than an ordinary chimney stack, carrying nothing but its own weight, was in truth a pier of brickwork, intended to carry, and in fact carrying, one end of an iron girder, upon which girder the whole upper floor of the house rested. If the plaintiffs' right, therefore, was to be established by prescription, I think it inevitable that the matter should have been dealt with by the learned Judge in the manner clearly described by Mr. Justice Lindley in his answer to your Lordships' fifth question. And I daresay it would have been so dealt with, if the learned Judge had not considered the plaintiffs' right to stand on a different ground altogether, and asserted it to be an absolute right acquired by twenty years enjoyment, quite independent of grant, acquiescence or consent. In so doing he relied, he said, upon the existing authorities. I will not recapitulate them or criticise them individually, as they have been carefully reviewed by others. They constitute the existing law on the subject, and I think the learned Judge has drawn what is, upon the whole, the correct inference from them, though they are by no means uniform; and although for the reasons I have given, and for those more fully expounded in Mr. Justice Fry's opinion, I am unable to find a satisfactory legal ground upon which these authorities may be justified, I feel the less difficulty in acquiescing in them, inasmuch as they affirm a right to exist after twenty years, which in my opinion should have been held to exist as soon as the plaintiff's house was built. The learned Judge's direction at the trial was therefore in my opinion correct, and this appeal should be dismissed with costs; and if I have ventured to question the legal principles upon which the authorities which guided him are founded, I have only done so lest this case should be thought an authority for the establishment of other rights more or less similar to the right here in question.

So far as my opinion goes, this right to the lateral support of the soil for an ancient house stands upon the positive authority of a series of cases and a long acceptance in the Courts of law; and the ratification of it by your Lordships ought not to be considered as the adoption of principles which might have a wide application in analogous cases.

LORD BLACKBURN.—The first of the defences raised by the pleadings is a denial that the plaintiffs were entitled to have their buildings supported by the land adjacent thereto. It is on this defence that the most difficult questions arise, and I shall consider it first. It is, I think, conclusively settled by the decision of this House in *Bonomi* v. *Backhouse* (12) that the owner of land has a right to support from the adjoining soil; not a right to have the adjoining soil remain in its natural state (which right, if it existed, would be infringed as soon as any excavation was made in it), but a right to have the benefit of support, which is infringed as soon as, and not till, damage is sustained in consequence of the withdrawal of that support.

This right is, I think, more properly described as a right of property, which the owner of the adjoining land is bound to respect, than as an easement or a servitude *ne facias*, putting a restriction on the mode in which the neighbour is to use his land; but whether it is to be called by one name or the other is, I think, more a question as to words than as to things. And this is a right which, in the case of land, is given as of common right; it is not necessary either in pleading to allege or in evidence to prove any special origin for it: the burthen, both in pleading and in proof, is on those who deny its existence in the particular case. No doubt the right is suspended, or rather perhaps cannot be infringed, whilst the adjoining properties are in the hands of the same owner. He may dig pits on his own land and suffer his own adjoining land to fall into those pits just as he pleases. When he severs the ownership and conveys a part of the land to another, he gives the person to whom it is conveyed (unless the contrary is expressed), not a right to complain of what has been already done, but a right to have the support in future. It is, I think, now settled that the conveyance may be on

such terms as to prevent any such right arising—see *Rowbotham* v. *Wilson* (2), *Smith* v. *Darby* (54), *Eadon* v. *Jeffcock* (55), *Aspden* v. *Seddon* (38). But the burthen both of pleading and proving such a case lies on those setting it up. And I think that the decision of this House in *Bonomi* v. *Backhouse* (12) also conclusively settles this, that though the right of support to a building is not of common right and must be acquired, yet when it is acquired the right of the owner of the building to support for it is precisely the same as that of the owner of land to support for it. Both Lord Cranworth and Lord Wensleydale say that this right also is more properly to be called a right of property to be respected by the owner of the adjoining land than a negative easement or servitude *ne facias*. Lord Wensleydale could not mean to say that the right of support to a house was of common right, and so overrule several authorities, including *Gayford* v. *Nicholls* (10), where he himself had delivered the judgment.

In the case now before your Lordships, nothing was proved which could have given rise to this right unless it arose from enjoyment in the manner and subject to the conditions and for the time required by law to give a title by prescription. And inasmuch as it was clearly proved that, though there had been some ancient buildings on the spot, they were removed, and buildings of a different structure and requiring a different degree of support were erected in their place only twenty-seven years before the excavations complained of, it seems to me clear that the buildings are not ancient buildings in the sense that they or similar buildings, for which in the course of repair they were substituted, had stood there from time beyond memory. The plaintiffs must (unless the construction of the 2 & 3 Will. 4. c. 71 is such as to embrace such a case as this) rely on the comparatively modern doctrine by which enjoyment of a right appurtenant to land for twenty years or more, under such circumstances as are required by law, is given the effect of prescription, though it is proved that the enjoyment began within living memory.

I do not understand the late Lord Chief Justice Cockburn to doubt that such a right as that now in question might be acquired, according to English law, where the building had stood from time immemorial, by enjoyment open and peaceable from time immemorial. It was questioned on the argument at the bar of this House, whether a right of support for a building could be acquired by any length of enjoyment, even from time immemorial, and I shall consider that later.

But the Lord Chief Justice, I think, denied that this right could be acquired by enjoyment for a less time than time immemorial. He said that such enjoyment might give rise to a presumption that there was originally a grant, or at least an assent in point of fact to the enjoyment; but he said that when it was proved, or, what comes to the same thing, admitted, that the assent of the defendant's predecessors was not asked for, or obtained by grant or in any other way, the presumption was at an end. This is expressed in terms confined to this particular right; but I think his position is general, and applies to every easement, unless it is claimed under Lord Tenterden's Act. This requires examination.

The English common law is stated by Lord Coke (*Co. Lit.* 113 *b*, 114 *a*). He says, to make prescription two things are incidents inseparable—possession or usage, and time. Possession must be long, continual and peaceable. As to "long," Lord Coke says it is the time given by law, which in England is the "time whereof there is no memory of man to the contrary." But though living memory might not be to the contrary, yet if written evidence showed that the possession had a beginning, it was defeated. By what Chief Justice Cockburn seems to think a judicial usurpation of legislative power, the time of legal memory was fixed to be the same as the limitation of real actions by the Statute of Westminster (A.D. 1275), namely, the time of Richard 1 (A.D. 1189). This, when first

(54) 42 Law J. Rep. Q.B. 140; Law Rep. 7 Q.B. 716.

(55) 42 Law J. Rep. Exch. 36; Law Rep. 7 Exch 379.

introduced, gave a prescription of about eighty-six years, but being a fixed date it became longer and longer, and already, when Littleton wrote, in the reign of Edward 4, he observes on the inconvenience felt because the time of limitation of a writ of right is of so long time past.

This inconvenience must have been particularly felt with regard to any rights attached to buildings. For though a few buildings which existed in 1189 still exist, and there are some old cities and towns (not of very great extent) which then existed, and in which it is possible that the ancient buildings have been from time to time repaired without altering structure, yet far the greater part of the buildings in England stand on land which can be shewn to have been first built upon at a much later date.

In *Bedle* v. *Beard* (56), A.D. 1606, it was held that, though it was proved that there was a time within legal memory when the right claimed had not existed, and consequently the right could not have its origin in prescription, long possession was a sufficient ground for presuming what was necessary to make that possession lawful, and consequently in that case, where there had been possession of 303 years, to presume a grant from the Crown, though none was shewn. This, says Lord Coke, "was resolved by Lord Ellesmere, Lord Chancellor, with the principal Judges, and on consideration of precedents." So that the doctrine was not then introduced for the first time. But the length of time necessary to give rise to such a prescription was left indefinite; and though I think no one, in that case, could have really believed that there actually had been a grant from the Crown which was lost, that is not said, and it may have been thought that long user was evidence by which the fact might be proved, but that it should not be found unless believed. The modern doctrine that a jury ought to be directed that if they believed that there had been what was equivalent to adverse possession as of right for more than twenty years they ought to presume that it originated lawfully—that is, in most cases, by a grant—must certainly have been introduced after the passing of the Statute of Limitations (21 James 1. c. 16; A.D. 1623); and as the earliest reported decision is that of *Lewis* v. *Price* (26), in 1761, referred to in Serjeant Williams's note to *Yard* v. *Ford* (57), the doctrine is probably not much more than a century old. I quite agree with what is said by the late Chief Justice Cockburn, that where the evidence proved an adverse enjoyment as of right for twenty years or little more, and nothing else, "no one had the faintest belief that any grant had ever existed, and the presumption was known to be a mere fiction." He thinks that thus to shorten the period of prescription without the authority of the Legislature was a great judicial usurpation. Perhaps it was. The same thing may be said of all legal fictions, and was often said (with, I think, more reason) of recoveries. But I take it that when a long series of cases have settled the law, it would produce intolerable confusion if it were to be reversed because the mode in which it was introduced was not approved of, even where it was originally a blunder, and inconvenient; *communis error facit jus*. But to refuse to administer a long-established law because it was based on a fiction of law, admitted to be for a purpose, and producing a result very beneficial, is, as it seems to me, at least as great a usurpation of what is properly the function of the Legislature as it was at first to introduce that fiction.

It is difficult to reconcile all the *dicta* and decisions on the subject. There is language used in *Darwin* v. *Upton* (29)—reported by Serjeant Williams in his note to *Yard* v. *Ford* (57)—as to the difference between an absolute bar and a presumptive bar, which I have never been able to understand. I quite agree that where the evidence is such as to leave it a question whether the enjoyment has been such—open, peaceable and continual—as to raise a presumption of the right, the jury must be asked to find as a fact

(56) 12 Rep. 4.

(57) 2 Saund. 171; Notes of Serjt. Williams, vol. ii. p. 500 (ed. 1871).

whether the enjoyment was of that kind; but the late Chief Justice seems to understand *Darwin* v. *Upton* (29) as amounting to this, that the jury should be told that if the enjoyment has been such as to raise a presumption of a right they may find a grant whether they believe in its existence or not; but that, if they choose to be scrupulous they need not so find. I cannot believe that the Judges meant that, and if they did, I think the subsequent cases are inconsistent with that ruling. I would more particularly rely on what is said by Mr. Justice Bayley in *Cross* v. *Lewis* (22). The Judges never altered the form of pleading, and it was still necessary for a defendant setting up a right as a defence to plead it with particularity—see *Hendy* v. *Stephenson* (58). In *Campbell* v. *Wilson* (59) the defendant pleaded, first, a way by prescription, which was traversed; and secondly, that Bryan Gray was seised in fee of the *locus in quo*, and that Joseph Wilson (under whom the defendant made title by devise) was at the same time seised in fee of an adjoining moss dale, and that by deed, lost by time and accident, Bryan Gray granted a right of way over the *locus in quo* to Joseph Wilson and his heirs. The replication traversed the grant. At the trial in 1803, before Mr. Justice Chambre, it appeared that in 1775, by an award made under an Enclosure Act, all ways not set out in the award were extinguished. And this way was not set out in the award. This put an end to the plea of prescription, and it would also have put an end to the second plea, unless the alleged grant by Bryan Gray was made subsequent to the award—that is, within twenty-five years next before the trial, and, of course, within less than that time before the plea was pleaded, in which it was alleged that the deed was lost by time and accident. But evidence was given that there had been, for more than twenty years, an adverse enjoyment of the right of way. Now, if the issue joined was to be understood in its literal and natural sense, it could hardly have been suggested that this was evidence to justify the Judge in leaving it to the jury whether in fact, in the interval between the making of the award and the commencement of the twenty years enjoyment, not more than two or at most four years, there actually had been a grant since lost. But so to construe the issue would have made the question of whether there was a right to depend on the accident of whether the right was set up by a plaintiff complaining of an obstruction to it, or a defendant justifying under it. Mr. Justice Chambre, who was a very learned pleader, does not seem to have had the least doubt of the meaning of the issue. He never said one word to the jury as to the reality of the grant, but left it to them to presume it, if satisfied that the enjoyment was adverse, and had continued twenty years before the action. And this direction was approved of by Lord Ellenborough and the whole Court of King's Bench; the only question on which they seem to have had any difficulty being as to whether there was a proper direction given as to the nature of the enjoyment which would give rise to the presumption that the defendant acted by right. And in *Penwarden* v. *Ching* (60), where issue was taken on a plea justifying a trespass in defence of an ancient window, and on the trial in 1829 it was proved before Lord Chief Justice Tindal that the window was first erected in 1807, that learned Judge said that "the question is not whether the window is what is strictly called ancient, but whether it is such as the law, in indulgence to right, has in modern times so called, and to which the defendant has a right, for this is the substance of the plea." The verdict was for the plaintiff, so that this ruling could not be reviewed, but it was the ruling of a Judge who was a very learned pleader. In both those cases, and in many more, if the question had been whether there really in fact had been a grant, or really in fact the window was ancient, there could have been no possible question. It was no doubt desirable that such artificial doctrines should be dispensed with. Lord Tenterden's Act (2 & 3 Will.

(58) 10 East, 55.
(59) 3 ibid, 294.
(60) 1 Moo. & M. 400.

4. c. 71), so far as it went, made that a direct bar which was before only a bar by the intervention of a jury, and the use of an artificial fiction of law. But it did not abolish the old doctrine; if it had, old rights, even from time immemorial, would have been put an end to by unity of occupation for the space of a year. But this was not done—see *Aynsley* v. *Glover* (61). I think the law, as far as regards this subject, is the same as it was before that Act was passed. Neither can I agree with what seems thrown out by Mr. Justice Lush, rather as a makeweight than as a substantial ground of decision, that the more recent Limitation Act (3 & 4 Will. 4. c. 27), which put an end to the doctrine of adverse possession, has made any difference in the law. This view of the matter renders it unnecessary to decide anything as to the construction of Lord Tenterden's Act (2 & 3 Will. 4. c. 71), and I wish to say nothing that may prejudice the decision of that question if hereafter it becomes material.

I scarcely think that if this had been the only point argued at your Lordships' bar on the first occasion, it would have been thought of sufficient difficulty to ask the opinions of the learned Judges. But it is satisfactory to find that they all agree that a building which has *de facto* enjoyed (under the circumstances and conditions required by the law of prescription) support for more than twenty years has the same right as an ancient house would have had.

I am glad that the recent alterations in the law have obviated the necessity of putting such very artificial constructions on issues as I have mentioned. But I am not able to agree with Mr. Justice Bowen in thinking that the alterations in the modes of procedure and the fusion of law and equity have made any alteration in the substance of the law. I quite agree with him in thinking that circumstances might, and often did, give rise to an equity to protect a house which would not have given rise to a legal claim to maintain an action at law. But those circumstances must always have existed in fact, and generally there must have been notice of them. I cannot think the alterations in procedure have altered the law.

On the first argument at the bar of this House, in November, 1879, when the Lords present were the then Lord Chancellor (Earl Cairns), Lord Penzance and myself, a very able argument was addressed to this House by the then Attorney-General (Sir John Holker) and the now Solicitor-General; and at the close of it the Lord Chancellor summarised the argument (I took a note of it at the time), and asked if this was a correct statement of their proposition: "In order to gain for the owner of land, by enjoyment, a title to some advantage from or upon his neighbour's adjacent close greater than would naturally belong to him, the advantage must be one the enjoyment of which is or ought to be known to the neighbour, and could, without destruction or serious injury to his own close, be interrupted by him." And this was accepted by the Attorney-General as truly representing the argument. As the 2 & 3 Will. 4. c. 71 was couched in terms which, as it has been held, prevented its applying to this case, it might be necessary in considering this proposition to decide questions of great importance, which had never yet been finally decided; and, therefore, it was deemed advisable to have the assistance of the learned Judges, and a further argument was ordered.

I do not think anything was said at the second argument that was not involved in the summary of the first argument, which I have above quoted. It was admitted that if the proposition was correct, no lapse of time, not even from time immemorial, could give a right of support to a building, such as to oblige the owners of adjoining land to respect it; and that the same would have been before 2 & 3 Will. 4. c. 71, and still was, in cases not within its provisions, the law as to the acquisition by enjoyment of the right to require the neighbours to respect the access of light and air to a window, unless it made a difference that the enjoyment in this latter case could be easily interrupted. And reference was made to cases which were said to be analogous,

(61) 44 Law J. Rep. Chanc. 523; Law Rep. 10 Chanc. 283.

such as that of keeping land undrained, so as to act as a reservoir for springs—*Chasemore* v. *Richards* (30); or that of claiming to have uninterrupted the access for the wind of a windmill—*Webb* v. *Bird* (19). And it was said that the principle on which those cases were decided was one which shewed that there was no right of support acquired by the common law prescription for a building, though it had stood for time immemorial; and if that was so, there could be none by the prescription for a shorter period created by the modern decisions; for I agree with Lord Justice Bramwell, where, in *Bryant* v. *Lefever* (20), he says that what he calls the expedient, introduced by these decisions, is ancillary to the doctrine of prescription at common law, and applicable in cases where something prevents the operation of the common law prescription from time immemorial, and is, therefore, only applicable where the right claimed is such as, if immemorial, might have been the subject of prescription.

During the very considerable interval that elapsed between the first argument in November, 1879, and the time when the opinions of the learned Judges were delivered, the 15th of March, 1881, I have at intervals bestowed consideration on this proposition, and though I refrained from finally coming to a decision till I had the advantage of considering their opinions, I was strongly impressed with the conviction that such a right as is here claimed was, according to the established law of England, one which might be acquired by prescription. And I find that all the Judges agree in that result, though not entirely for the same reasons; and I am not sure that any of them would have quite assented to the train of reasoning which has led me to that same result. On a minor point—whether there should be a new trial because the Judge at the trial left no question to the jury when, as it was said, there was or might have been evidence produced which would raise a question of fact which might have been a defence—the learned Judges are divided in opinion: Justices Lindley, Lopes and Bowen agreeing with the majority of the Court of Appeal, that there should be a new trial; Baron Pollock and Justices Field, Manisty and Fry thinking that there should not. It is not necessary to choose between the divers reasons which led them to the same result on the first point. It may be necessary to do so on this minor point, where their reasons led to different results. I have come to the conclusion that there should not be a new trial.

I will state the reasoning which has led me to these conclusions.

I cannot agree that the only principle on which enjoyment could give the owner of property a prescriptive right over a neighbour's land, exceeding what would of common right belong to the owner of that property, was acquiescence on the part of the neighbour, nor even that it is the chief principle. In general such enlarged rights are of such a nature that those over whose property they are enjoyed could in the beginning have stopped them; and a failure to stop them is evidence of acquiescence, and may afford a ground for finding that there was an actual assent; but that is in many, if not in all cases, a fiction: there is seldom a real assent. But no doubt a failure to interrupt, when there is power to do so, may well be called *laches*; and it seems far less hard to say that for the public good and for the quieting of titles enjoyment for a prescribed time shall bar the true owner when the true owner has been guilty of *laches*, than to say that for the public good the true owner shall lose his rights, if he has not exercised them during the prescribed period, whether there has been *laches* or not; but there is not much hardship. Presumably such rights, if not exercised, are not of much value, and though sometimes they are, "In ea quæ frequentius accidunt præveniant jura." This ground of acquiescence or *laches* is often spoken of as if it were the only ground on which prescription was or could be founded. But I think the weight of authority, both in this country and in other systems of jurisprudence, shews that the principle on which prescription is founded is more extensive.

Prescription is not one of those laws which are derived from natural justice. Lord Stair, in his *Institutes*, treating of

the law of Scotland, in the old customs of which country he tells us prescription had no place (bk. 2, tit. 12, s. 9), says, I think truly, "Prescription, although it be by positive law, founded upon utility more than upon equity, the introduction whereof the Romans ascribed to themselves, yet hath it been received by most nations, but not so as to be counted amongst the laws of nations, because it is not the same, but different in diverse nations as to the matter, manner and time of it."

It was called by the old Roman lawyers "Usucapio," which is defined (*Dig.* lib. 41, tit. 3; "De usurpationibus et usucapionibus," l. 3) to be "adjectio dominii per continuationem possessionis temporis lege definiti." And in the same book and title, l. 1, the reason is given: "Bono publico usucapio introducta est ne scilicet quarundam rerum diu et fere semper incerta dominia essent quum sufficeret dominis ad inquirendas res suas statuti temporis spatium." This is precisely the object with which modern statutes of limitations are established, and it would be baffled if there was to be a further enquiry as to whether there had been acquiescence on the part of the true owner. It is both fair and expedient that there should be provisions to enlarge the time when the true owners are under disabilities, or for any other reason are not to be considered guilty of *laches* in not using their right within the specified period, and such provisions there were in the Roman law, and commonly are in modern statutes of limitations; but I have it that these are positive laws, founded on expedience, and varying in different countries and at different times. The minor question, whether there should be a new trial, in my mind depends on the question what positive laws have been adopted by the English Courts. To return to the Roman law. *Usucapio*, it will be noticed, was confined to the *dominium*, nearly equivalent to the modern phrase of the legal estate. It was enunciated in the laws of the Twelve Tables, in terms brief to the extent of being secure, and simple to the extent of being rude—"Usus auctoritas fundi biennium, cæterarum rerum annus esto." This for centuries, down to the time of Justinian, continued to be the law, as far as regarded the *dominium*, within the old territory of the republic; but side by side with it the prætors introduced by their edicts a *jus prætorium*, nearly equivalent to the modern phrase of equity, which practically superseded the old law, and in the provinces was the only law. No one who has ever looked at the *Digest* will complain of this prætorian law as brief; nor will anyone who has read any portion of it fail to admire the skill with which legal principles are worked out. Some of the edicts of the prætors are so obviously just and expedient, and are so tersely expressed, that they have been generally adopted, and are quoted as legal maxims by those who often do not know whence they came. Two edicts were restitutory: "Prætor ait, Quod vi aut clam factum est qua de re agitur id, quum experiundi potestas est, restituas" (*Dig.* lib. 43, tit. 24). This relieved the true owner from the *usucapio*, which transferred the *dominium* in consequence of a possession of two years, if the possession was not peaceable, or not open.

"Ait prætor, Quod precario ab illo habes, aut dolo malo fecisti, ut desineres habere, qua de re agitur, id illi restituas" (*Dig.* lib. 43, tit. 26, l. 2). This relieved him from the effect of a possession of two years if it was not adverse, or if it was fraudulent. By a prohibitory edict, "Uti possidetis" (*Dig.* lib. 43, tit. 17), the prætor forbade anyone to disturb, by force, any possession which had been obtained "nec vi nec clam nec precario." And on the basis principally, but not exclusively, of those three edicts, the prætors established what was called the "præscriptio longi temporis." I will read what Pothier says in his treatise, "*De la Prescription*," art. "Préliminaire," art. 3 (I quote from the eighth volume of Pothier's works by M. Dupin, p. 390): "Suivant ce droit de prêteur le possesseur de bonne foi, qui avait eu une possession paisible et non interrompue, soit d'un droit incorporel, soit d'un héritage qui n'était pas du nombre de ceux qui étaient *res mancipi*, pendant le temps de dix ans *inter præsentes* et de vingt ans

inter absentes, acquérait, après l'accomplissement du temps de sa possession, non la domaine de la chose, mais une prescription ou fin de non recevoir, à l'effet d'exclure la demande en revendication du propriétaire de la chose, qui n'aurait été intentée qu'après l'accomplissement de ce temps. Depuis, on avait aussi accordé une action utile à ce possesseur pour revendiquer la chose, lorsqu'il en avait perdu la possession après l'accomplissement du temps de la prescription." Thus the prætors, whilst professing to leave the law of the tables in force, at least within the old territory of the republic, practically deprived it of all force. Justinian, by two laws (*Codex*, lib. 7, tit. 25, "De nudo jure Quiritium tollendo;" and tit. 31, "De usucapione transformanda"), changed all this. The two laws are couched in terms that shew that those who framed them had very little respect for antiquity, and were intolerant of legal fictions. Justinian, says Pothier, by these enactments, has changed the prescription of ten and twenty years into a true *usucapio*, for they have caused the *dominium* to pass to the possessor of the heritage or the incorporeal right of which he has had during that time a possession or *quasi* possession peaceable and not interrupted.

The name of prescription has, however, survived the thing. And in the numerous provinces into which France was before the Revolution divided, many of which were governed by their own customs, the laws of prescription varied. Domat in his treatise on the "Civil Law" (I quote from the translation by Doctor Strahan), pt. 1, bk. 3, tit. 7, s. 4, says, "It is not necessary to consider the motives of these different dispositions of the Roman law, nor the reasons why they are not observed in many of the customs. Every usage hath its views, and considers in the opposite usages their inconveniences. And it sufficeth to remark here what is common to all these different dispositions of the Roman law, and of the customs as to what concerns the times of prescriptions which consists in two views—one, to leave to the owners of things, and to those who pretend to any rights, a certain time to recover them; and the other to give peace and quiet to those whom others would disturb in their possessions or in their rights after the said time is expired." Those who framed the *Code Napoléon* had to make one law for all France. To facilitate their task they divided servitudes into classes—those that were continuous and those that were discontinuous, and those that were apparent and non-apparent (*Code Civil*, arts. 688, 689). Those divisions and the definitions were, as far as I can discover, perfectly new; for though the difference between the things must always have existed, I cannot find any trace of the distinction having been taken in the old French law, and it certainly is not to be found in any English law authority before *Gale on Easements*, in 1839. On this division their legislation was founded. The first *projet* of the Code allowed continuous servitudes, whether apparent or not, and discontinuous servitudes, if apparent, to be gained by title or by possession for thirty years. The Code Civil, as it was finally adopted, by article 690, allows servitude, if continuous and apparent, to be acquired by title or by possession for thirty years; and by article 691, enacts that continuous servitudes not apparent, and servitudes, if discontinuous, whether apparent or not, can only in future be established by titles, but saves vested rights already acquired. The authors of *Les Pandectes Françaises* (Paris, 1804), on whose authority I state this, say (vol. 5, p. 488) that this great change from the principle of the *projet* was made without any publication of the discussions concerning it, or of the reasons that led to it. And they state, more openly than I should have expected in a book published in Paris in 1804, that in their opinion it was not an improvement. It certainly has never been received in English law.

I think that what I have above stated is quite enough to confirm Lord Stair's position that the laws of different countries relating to prescription are positive laws differing in matter, manner and time in different countries. I think that, though the English law as to prescription was, beyond controversy, greatly derived from the Roman law, the very words of

which are often quoted in the earliest English authorities, yet, to borrow the idea expressed by Domat in the passage I have above cited, every system of law is founded on its own ideas of expediency, and that we must look to the English decisions to see what principles have been adopted in it, as upon the balance of inconvenience and convenience expedient, and what have in it been rejected as on the balance inexpedient. It cannot be disputed that from the earliest times the owner of adjoining land was bound to respect the access of light and air acquired by enjoyment of an ancient window. The immemorial custom of London to build upon an ancient foundation, though thereby an ancient window was obstructed, which was pleaded and held to be a good custom in *Hughes* v. *Keme* (62), proves the great antiquity of this law. But, as far as I find, the first mention of it in a reported case is *Bowry and Pope's Case* (63). I will read the whole of it; for, though the point actually decided was only that a window first erected in the reign of Queen Mary—that is, after 1553 and not later than 1558—had not acquired in 1587 the *status* of an ancient window, I think the opinion of the Court on points not actually decided is important. "Bowry brought an action upon the case against Pope and declared that in the time of Edward 6 the Dean and Chapter of Westminster leased two houses in St. Martin's, in London, to Mason for sixty years. The which Mason leased one of the said houses to one A, and covenanted by the indenture of lease with the said A, that it should be lawful for the said A, his executors and assigns, to make a window in the shop of the house so to him assigned; and afterwards, in the time of Queen Mary, a window was made accordingly where no window was there before. And afterwards A assigned the said house to the plaintiff. And now Pope, having a house adjoining, had erected a new building *super solum ipsius Pope ex opposito* the said new window, so as the new window is thereby stopped. The defendant pleaded not guilty, and it was found for the plaintiff. And it was moved for the defendant in arrest of judgment that here upon the declaration appeareth no cause of action, for the window, in the stopping of which the wrong is assigned, appears upon the plaintiff's own shewing to be of late erected *scilicet* in the time of Queen Mary. The stopping of which by any act upon my own land was holden lawful and justifiable by the whole Court. But if it were an ancient window time out of memory, &c., there the light or benefit of it ought not to be impaired by any act whatsoever, and such was the opinion of the whole Court. But if the case had been that the house and soil upon which Pope had erected the said building had been under the estate of Mason, who covenanted, as above said, then Pope could not have justified the nuisance which was granted by the whole Court."

It is for this last opinion that I cite the case. The Court of Common Pleas do not seem to have felt the difficulty which pressed so strongly on Mr. Justice Littledale in *Moor* v. *Rawson* (18), and which leads Mr. Justice Fry, in his very able opinion, to declare that this right does not lie in grant. They seem to have had no doubt that the express covenant operated as a grant of the window, and that neither Mason, nor any who held under his estate, could derogate from that grant by stopping the benefit of the window.

In Trinity, 29 Eliz., about nine months later, the Queen's Bench in *Bland* v. *Moseley* (64) decided the second point, resolved by the Common Pleas the same way, and they also seem to have agreed with the third resolution. The case is cited in *Aldred's Case* (65). The reasons, as reported by Lord Coke, are—"It may be that, before time of memory, the owner of the said piece of land has granted to the owner of the said house to have the said windows without any stopping of them, and so the prescription may have a lawful beginning; and Wray Chief Justice then said, that for stopping

(62) Yelv. 215, A.D. 1613.

(63) 1 Leon, 168, Michaelmas, 29 & 30 Eliz A.D. 1587.

(64) Cited in *Aldred's Case*, 9 Rep. 57*b*.

(65) 9 Rep. 57*b*.

as well of the wholesome air as of light an action lies, and damages shall be recovered for them, for both are necessary; for it is said 'et vescitur aura ætherea,' and the said words 'horrida tenebritate, &c.' are significant and imply the benefit of the light. But he said that for prospect, which is a matter only of delight and not of necessity, no action lies for stopping thereof; and yet it is a great commendation of an house if it has a long and large prospect, 'unde dicitur, laudaturque domus longos quæ prospicit agros.' But the law does not give an action for such things of delight."

It will be noticed that not a word is said about the possibility of obstructing the light, and, indeed, it seems to me clear that no one could ever have thought of stopping his neighbour's lights by hoardings until it was established that uninterrupted enjoyment for a period short of time immemorial would give a right. Then some ingenious lawyer thought of that easy mode of preventing the acquisition of a right in a window not yet privileged. The distinction between a right to light and a right of prospect, on the ground that one is a matter of necessity and the other of delight, is to my mind more quaint than satisfactory. A much better reason is given by Lord Hardwicke in *The Attorney-General* v. *Doughty* (66), where he observes that if that was the case there could be no new towns. I think this decision, that a right of prospect is not acquired by prescription, shows that, whilst on the balance of convenience and inconvenience it was held expedient that the right to light, which could only impose a burthen upon land very near the house, should be protected when it had been long enjoyed; on the same ground it was held expedient that the right of prospect, which would impose a burthen on a very large and indefinite area, should not be allowed to be created, except by actual agreement. And this seems to me the real ground on which *Webb* v. *Bird* (19) and *Chasemore* v. *Richards* (30) are to be supported. The rights there claimed were analogous to prospect in this, that they were vague and undefined, and very extensive. Whether that is, or is not, the reason for the distinction, the law has always, since *Bland* v. *Moseley* (64), been that there is a distinction; that the right of a window to have light and air is acquired by prescription, and that a right to have a prospect can only be acquired by actual agreement.

Shury v. *Pigott* (67) (decided in 1625) seems to have excited a good deal of attention, and many things collaterally to have been discussed which were not necessary for the decision. The actual point decided in *Shury* v. *Pigott* (67) was, that in a conveyance there was (though nothing was said) an implied grant that neither the conveyer nor any who claimed under him should use their lands so as to deprive the property conveyed of what was necessary for its enjoyment—in that case an artificial supply of water—a principle which in the case of a house would certainly include support.

In *Palmer* v. *Fleshees* (5), the first point ruled by Justices Twysden and Windham was, "If I, being seised of land, lease forty feet to A to erect a house upon it, and other forty feet to B to erect a house on it, and one of them builds a house and then the other dig a cellar in his land by which the wall of the first house adjoining falls, no action lies for this. And so they said it had been adjudged in *Shury* v. *Pigott's* case (67), for each can make the best advantage of his own; but to them it seemed that the law was otherwise if it had been an ancient wall or house which fell by this digging." The reference to *Shury* v. *Pigott* (67) shews that in this place "ancient" means "existing before the conveyance of the land." The point actually decided was as to light, and the *ratio decidendi* is thus stated in the report in Levinz, 122: "It was resolved that, although it be a new messuage, yet no person who claims the land by purchase under the builder (vendor) can obstruct the lights any more than the builder himself could, who cannot derogate from his own grant; by Twysden and Windham, J.J.—Hyde being absent, and Kelynge doubting—

(66) 2 Ves. sen. 452.

(67) Palm. 444; Pop. 166; 3 Bulst. 339; Noy, 84; Latch, 153; W. Jones, 145.

for the lights are a necessary and essential part of the house. And Kelynge said, Suppose the land had been sold first and the house after, the vendee of the land might stop the lights. Twysden, to the contrary, said, Whether the land be sold first or afterwards, the vendee of the land cannot stop the lights of the house in the hands of the vendor or his assignees. But all agreed that a stranger having lands adjoining to a messuage newly erected may stop the lights, for the building of any man on his lands cannot hinder his neighbour from doing what he will with his own lands—otherwise, if the messuage be ancient, so that he has gained a right in the lights by prescription." I say nothing as to the questions whether there is an implied reservation where the lands are parted with, as well as an implied grant where the house is parted with; or whether, when the land is sold before the house is erected on it, but on the terms that a house is to be built, the purchaser is driven to have recourse to equity to protect his subsequently built house; as neither of these questions is raised by the facts in the present case. But I think it is now established law that one who conveys a house does, by implication and without express words, grant to the vendee all that is necessary and essential for the enjoyment of the house, and that neither he, nor any who claim under him, can derogate from his grant by using his land so as to injure what is necessary and essential to the house. And I think that the right of support from the adjoining soil is necessary and essential for the enjoyment of the house.

Now, if the motive for introducing prescription is that given in the *Digest* (bk. 41, tit. 3, l. 1), quoted before, I think it irresistibly follows that the owner of a house, who has enjoyed the house with a *de facto* support for the period and under the conditions prescribed by law, ought to be protected in the enjoyment of that support, and should not be deprived of it, by showing that it was not originally given to him. And I think that the decisions ending in *Bonomi* v. *Backhouse* (12), which is put in a very clear light by Mr. Justice Manisty in his opinion, decide that he should not be deprived of it. Mr. Justice Fry thinks those decisions are contrary to principle, but too strong to be departed from. I have come to the conclusion, for the reasons I have given, that they are founded on principle.

But it still remains to enquire whether any of the doctrines established by the English law, which on the ground of expediency prevent the acquisition of a right by enjoyment, would apply.

In *Bonomi* v. *Backhouse* (12) the workings which did the mischief were at a considerable distance from the plaintiff's house, and would not have done any harm if the intervening minerals had not been previously removed by the defendants. Very different considerations may arise where the intervening minerals have been removed by the plaintiff himself, or those under whose estate he claims, or even by a third person. I express no opinion as to this, because it is not raised by the facts; but I mention *The Corporation of Birmingham* v. *Allen* (68), as Mr. Justice Lush did below, to shew that it has not been overlooked.

Neither do I think it necessary to express any opinion as to the distinction taken in *Solomon* v. *The Vintners' Company* (23), where is was said that, at all events, the right, if it could be acquired against the next adjoining house, could not be acquired when there were intervening properties, for, in this case, the defendants' land which they excavated was next adjoining to the plaintiffs' house, and I think the right to support from the adjoining land is not open to the objection that it is extensive and indefinite, and so far analogous to a prospect. It seems much nearer in analogy to the right to the access of light to a window; perhaps if it were *res integra* one might doubt if it was expedient to protect an ancient window. But I see no ground for doubting that the right to forbid digging near the foundations of a house without taking proper precautions to avoid injuring it is, for the reasons given by Mr. Justice Lush, one very little onerous to the neighbours, and one which it is expedient to give to the owner of the house.

(68) 46 Law J. Rep. Chanc. 673; Law Rep. 6 Ch. D. 284.

No question here arises as to the effect of any disability on the part of the owner of the land, nor as to the effect of any restrictions arising from the state of the title.

But a question does arise as to whether there was not, or at least might not have been, evidence of something which would prevent the enjoyment here being of that nature which would give rise to prescription on the ground that the possession was not open. The edict of the prætor that possession must not be *vi vel clam*, as I think, is so far adopted in English law that no prescriptive right can be acquired where there is any concealment, and probably none where the enjoyment has not been open. And in cases where the enjoyment was in the beginning wrongful, and the owner of the adjoining land may be said to have lost the full benefit of his rights through his *laches*, it may be a fair test of whether the enjoyment was open or not to ask whether it was such that the owner of the adjoining land, but for his *laches*, must have known what the enjoyment was, and how far it went. But in a case of support, where there is no *laches* and the rights of the owner of the adjoining land are curtailed for the public benefit, on the assumption that, in general, rights not exercised during a long time are not of much value, and that it is for the public good that such rights (generally trifling) should be curtailed in favour of quieting title,—where that is the principle, I do not see that more can be requisite than to let the enjoyment be so open that it is known that some support is being enjoyed by the building. That is enough to put the owner of the land on exercising his full rights, unless he is content to suffer a curtailment, not in general of any consequence. And in the present case all that is suggested is that the plaintiffs' building was not an ordinary house, but a building used as a factory, which concentrated a great part of its weight on a pillar. It had stood for twenty-seven years, and as far as appears would, but for the defendants' operations, have stood for many more years; and there was nothing in the nature of concealment. Anyone who entered the factory must have seen that it was supported in a great degree by the pillar. And there is not the slightest suggestion that those who made the excavation were not perfectly aware that the factory did rest on the pillar, or that they took such precautions as would have been sufficient if the building had been supported in a more usual way, but that the mischief happened from its unusual construction. That being so, I am at a loss to see what question the learned Judge could, at the trial, have on this evidence left to the jury beyond the question whether the building had for more than twenty years openly, and without concealment, stood as it was and enjoyed without interruption the support of the neighbouring soil. The Judge offered to ask the jury if the building fell on account of the weight of the goods stored on the upper storey, and I cannot see what else could have been asked.

The second defence is a question of pure law. Ever since *Quarman* v. *Burnett* (69) it has been considered settled law that one employing another is not liable for his collateral negligence unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it—*Hole* v. *The Sittingbourne Railway* (70), *Pickard* v. *Smith* (71), *Tarry* v. *Ashton* (72).

I do not think either side disputed these principles; nor that, in *Bower* v. *Peate* (51), the Queen's Bench Division thought that the case of a man employing a contractor to excavate near the foun-

(69) 6 Mee. & W. 499; 9 Law J. Rep. Exch. 308.
(70) 6 Hurl. & N. 488.
(71) 10 Com. B. Rep. N.S. 470.
(72) 45 Law J. Rep. Q.B. 260; Law Rep. 1 Q.B. D. 314.

dation of a house which had a right of support fell within the second class of cases; nor that, if correctly decided, that case was decisive. But *Butler* v. *Hunter* (73) was relied on, which case the Court of Exchequer held fell within the first class of cases. I am not quite sure that I understand from the report what the state of the evidence was. But assuming that the defendants are right in saying that it was such as to make the case not distinguishable from *Bower* v. *Peate* (51) I think that the reasoning in *Bower* v. *Peate* (51) is the more satisfactory of the two.

The Court of Appeal in this case ordered that unless the defendants elected within fourteen days to take a new trial, judgment should be entered for the plaintiffs. If your Lordships take the view of the case which I have stated, and which is that of Mr. Justice Lush, Mr. Baron Pollock and Justices Field, Manisty and Fry, it will be sufficient to dismiss the appeal, for the time for the election to take a new trial is long passed, and it need not be noticed.

LORD WATSON.—It is unnecessary for me to make any lengthened observations in this case. Seeing that my opinion is in substantial concurrence with what has already been said, few words of explanation will suffice to express my views.

I am of opinion that a right to lateral support from the adjoining soil may be acquired for a building which has enjoyed that support peaceably and without interruption for the prescriptive period of twenty years. That proposition appears to me to have been recognised as the law of England in a long series of weighty, if not conclusive, judicial opinions, and to have been tacitly accepted by this House in the case of *Bonomi* v. *Backhouse* (12).

The obligation which the creation of such a right by user imposes upon the owner of the adjacent soil is to give continued support to the building. Consistently with that obligation, he can make any lawful use of his land which he thinks proper. He may dig into, or even remove, the *strata* from which the building derives support, provided he gives efficient substituted support by means of a retaining wall or other device. The proprietor of the building cannot, according to the decision in *Bonomi* v. *Backhouse* (12), complain that his right has been infringed unless and until the stability of the edifice has been affected by the withdrawal of its lateral support. I agree with the noble and learned Lord on the woolsack in holding the right in question to be a proper easement and in the results which follow from taking that view of its character. In one sense every easement may be regarded as a right of property in the owner of the dominant tenement—not a full or absolute right, but a limited right or interest in land which belongs to another whose *plenum dominium* is diminished to the extent to which his estate is affected by the easement. But a right constituted in favour of estate A and its owners in or over the adjoining lands of B, is, in my opinion, in the nature of an easement, and that whether such right is one of the natural incidents of property or has its origin in grant or prescription.

I am unable to regard the right of support to a building, whether lateral or vertical, as a negative easement; and I concur in the observations which have been made upon that point by the noble and learned Lord on the woolsack, as well as by Mr. Justice Lindley and Mr. Justice Bowen. It appears to me to be as truly a positive easement as the well-known servitude *oneris ferendi*, when a wall or beam is rested on the servient tenement. The distinction between positive and negative easements may not be of vital importance in the present case; but in dealing with this point I am probably influenced by the consideration that a decision, to the effect that an easement of lateral support to buildings is negative, would form an unsatisfactory precedent in another part of the country where positive servitudes alone are capable of being acquired by prescriptive enjoyment.

It appears to me, for reasons which have already been fully explained by your Lordships, that the respondents have adduced proof of possession for the

(73) 7 Hurl. & N. 826; 31 Law J. Rep. Exch. 214.

prescriptive period sufficient to establish their right to support from the adjacent soil, for the new or altered building which has stood for the last twenty-seven years. I do not think that any question of fact is disclosed by the pleadings or by the evidence in the case, which ought to have been but was not submitted to the jury.

Upon the point of law which was not remitted to the learned Judges who have favoured the House with their opinions upon the main questions arising in this appeal, I agree with your Lordships. The operations of the commissioners were obviously attended with danger to the building in question; but these appellants seek to shelter themselves from responsibility by proving that they bound their contractor to adopt all measures necessary for ensuring the safety of the building. When an employer contracts for the performance of work which, properly conducted, can occasion no risk to his neighbour's house, which he is under obligation to support, he is not liable for danger arising from the negligence of the contractor. But in cases where the work is necessarily attended with risk, he cannot free himself from liability by binding the contractor to take effectual precautions. He is bound, as in a question with the party injured, to see that the contract is performed, and is therefore liable as well as the contractor to repair any damage which may be done. I therefore concur in the judgment which has been proposed by your Lordships.

Question put and agreed to in "Her Majesty's Commissioners of Works, &c. v. Angus & Company": That the order appealed from be affirmed, and the appeal dismissed with costs.

Mr. Littler.—Would your Lordships allow me to mention one matter which seems to me to be of a little difficulty. With regard to the printing of the evidence, where it is a matter of appeal under the rules of the Judicature Act, there is a provision in Order LVIII. rule 12, that "any party printing evidence for the purpose of an appeal, without such order, shall bear the costs thereof unless the Court of Appeal or a Judge thereof shall otherwise order." It does not seem to be clear whether this applies merely to the Court of Appeal below, or whether it also applies to your Lordships' House. There is no provision for printing evidence in the directions to the taxing officer of your Lordships' House. I take it that, without any argument, your Lordships would be of opinion in such a case as this that we were right in printing the evidence; and probably it would be sufficient for the taxing officer, if, without there being any order, there were an expression of opinion, on the part of your Lordships, that it was right that in this case such costs of printing should be allowed.

THE LORD CHANCELLOR (LORD SELBORNE).—I take it to be perfectly clear that the rules of the Judicature Act do not apply to this House.

Mr. Littler.—I took it to be so, but I thought it was right to mention the point.

Mr. Shield.—There is another matter to which I should like to call your Lordships' attention, if you will permit me to do so. There are proceedings of the defendants with reference to the assessment of damages. I presume that your Lordships' judgment is, as was the judgment of the Court of Appeal, without prejudice to those proceedings.

THE LORD CHANCELLOR (LORD SELBORNE).—As I understand the judgment of the Court of Appeal, it said expressly that, unless there were a new trial taken within the time limited in that judgment, the judgment was to stand for the amount which the special referee found; and that is what this House has affirmed.

Mr. Shield.—The order of the Court of Appeal concludes with these words: "But this order is to be without prejudice to the defendants' proceedings in reference to the amount of damages." Those proceedings are that rules have been obtained to set aside the award of the arbitrator, who found the sum of 1,943*l.*, which is the amount for which the judgment will stand.

THE LORD CHANCELLOR (LORD SELBORNE).—The House has not heard anything until this moment about any such proceedings, and I certainly had assumed that there were no such proceedings; but that which the learned counsel has read being in the judgment which the House affirms, although I said, in ignorance of what he has just mentioned, at the end of the opinion which I have just delivered, that the effect would be that the judgment would stand for the sum which the special referee found, yet if, under and consistently with the judgment appealed from, there are proceedings going on, I presume that your Lordships' judgment would not interfere with them. The affirmance will be without prejudice to that which the Order appealed from affirms.

Question put and agreed to in the appeal "Dalton v. *Angus and Company": That the order appealed from be affirmed, and the appeal dismissed with costs.*

Solicitors—Hare & Fell, for the Commissioners of Works; Prior, Bigg, Church & Adams, agents for Thomas Dalton, Leeds, for Messrs. Dalton; Shum & Crossman, agents for Stanton & Atkinson, for respondents.

[IN THE QUEEN'S BENCH DIVISION.]

1881. March 28. } RAMSDEN *v.* YEATES AND ANOTHER.

General Highway Act (5 & 6 *Will.* 4. *c.* 50. *s.* 54)—"*Search for, dig and get in or through*"—"*Avenue to dwelling-house*"—*Licence to get Materials for repair of Highway.*

[For the report of the above case, see 50 Law J. Rep. M.C. 135.]

[IN THE COURT OF APPEAL.]

1881. April 25, 27, 28. June 25. } JOHNSON AND ANOTHER *v.* RAYLTON, DIXON AND COMPANY.*

Sale of Goods—Manufacturer—Contract for Sale of Goods by Manufacturer—Implied Term that Goods are of Manufacturer's own make—Evidence—Custom.

In a contract to supply goods by a firm, who manufacture, but do not otherwise deal in the goods, there is, where no usage or custom to the contrary is shewn, an implied term that the goods shall be of the firm's own make.

The plaintiffs, a firm who were manufacturers of, but did not otherwise deal in, iron goods, by a contract in writing agreed to supply to the defendants a quantity of ship-plates of a specified quality and description by monthly deliveries at the defendants' shipyard. The contract was headed with the name of the plaintiffs' works, and had their trade mark on its margin, and it contained a clause providing that in case of any strike of workmen causing a stoppage of the works, the supply of the plates might be suspended during the continuance of the strike. Before the deliveries were completed the plaintiffs closed their works and proposed to complete the contract by delivering plates of the specified quality and description, but manufactured by other firms. The defendants having refused to accept delivery of these plates, the plaintiffs sued them for breach of contract, and at the trial the defendants tendered evidence of a custom in the iron trade that the buyer of iron plates from a firm of manufacturers of them is, in the absence of any stipulation to the contrary, entitled to require plates to be supplied of the seller's own make:—

Held, *that the evidence of custom did not contradict the written contract, and was therefore admissible.* Held *also* (*by* BRETT, L.J., *and* COTTON, L.J.; BRAMWELL, L.J., *dissenting*), *that the defendants were entitled to refuse to accept delivery of the plates which were not of the plaintiffs' own manufacture.*

Judgment of MANISTY, J., *reversed.*

Appeal from a judgment of Manisty, J., at the trial.

* *Coram* Bramwell, L.J.; Brett, L.J.; Cotton, L.J.

Johnson v. *Raylton* (*App.*), *Q.B.*

The plaintiffs were a firm of iron manufacturers, carrying on business at the Moor Iron Works, Stockton-on-Tees. The defendants were shipbuilders at Middlesborough.

By a contract, dated the 13th of December, 1878, contained in a printed form supplied by the plaintiffs, and afterwards filled up and signed by the parties, the plaintiffs agreed to sell and supply to the defendants, who were to buy and accept from them 2,000 tons of iron shipplates of the quality known as "Crown," to pass Lloyds' survey, at the price of 6*l.* 2*s.* per ton, to be delivered at the defendants' shipyard at Middlesborough, over the first nine months of the year 1879, in about equal monthly quantities. The contract was headed "The Moor Iron Works, Stockton-on-Tees," and had on its margin the plaintiffs' trade-mark. There was no express stipulation in the contract that the plates should be of the plaintiffs' manufacture, but it contained the following strike clause: "In the case of strikes or combination of workmen, or accidents causing a stoppage of the works, the supplies of iron now contracted for may be suspended during their continuance. This clause applies to buyers and sellers." The plaintiffs were not dealers in iron goods otherwise than as manufacturers. The defendants sent in some specifications under the contract as to the size and shape of the plates, some of which had to be made with respect to the size and shape of the particular ship for which they were required, and the plaintiffs made some deliveries under the contract; but before it was completed they closed their works and proposed to complete the contract by delivering iron plates of the contract quality but manufactured by other firms. The defendants refused to accept delivery of them, or to furnish the specifications required for making them. The plaintiffs thereupon brought an action to recover damages against the defendants for breach of their contract.

At the trial before Manisty, J., at the York Spring Assizes, it was admitted that the plates not of the plaintiffs' own manufacture which they proposed to deliver would be of Crown quality, to pass Lloyds' survey, and substantially as good as if manufactured by the plaintiffs. The defendants set up as a defence that under the contract they were entitled to be supplied with plates of the plaintiffs' own manufacture, and they tendered evidence of a custom in the iron trade that where iron plates are contracted to be supplied by manufacturers, the sellers must, if there is no stipulation to the contrary, supply plates of their own make, and that the buyer is entitled to reject other plates, though of the quality contracted for.

Manisty, J., on objection being taken, refused to admit this evidence, on the ground that it contradicted the terms of the written contract; and being of opinion that it was not an implied term of the contract that the plates should be of the plaintiffs' own manufacture, he gave judgment for the plaintiffs for a sum to be determined by a referee.

The defendants appealed.

Benjamin and *Hugh Shield*, for the defendants.

Digby Seymour and *A. Forbes* (*Cohen* with them), for the plaintiffs.

The arguments sufficiently appear from the judgments (*post*). The following authorities were referred to: *The West Stockton Iron Company* v. *Nielson and Maxwell* (1), *Johnson and Reay* v. *Nicoll & Son* (2), *Bigge* v. *Parkinson* (3), *Jones* v. *Just* (4), *Brown* v. *Edgington* (5), *Hutton* v. *Warren* (6), *The Merchant Banking Company of London* v. *The Phœnix Bessemer Steel Company* (7), *Wigglesworth* v. *Dallison* (8), *Brown* v. *Byrne* (9), *Cort* v. *The Ambergate Railway Company* (10), *The British Wag-*

(1) 17 Scottish Law Rep. 719; 7 Court Sess. Cas. (4th ser.), p. 1055.
(2) 18 Scottish Law Rep. 268; 8 Court Sess. Cas. (4th ser.), p. 437.
(3) 7 Hurl. & N. 955; 31 Law J. Rep. Exch. 301.
(4) 37 Law J. Rep. Q.B. 89; Law Rep. 3 Q.B. 197.
(5) 2 Man. & G. 279.
(6) 1 Mee. & W. 466; 5 Law J. Rep. Exch. 234.
(7) 46 Law J. Rep. Chanc. 418; Law Rep. 5 Ch. D. 205.
(8) 1 Smith's Leading Cas. (8th ed.), p. 594.
(9) 3 E. & B. 703; 23 Law J. Rep. Q.B. 313.
(10) 17 Q.B. Rep. 127; 20 Law J. Rep. Q.B. 460.

gon Company v. *Lea & Co.* (11), *Boulton* v. *Jones* (12), *Gibson* v. *Carruthers* (13), *Humfrey* v. *Dale* (14), *Fleet* v. *Murton* (15), *Hutchinson* v. *Tatham* (16), *Benjamin on Sales*, p. 156, *Chitty on Contracts* (10th ed.), p. 414.

Cur. adv. vult.

The following judgments were delivered on June 25:—

COTTON, L.J.—The plaintiffs in this case are not dealers in iron, but manufacturers; and they are so described in the statement of claim and in the contract in which they sue. By the contract the defendants agreed to buy from the plaintiffs 2,000 tons of ship-plates of the quality known as "Crown," to pass Lloyds' survey, to be delivered monthly. The plaintiffs before the contract was completed closed their works, and proposed to complete the contract by delivery of ship-plates of the quality mentioned in the contract made by another firm. These the defendants refused to accept; hence the action, in which the plaintiffs obtained a decision in their favour against which the defendants appealed.

At the trial the defendants tendered evidence to show that in the iron trade there is a custom that, under a contract between a manufacturer of iron plates and a customer for the supply of plates the seller must, in the absence of stipulation to the contrary, supply plates of his own make, and that the purchaser is entitled to reject other plates if tendered, though of the quality contracted for. This evidence was objected to by the plaintiffs and rejected, and I am of opinion that this evidence was improperly rejected, and that the defendants are at least entitled to a new trial. The contract contains no express stipulation on the question in dispute; and, as this is the fact, the principle of the cases is that if there was a custom or practice of the trade, the parties must be taken, as regards matters on which the contract is silent, to have dealt with reference to the practice or custom of the trade, and to have expressed in their written contract those matters for which the custom of the trade did not provide, or in which, in the particular case, they decided to depart from or vary the custom. But the defendants contended that they are entitled to judgment without any further trial, on the ground that under such a contract the plaintiffs, the manufacturers, are not entitled to require the purchaser to take any goods not of their own manufacture, even though the goods tendered be, as in the present case was admitted to be the fact, as good as those made by the plaintiffs. With the exception of two recent cases in the Court of Sessions—*The West Stockton Iron Company* v. *Nielson and Maxwell* (1) and *Johnson and Reay* v. *Nicoll & Son* (2)—there is not, either in the decided cases or in text-books, any authority on the question thus raised. It must be considered on principle. If a picture is ordered from an artist, it must be conceded that the order is for a picture painted by him, and that in like manner, when a contract for any article is made with a maker of such article, and the excellence or value depends on the individual skill of the maker, the purchaser has a right to require the article furnished to be one made by him to whom the order is given, with such assistance only from his pupils or servants as must necessarily be obtained by him, or as custom or the practice or usage of the art or trade recognises or allows. Does this principle apply when the order is given to a firm? It was not and could not be denied that, where the manufacture of a person or firm has acquired with the public a name or reputation—as Broadwood's or Erard's pianos, Purday's or Lancaster's guns—a purchaser from them of articles of which they are makers is entitled to refuse any not made by the firm with whom he contracts. In such a case the purchaser relies on reputation or public opinion, that the maker to whom

(11) 49 Law J. Rep. Q.B. 321; Law Rep. 5 Q.B. D. 149.

(12) 2 Hurl. & N. 564; 27 Law J. Rep. Exch. 117.

(13) 8 Mee. & W. 321; 11 Law J. Rep. Exch. 138.

(14) 7 E. & B. 266; in error, E. B. & E. 1004; 26 Law J. Rep. Q.B. 137; 27 ibid. 390.

(15) 41 Law J. Rep. Q.B. 49; Law Rep. 7 Q.B. 126.

(16) 42 Law J. Rep. C.P. 260; Law Rep. 8 C.P. 482.

he goes supples good articles. In other cases, when a man contracts with a particular firm for goods such as they make, in the absence of evidence that in the particular trade, or as regards the particular goods, there is a known practice that a maker of whom the goods are ordered is at liberty in the absence of such stipulation to supply goods of the kind, though made by other firms, I should come to the conclusion that the purchaser is induced to go to the particular firm of manufacturers by his reliance, in part at least, on the opinion which he forms either on his own experience, or from information of others, as to the average or general excellence of the goods which are manufactured by them. He is trusting to his own experience, or to that of his friends, as a purchaser who goes to a firm which has acquired a public reputation trusts to the opinion of the public.

But it is contended in support of the judgment that, as regards ship-plates of a particular description, and to satisfy a specified test, it is immaterial to the purchaser by whom the plates are made. I cannot agree with this argument. If the plaintiffs' contention is right, they may supply Crown ship-plates by whomsoever made. Even if Crown ship-plates of all makers, which, when worked up, will pass Lloyds' survey, are equally good, of which there was no evidence, and which, in the absence of evidence, I should not assume, it can hardly be contended that the average of all Crown plates supplied by all manufacturers would be equally good. This must, in all cases, be important, and in this contract the clause, that faulty plates are to be returned without charge for workmanship or other expenses, shews that the general average excellence of the plates to be supplied must be a material consideration. If the contention of the plaintiffs is right they are at liberty to supply goods of any maker; and therefore, in my opinion, it is not material with reference to the question now under consideration that the plaintiffs in fact proposed to supply plates as good as those manufactured by themselves, though this would be material on the question of damages if the defendants were suing the plaintiffs for breach of their contract.

The plaintiffs relied on two recent decisions of the Court of Sessions, which, no doubt, are in their favour. But although we ought to pay respect to the opinion on a point of law common to both England and Scotland expressed by that Court, their decisions cannot be considered binding here, and the authority of these cases is much diminished by the fact that Lord Young dissented from the opinions of the majority of the Court. I think the view of Lord Young more correct than that of the majority, and I am of opinion that when a purchaser orders goods from a firm which is a manufacturer only of such goods, not a dealer in them, then, unless it is shewn that in the particular trade, or as regards the particular goods, there is a practice or usage for the manufacturer to supply the goods of other makers, the purchaser must be assumed to have contracted with the particular manufacturers in reliance on the general excellence of the work of their firm, and is entitled, in the absence of any express stipulation to the contrary, to have, in performance of the contract, goods of the manufacturers' own make.

It is said that the clause as to strikes shews on this contract a contrary intention. But this is not, I think, the necessary or fair construction of this clause. I think the clause rather assumes that stoppage of the manufacturers' works would probably prevent them from performing their contract, though, notwithstanding the stoppage of the works, the manufacturers might have plates of their own make which they could supply.

The result, in my opinion, is, that judgment should be entered for the defendants, for it would be for the plaintiffs to shew that the custom of the trade enabled them to supply ship-plates of other makers; and as the plaintiffs objected to the evidence tendered by the defendants, to shew the usage of the trade, we ought, I think, to assume that the plaintiffs could not adduce such evidence as, in my opinion, is necessary to support their contention.

BRAMWELL, L.J.—I regret the difference

of opinion that exists; considering that difference, that there is, strange to say, no English authority on this subject, the opinion of eminent Scotch judges in favour of the defendants, and the cogency of the arguments on each side, it is impossible to have a confident opinion when I say that the decision of this case ought not to be difficult; that is to say, there is no difficulty about the facts, which are few and clear, and there is no difficulty of construction, as often happens in litigation resulting in uncertainty—which is said to be the uncertainty of the law, when in truth it is uncertainty of facts or uncertainty of ill-drawn documents. If there is an uncertainty in this case it is an uncertainty of the law. This ought not to be. There ought to be, and I think is, a rule by which to decide this case. That rule, I think, is that we must look at what the parties have said, add nothing to and take nothing from it without necessity, and see if the facts relied on by the plaintiffs bring this case within what has been so said. Now the plaintiffs have agreed to sell, and the defendants to buy, certain articles—ship-plates—to be made. The plaintiffs have offered to supply and sell goods, and the defendants have refused to take them by refusing to furnish the specifications according to which they were to be made; the defendants admitting that the plaintiffs would supply and the defendants would get such articles as described in the contract, properly made, and which would be within it if the plaintiffs themselves had made them. So stated there is a clear breach of contract. But the defendants make this defence: they say the plaintiffs are makers of the article to be supplied, and that they being makers, it is to be assumed that the contract is for articles of the plaintiffs' make. They further say that it is so in the particular case on account of certain matters in the written contract. Disregarding these for the present, is the general proposition true in point of law, that when goods which have to be made are ordered of a man who makes them, the goods are to be of his own make? Of course, if his make is a peculiar make, if he has a brand known in the market, if even he has a known name, if it can be supposed there is any *pretium affectionis*, it might be so. An order to Moet & Chandon of champagne of the vintage of 1881 would doubtless mean of their make, as it would if it were an order for champagne of the vintage of 1871 already made. An order for a pianoforte from Erard or Collard would mean of an instrument made or to be made by them, respectively; so, perhaps, of clothes from a renowned tailor. But is the proposition true of an article not so situate—articles of which one maker's make is as good as another's, and which have no special repute or name or other distinction? This is a pure question of law. I answer it in the negative. I know no authority for it; I know no reason for it; on the contrary, there are reasons the other way. A manufacturer would agree to sell goods at a lower price if he might supply them of his own make, or that of some other maker in case of need, as in this case. To the buyer it would be a matter of indifference if he got the goods he bargained for, and the responsibility of his vendor for them. It would be in practice an enormous inconvenience to hold otherwise. It is obvious that whatever reason there is for saying that goods to be made ordered of a manufacturer means goods of his make, equally applies to shew that when made goods are bought of a maker there is an implication that they are his make. There must be hundreds of manufactures in which the manufacturer buys the article he makes in a complete state, or partly complete, from other makers, and with perfect propriety sells them with no notice to the buyer that the article is not his entire make. Would it be reasonable or convenient to say that he has broken some implied agreement between himself and the vendor. It seems to me to be unimportant that the thing is to be made. If I order 10,000 bags of a maker which he has not in stock, he must make them or get them, and there is as much reason for holding that he warrants those he has, if he has them, to be his make as there is that he will make them himself if he has them not in his stock. A man buys a watch which was made or half made out of the seller's factory: has he a right of

action against the seller on an implied warrant that he made it? Or he buys a chair of an upholsterer: would he have a claim if the upholsterer had bought part of the stock of another maker, including that chair? It may be said that in the cases I have put watchmakers and upholsterers buy and sell things not of their own make. For aught I know they may; and so I say does every maker, if it suits him, where there is no specialty in his own make. Suppose a man is a maker and also a dealer in the article—that is, a buyer from others and a seller—what is the implied contract then?—that when he sells he shall sell his own make unless he bargains to the contrary? Suppose the buyer does not know that the seller buys of others: has he then a right to insist on the seller's make, and not if he does know it? To hold that it was part of the bargain that they should be of the vendors' make is to insert a term in the contract that the parties might have put in for themselves; and this ought never to be done without some most cogent consideration—*Stokes* v. *Cox* (17). I hold, therefore, that where goods are bought which are as good when of one man's make as of another, there is no agreement by the seller, though a maker, that the goods shall be of his make, and that this is true, whether the article is already made or is to be made. But it is urged that it is not to be assumed that ship-plates are articles of which one maker's make is the same as another's, and that there was no evidence that it was so. I understood that this was admitted by the defendants. If not, I cannot but think that the burden of proof was on them. The plaintiffs say, We were ready to supply goods such as you had ordered. The defendants say, Yes, but they are goods of such a description that they differ according to the maker; that there is a quality or repute or name attached to your make, and that in ordering of you we must be taken to have ordered your make. So stated, it is manifest that the burden of proof is on the defendants. But then it is said that there are matters in this contract (which is in writing) which shew that the goods were to be of the vendors' make. What is relied on is, that the plaintiffs are mentioned as manufacturers, and their factory is mentioned, and their trade-mark. In my judgment, no value ought to be put on these. The matters in question are in print on the form commonly, I assume, used by the plaintiffs, and would have been there if the contract had said in express terms that the goods might be of any maker's make. If these things were used with any intent to express what is attributed to them, is it not strange that that intent was not expressed in terms? I cannot set any value on this. But there is one thing in the contract which I think strongly shows that it was not necessary that the articles to be supplied should be of the plaintiffs' make. If the manufacturer is stopped by strikes the delivery by the plaintiffs may be suspended. This seems to contemplate that it will not necessarily be so; which can only be if the articles might be made by some other maker. I come to the conclusion then that we cannot give judgment for the defendants.

I do not discuss the Scotch cases. They are not binding on us as authorities, though of the greatest service, as containing the opinions and arguments of able and accomplished lawyers. I have endeavoured to avail myself of them. With two exceptions, the opinions are the same as that which I have formed. I think the reasoning of Lord Crayhill unanswerable. As to that of Lord Young, I respectfully say that he merely states what, in his opinion, is the law of implied agreement, namely, "I venture to think it is a generally, if not universally, true proposition that such a contract made with the manufacturer of an article to be made and supplied under it, implies that the article shall be his manufacture." He gives no reason why, and does not deal with the case of an article ready made bought of the maker. Further, he begs the question when he says, "A supply from other works is not according to the terms of the contract;" and, with submission, gives a bad reason when he says, "The partners are not bound to implement it all, unless they can do so from their own works." They are not bound,

(17) 1 Hurl. & N. 320, 533; 25 Law J. Rep. Exch. 291; 26 ibid. 113.

indeed, but have the right. But I regret to say I think there must be a new trial. I think the evidence rejected was admissible. It is true it alters the contract, as I interpret it, but it does not alter any of its express terms—it does not contradict it. The implied meaning of the contract is, as I think, that the goods may be of any maker's make. If it has said so in words, the custom would contradict it; as it is, it only displaces the implication. As has been said, all customs when proved alter the contract as it would be without them. I cannot distinguish this case from *Jones* v. *Just* (4). I think, therefore, there must be a new trial. I regret, for the reasons given by Lord Wensleydale, and also because I have a strong opinion that any evidence that may be given in support of this alleged custom would be evidence to shew that whenever anyone orders any goods of a maker he expects that maker's make. That, of course, would not be enough. I dare say it is a common expectation. I dare say it existed in this case; but that is very different from an agreement, and very different from a custom in a particular manufacture.

BRETT, L.J.—In this case the material facts for consideration, as it seems to me, are that the contract was made by the defendants without an inspection, or the means of inspection, by them of the goods —that is to say, upon the terms of there being no inspection by the defendants; but it was a contract made with the plaintiffs, as persons assuming to carry on the business of manufacturers of such goods as were the subject-matter of the contract, and not assuming to deal in such goods in any other character; that the subject-matter of the contract was iron ship-plates—some of which, after enquiring, I understand may be kept in stock, and be applied, with some manipulation, to any ship, but others of which must be made to fit the parts of the particular ship for which they are required, and therefore must be made according to specifications or patterns to be supplied by a shipbuilder; that the contract was made in writing, by means of an order in writing, filled up and signed by or for the defendants, on a form of order supplied by the plaintiffs, and of an acceptance of such order by the plaintiffs in writing, signed by them; that the order had a heading bearing the initials and mark of the plaintiffs; that it contains a stipulation binding on the plaintiffs that the plates should satisfy a Lloyds' survey, and it contains a strike clause; that it does not contain any express stipulation that the plates should be of the plaintiffs' manufacture. There was an admission that the plates, which the plaintiffs were ready to deliver, though they were not manufactured by the plaintiffs, would be substantially as good as if manufactured by the plaintiffs. Upon the construction of the contract itself, I do not agree that the heading of the order is no part of the contract, or is outside the contract. I think it is a part of the contract, and imports an obligation on the plaintiffs that the iron plates would bear their mark or brand. But it seems to me that it has no effect on the question we have to determine, because I think the obligation contained in it might be satisfied, although the plaintiffs might be entitled to supply plates not manufactured by themselves; as, for instance, although they might not legally affix the registered trademark of another manufacturer to plates manufactured by themselves, yet if, in order to supply the defendants' order, they bought from another manufacturer goods made by him with his mark or brand on them, I know no law which prohibits them from effacing the other manufacturer's mark and substituting their own, or from adding their own mark or brand to his. And in either case they would satisfy the stipulation of delivering plates marked with their own brand, thereby enabling the purchaser to refer to them in case any plate should be rejected by a Lloyds' surveyor. Neither do I think that the stipulation as to satisfying Lloyds' survey affects the question we have to determine, because that may equally exist whether the suggested stipulation as to manufacture by the plaintiffs is to be implied or not. That is an independent and additional undertaking by the plaintiffs. And so as to the strike clause, which, in my opinion,

would, if the suggested stipulation were implied, have ample effect, thus—that upon a strike at the plaintiffs' works they might exercise their discretion whether they would procure other workmen and continue the work under the contract, or stop; and so in the case of a strike at the defendants' works, they might exercise their discretion whether to take delivery or stop. In either case the decision would probably depend on the value of the contract to the person who had to exercise option. The question, therefore, for decision, seems to me to be whether, upon an order given and accepted, or a contract otherwise made with a person holding himself out to be a manufacturer of certain classes of goods, and not holding himself out as otherwise dealing in them, for the purchase and sale of such goods as such manufacturer professes to manufacture, the order being given or contract made by a purchaser who deals upon the terms that he is not to inspect the goods, and there being no express stipulation that the goods are to be of the manufacture of the manufacturer, there is an implied stipulation that the goods shall be of the manufacture of the manufacturer who is thus to supply them. The question being thus stated, it seems to me that it cannot make any difference whether the goods happen to be in existence, or in stock, or whether they have still to be made when the contract is entered into. The terms of the question embrace equally both positions. It seems to me useful, in order to present the question clearly to one's mind, to consider what is the alternative if there be no such implication as is suggested. If there be not, what are the contracts imposed upon the manufacturer under the given circumstances with regard to the nature or quality or making of the goods? One is that the goods shall be merchantable; another is that they shall be reasonably fit for the purpose for which they are ordered. I know of no other implied contract as to the nature or make of the goods. There is no contract that they shall be equal to the ordinary make of the manufacturer himself, or equal to the ordinary make of any other manufacturer, or to the ordinary make of all manufacturers of similar goods. It has been suggested that if the manufacturer have a mark or brand of his own known in the market, or if his goods have a known character in the market, then the suggested contract may be implied. But if the manufacturer does not propose different prices for goods manufactured by himself as distinguished from goods not so manufactured, I can see no reason why, unless the implication is to be made in all cases, it is to be made in the given cases. It is perfectly possible that the purchaser would know nothing about such mark or such character, or the value of either. And if not, there being no difference in price, why should there be imposed on the manufacturer an increased liability in favour of such a purchaser, because the manufacturer has a good trade character? If, then, there is no other contract binding on the manufacturer in the absence of the suggested one, but the two I have above mentioned, it is immaterial to enquire whether the goods, the subject-matter of the contract, are such as in ordinary circumstances one manufacturer makes substantially as well as another. It was immaterial to consider in this case, as affecting the liability of the defendants to accept the goods, whether the goods which the plaintiffs were ready to deliver were as good as if manufactured by the plaintiffs themselves. That would be evidence material upon the question of damages, if the defendants were liable for a breach of contract for not accepting such goods as are the subject-matter of the contract in question, but not material as to the question whether there was or was not a breach of contract by not accepting them. If, then, there be no such contract as is suggested, a manufacturer under the stated circumstances may supply goods not manufactured by himself—inferior to his own usual manufacture, inferior to the usual manufacture of the person from whom he has purchased, inferior to the usual standard of manufacture by other manufacturers of similar goods—the goods of a manufacturer to whose manufacture the purchaser, whether with good reason or from fancy, has objected, and with whom on account of such objection the purchaser has ceased to deal, and to whom on account of such

objection he has preferred the manufacturer with whom he is now dealing. If only the goods supplied be merchantable and reasonably fit for the purpose for which they were ordered the purchaser must accept them, notwithstanding any of these objections he may feel. The question, therefore, really is, whether the suggested contract is to be implied from the fact of the order being given or contract made with a person holding himself out to be a manufacturer of such goods, and not holding himself out as otherwise dealing in such goods; or whether the purchaser, buying without inspection, is bound to be content with the alternative and its consequences thus pointed out. It seems to me, after long consideration, to be more consonant with the ordinary simplicity of fair mercantile business, and more in accordance with legal principles, to say that he who holds himself out to be a selling manufacturer of goods, and does not hold himself out as being otherwise a dealer in such goods, does hold out to a proposing purchaser that what he (the manufacturer) offers to do on an order given to, or contract otherwise made with, him for the supply of goods such as he professes to deal in, is that he will supply goods manufactured by him. And it seems to me that it is more reasonable to assume that the purchaser contracting under such circumstances will rely, as a matter of right, upon receiving goods manufactured by the manufacturer with whom he deals than to assume he will run the risk of the alternative consequences I have pointed out. Such a holding out and such a reliance make a contract, or a term of a contract, that the goods supplied shall be of the manufacture of the manufacturer. Several objections were made to this view: as that in certain trades it is known that a manufacturer to whom an order is given fulfils it by delivering goods manufactured by other makers. The shoe trade of Northampton was mentioned as an illustration. If such a mode of fulfilling such a contract is generally known to both buyers and sellers in a particular manufacture, such an usage would negative the suggested implication. That state of things in a particular trade does not destroy the general proposition. It was suggested that if the implication exists, the absence or death of a partner in the manufacturing firm would render the contract impossible of performance by the manufacturing firm. But the implied contract seems to me in reason to be not that the goods shall be manufactured under any particular personal superintendence. It is well known to all men of business that manufacturing work is not so done, but that the only binding stipulation is that the goods shall be of the manufacture of the manufacturer—understood in the ordinary business sense of that phrase—be made by the ordinary appliances of the manufacturer's works. It was suggested that the implication would require every part of the manufactured article to be made in the factory of the manufacturer, as every wheel of a watch to be made by a watchmaker, or every part of a carriage by the coachmaker. But in such cases the article which is the subject-matter of the contract is the article made up of different parts; and the parts before they are put into that article, so as to form it, are not the subject-matter of the contract. It was suggested that a great manufacturer would not, without the power of employing others, be able to fulfil his contract; but if it be held that the implied contract does arise where a manufacturer has a good brand or a known good work, then it is precisely the greatest manufacturer who will be deprived of the suggested necessary power. I cannot think that these objections should prevail. As to authority, there are only the Scotch Cases, which are to be treated with every respect. I notice, however, that the Lord Ordinary and Lord Young agree with the view which I in the end think right; and that Lord Giffard founds his judgment on a view of the particular evidence in the case before him, and does not deal with the general proposition at all. He relies upon evidence which he says was preponderating, "that in such contracts it is of no consequence who makes the plates, and that one maker often supplies plates procured from other makers." If such a practice in the trade was generally known to buyers and manufacturers, it seems to me, as I have

before said, that the suggested implication cannot be made. The authority of the Scotch Judges is a balance of high opinions. The remaining point is, what is the proper result of the opinion at which I have arrived. Let me say that I have arrived at it after many doubts and with much hesitation, the greatest cause of doubt being the opinion of Lord Justice Bramwell. The logical conclusion is, that judgment should be entered for the defendants. I think it better for the parties that we should order such a judgment, so that the case may be taken, as I think it should be taken, at once to the House of Lords.

Judgment reversed.

Solicitors—G. & W. Webb, agents for Crosby & Archer, Stockton-on-Tees, for plaintiffs; Van Sandau & Cumming, agents for J. T. Belk & Parrington, Middlesborough, for defendants.

[IN THE QUEEN'S BENCH DIVISION.]

1881. May 21. June 3. WHITE (*appellant*) *v.* THE JUSTICES OF COQUETDALE (*respondents*).

Licensing Acts — Death of Licensed Person during continuance of Licence—Expiration of Licence — Application to Special Sessions—9 *Geo.* 4. *c.* 61. *ss.* 4, 13, 14.

[For the report of the above case, see 50 Law J. Rep. M.C. 128.]

[IN THE QUEEN'S BENCH DIVISION.]

1881. June 23. TAYLOR (*appellant*) *v.* ROGERS (*respondent*).

Wild Birds Protection Act, 1880 (43 *&* 44 *Vict. c.* 35), *s.* 3—*Foreign Bird—Exemption from Penalties.*

[For the report of the above case, see 50 Law J. Rep. M.C. 132.]

[IN THE QUEEN'S BENCH DIVISION.]

1881. June 21. THE QUEEN *v.* THE JUSTICES OF HERTFORDSHIRE. *In re* WROUGHTON AND ANOTHER.

Licensing Acts, 1828 (9 *Geo.* 4. *c.* 61) *s.* 14—1874 (37 *&* 38 *Vict. c.* 49), *s.* 15—*Conviction of Licensed Person—Application by Owner for Authority to carry on Business—Discretion of Justices at Special Sessions to refuse.*

[For the report of the above case, see 50 Law J. Rep. M.C. 121.]

[IN THE QUEEN'S BENCH DIVISION.]

1881. June 28. PEARSON (*appellant*) *v.* HEYS (*respondent*).

Bastardy—Affiliation Order—Limiting Duration of Order—Marriage of Mother—35 *&* 36 *Vict. c.* 65 (*the Bastardy Laws Amendment Act*, 1872), *ss.* 4 *and* 5.

[For the report of the above case, see 50 Law J. Rep. M.C. 124.]

[IN THE QUEEN'S BENCH DIVISION.]

1881. June 27. SAUNDERS *v.* RICHARDSON.

Elementary Education Acts, 1870 *and* 1876—"*Causing children to attend school*"—*Attending without Fee — By-laws of School Board.*

[For the report of the above case, see 50 Law J. Rep. M.C. 137.]

[IN THE QUEEN'S BENCH DIVISION.]

1881. March 22, 24. DRAKE *v.* FOOTTIT. DRAKE *v.* HANKIN.

Riot—Felonious Demolition of Houses—Liability of Hundred—7 *&* 8 *Geo.* 4. *c.* 31. *s.* 2.

[For the report of the above case, see 50 Law J. Rep. M.C. 141.]

[IN THE COURT OF APPEAL.]

(Appeal from the Queen's Bench Division.)

1881. June 27, 28. } THE QUEEN *v.* HOLL AND OTHERS.*

Corrupt Practices Prevention Act (26 *Vict. c.* 29), *s.* 7—*Enquiry into Corrupt Practices by Commissioners—Power of Commissioners to refuse Certificate to Witness—Mandamus to review Decision of Commissioners.*

By 26 *Vict. c.* 29. *s.* 7, *it is enacted that no person called before commissioners appointed to enquire into corrupt practices at an election shall be excused from answering any question relating to any corrupt practice on the ground that the answer may criminate or tend to criminate him, provided that where any witness shall answer every question which he shall be required to answer, and the answer to which may criminate or tend to criminate him, he shall be entitled to receive a certificate stating that he was so required to answer, and had answered all such questions. A witness before such commissioners answered all the questions put to him, but did not, in the opinion of the commissioners, answer truly certain questions which might tend to criminate him, and they refused to grant him a certificate. On an application by him for a mandamus to compel them to grant him a certificate,*—Held, *by the Court of Appeal (affirming the judgment of the Queen's Bench Division), that no mandamus ought to issue to review the decision of the commissioners, for that, as they had exercised their discretion on the facts before them, their conclusion founded on those facts was conclusive; and further, that the circumstances of the case afforded good ground for the conclusion at which they had arrived.*

The Queen *v.* Price (Law Rep. 6 Q.B. 411) *overruled.*

Appeal from a judgment of the Queen's Bench Division discharging a rule *nisi* for a *mandamus* to the commissioners appointed to enquire into alleged corrupt practices at an election for the borough of Sandwich, to compel them to grant a certificate of indemnity to J. B. Edwards.

It appeared from the affidavits, that J. B. Edwards, who had been agent for one of the candidates at an election of a member of Parliament for the borough of Sandwich, was called as a witness before the commissioners appointed under 15 & 16 Vict. c. 57, and 26 & 27 Vict. c. 29, to enquire into alleged corrupt practices at that election. Edwards was examined at some length, and in the course of his examination he handed in a bill, which was as follows:—

"May 21, 1880.

"Sir J. Goldsmid's Committee,

"Dr. to W. Brown, 52 High Street, Deal.

"To arranging names of voters from Parliamentary Register, making out six canvassing books, fair copies of register of voters . . . 14*l.*"

In connection with this the following examination took place:—

"3348. (*Mr. Holl*).—There is an item here of 14*l.* to Brown for preparing canvassing and promising books. Was that for printing them?—It was dissecting the register, and putting the names into canvass books, and preparing sheets for the committee-rooms—instructions I think they call them.

"3349. What is Mr. Brown?—He is a rate collector here.

"3350. How long would that take him to do—a day or so?—I should think some days.

"3351. Two or three days?—Quite. It is not an easy matter to dissect a register, so as to have the names all in order for the purpose of canvassing, and to prepare large sheets likewise for the voting.

"3352. Does not it strike you as being a large item—14*l.*—for two or three days' work, to a gentleman in that position?—I do not know, and I think that is the amount that has been paid before."

Brown afterwards denied that he had ever made any charge of 14*l.*, and said that his charge for the work done had been 4*l.* Edwards, being further examined, stated that he had altered the

* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

bill by inserting the figure 1 before the figure 4, and that he believed Brown had been informed of the alteration. This Brown denied.

The commissioners stated as follows: that Edwards "did not in our judgment on his examination on October 8, 1880, answer truly the questions put to him in respect of the item of 14*l.* purporting to be a charge by Brown for preparing canvass and promise books. That, in our judgment, the answers made by him were evasive and untrue; and the questions to which such answers were given were, in our judgment, questions the answers to which might criminate or tend to criminate him."

Edwards was also examined with respect to the expenses of certain candidates at the general election of 1880, when he stated that a certain bill included all the expenses incurred at Deal at that election.

The following examination took place in connection with this subject:—

"Does that include, so far as Deal is concerned, all the expenses that were incurred in that election?—Yes, the whole of them.

"Were there, beyond those, any other expenses that you are aware of, of any kind, in connection with the election?—No, not any.

"Did you expend, or are you aware of any money being expended in connection with that election at Deal beyond the sum mentioned there?—I know of nothing, nor do I believe there is such a thing. It has been said that a certain amount of money was sent down to be divided between the Liberal party, but I know nothing of it, nor do I believe it.

"I understand you to say distinctly, as far as your knowledge goes, and so far as your belief goes, nothing whatever was spent at that election beyond what appears in this account?—Not anything."

From evidence given by one of the candidates it appeared that Edwards had received a sum of 100*l.* beyond what he stated; and in respect of this matter also the commissioners stated as follows:—

"Having found that corrupt practices were committed at the election of May, 1880, we proceeded to enquire whether corrupt practices had existed at the previous election of 1880, and the evidence of the said James Barber Edwards as to the amount of the expenditure at that election, and the evidence of Mr. Henry Arthur Brassey, was given on and in reference to such enquiry.

"In our judgment, the answers given by the said James Barber Edwards on such enquiry, in reference to the amount of the expenditure at such previous election, were untrue; and the questions to which such answers were given were, in our judgment, questions the answers to which might criminate or tend to criminate him."

For these reasons the commissioners refused to give Edwards a certificate of indemnity. Edwards thereupon obtained a rule *nisi* in the Queen's Bench Division for a *mandamus* to compel the commissioners to give him that certificate, which rule was afterwards discharged.

Edwards appealed.

White and *Anderson* (with them *Sir J. Holker*), for the appellant.

The Attorney-General (*Sir H. James*), for the commissioners.—There is a preliminary objection to the hearing of this appeal on the ground that this is a criminal matter, inasmuch as the certificate given under 26 & 27 Vict. c. 29. s. 7 (1)

(1) 26 Vict. c. 29. s. 7: "No person who is called as a witness before any election committee or any commissioners appointed in pursuance of the Act 15 & 16 Vict. c. 57, shall be excused from answering any question relating to any corrupt practice at, or connected with, any election forming the subject of enquiry by such committee or commissioners on the ground that the answer thereto may criminate, or tend to criminate, himself: Provided always, that where any witness shall answer every question relating to the matters aforesaid which he shall be required by such committee or commissioners (as the case may be) to answer, and the answer to which may criminate or tend to criminate him, he shall be entitled to receive from the committee, under the hand of their clerk, or from the commissioners, under their hands (as the case may be), a certificate stating that such witness was upon his examination required by the said committee or commissioners to answer questions or a question relating to the matters aforesaid, the answers or answer to which criminated or tended to criminate him, and had answered all such questions or such question."

The section then proceeds to enact that if any

is sought for as an answer to matters on which criminal proceedings might ensue, and by section 47 of the Judicature Act, 1873, no appeal lies in any criminal matter—*The Queen* v. *Steel* (2).

[BRAMWELL, L.J.—We do not think this is a criminal proceeding.]

White, for the appellant.—The cases of *The Queen* v. *Price* (3) and *The Queen* v. *Hulme* (4) shew that the judgment of the commissioners is not final, and that in a fitting case a *mandamus* will go to review their decision. The case of *The Queen* v. *Burrell* (5) does not contradict those cases; and although in that case the *mandamus* was refused, yet it was refused on the particular circumstances of the case and because the Court was of opinion that the witness had not answered truly the questions put to him. Authority is therefore in favour of the position that questions of fact may in cases of this nature be reviewed by the Court, and it is equally a question of fact whether a witness has answered at all, or whether he has answered truly. If this be so, then in the present case the appellant is entitled at least to have the question tried whether he has answered truly; for even though his earlier answers may be deemed to be ambiguous, still his further answers explained all the matters enquired into, and therefore as a whole his evidence was true.

The questions which a witness is bound to answer truly to entitle him to a certificate must be questions which relate to a corrupt practice at an election forming the subject of an enquiry by the commissioners, whereas the questions and answers relied on by the commissioners relate to matters arising after the election, and do not relate to corrupt practices such as are provided for by the statute.

Further, the questions were not such as tended to criminate the witness with respect to corrupt practices.

A. L. Smith, with him *The Attorney-General* (*Sir H. James*) and *The Solicitor-General* (*Sir F. Herschell*), for the respondents.—To support the appeal it is necessary for the appellant to show that he has complied with the requirements of the statute (1), whereas he has not done so, for he has not answered "every question relating to the matters aforesaid"—that is, to corrupt practices—"which he was required" to answer. He has not answered because he has not answered truly, and an evasive answer is equivalent to no answer—*The Queen* v. *Hulme* (4); he has, therefore, failed to answer a question which might tend to criminate him.

[BRETT, L.J.—Have you observed the form of the certificate?]

The words are different. The certificate is that the answers did criminate or tend to do so; but the proviso in section 7 is wider in its terms, it is that the answers may criminate or tend to do so. The commissioners alone can judge whether the answer to any question might or might not tend to criminate, or might or might not form a link in a chain which might tend to criminate the witness.

It is also submitted that as the commissioners have adjudicated on the matter there can be no review of their decision, and so no *mandamus* can issue. The only authority adverse to the contention is *The Queen* v. *Price* (3), but that case was argued on the point whether the witness had or had not in fact answered the questions; the Court thought it was a case for further enquiry, and the rule *nisi* was made absolute, but no further steps were taken. After that decision came the case of *The Queen* v. *Burrell* (5), wherein a rule for a *mandamus* to commissioners to grant a certificate was refused. Blackburn, J., in giving judgment, said, "In the present case the commissioners came to the conclusion that the witness did shuffle and equivocate, and we are asked to put that in review. I apprehend that in all cases where we are asked to grant a *mandamus* it must in

proceedings be thereafter pending in any Court against the witness for any offence under the Corrupt Practices Prevention Acts, the Court shall, on production and proof of such certificate, stay the proceedings.

(2) 46 Law J. Rep. M.C. 1; Law Rep. 2 Q.B. D. 37.

(3) Law Rep. 6 Q.B. 411.

(4) Ibid. 5 Q.B. 377.

(5) Not reported. Shorthand notes of the judgments of Blackburn, J., Mellor, J., and Lush, J., were supplied to the Court.

great measure be a matter of discretion. . . . . We think the commissioners who have decided have the best means of knowing." That judgment is exactly in point here, and the present case, like the cases of *The Queen* v. *Hulme* (4) and *The Queen* v. *Burrell* (5), can be distinguished from *The Queen* v. *Price* (3), which, however, it is submitted, may be successfully impugned in this Court.

Moreover, the granting of a *mandamus* is always a question of discretion—*The Queen* v. *Wigan* (6) ; and this Court will not overrule the discretion exercised by the Queen's Bench Division in the matter.

White, in reply.

BRAMWELL, L.J.—I am of opinion that this judgment should be affirmed. I am not quite satisfied that the questions which the appellant is supposed to have answered untruly are questions which he was bound to answer truly in order to entitle him to a certificate. It appears to me that the contention on the part of the appellant has been that the questions were not questions the answers to which might criminate or might tend to criminate him. Now I should have some difficulty in deciding this in favour of the appellant, even if we could go behind the refusal by the commissioners to give him a certificate, because I think that the meaning of the statute is, that no witness can be excused from answering any question relating to a corrupt practice at an election on the ground that the answer may tend to criminate him: provided always, that where any witness shall answer every question the answers to which may criminate or tend to criminate him, he shall be entitled to receive a certificate. I do not feel able to say that if a man answered every question the answer to which might criminate or tend to criminate him, and then refused to answer a question, a truthful answer to which would not either criminate or tend to criminate him, he would not be entitled under the statute to a certificate. With regard to the particular questions which the appellant answered untruly, I do not see that they were questions true answers to which would have criminated or tended to criminate him of any corrupt practice, and it is admitted that the words " may criminate or tend to criminate "must have relation to some corrupt practice, the subject of the enquiry. The argument for the respondents is that there is no question the answer to which may not criminate or tend to criminate. I do not agree; for, if so, the statute need not have contained these particular words, for " any question " would have sufficed. It seems to me that the way to ascertain whether the question is one the answer to which may criminate the witness, is to see whether a truthful answer would have that effect. In the present case, the truthful answer would not have tended to criminate the appellant of a corrupt practice, although it might have led to a charge of obtaining money by false pretences. I should, therefore, have considerable difficulty, if we could examine into the matter, in saying that the appellant had refused to answer a question the answer to which might tend to criminate him. It may then be urged that, if this be so, the commissioners should have given him a certificate. I, however, do not intend to suggest that; they could, from materials before them, very probably see consequences which I cannot see. I think that this judgment must be affirmed on the ground that the judgment of the commissioners is conclusive. I have a strong opinion that *The Queen* v. *Price* (3) was wrongly decided. It appears to me that this statute must be read as though it ran, " Provided that where any witness in the judgment of the commissioners or committee; " and thus I read it, although I never insert words in a statute unless for cogent reasons. Now it is clear some words must be read into this Act: you must add " corrupt practices " after " criminate or tend to criminate; " so, again, before the word " answer " you must insert " honestly " or " *bona fide*." The statute cannot mean that a witness is to have a certificate if he were to answer every question put to him, and yet give a dishonest and untrue answer in every case. Still more cogent reasons, as it seems to me, compel the introduction of the words " in the judg-

(6) Law Rep. 1 App. Cas. 611.

ment of the commissioners or committee," because the certificate is to be that a witness was required to answer certain questions the answers to which criminated or tended to criminate him, and that he had answered all such questions honestly and truly. That means, in their judgment, they do not certify it as a fact on which no opinion has been or could be exercised, not as they might certify that a man was sworn or was examined, but they certify that in their opinion the witness has *bona fide* answered the kind of questions referred to in the statute. Then how can any other judgment be possibly substituted for that of the commissioners? Suppose the matter were referred to some other tribunal—to the Court or to a jury—the commissioners would then have to certify that the tribunal selected was of opinion that the witness answered *bona fide*; but that is not the certificate required by the statute, and the commissioners would, if they were of a different opinion, be giving a false certificate. Other practical inconveniences might follow. There might be, to take a moderate test, five questions: and as to each, the question might arise whether the answer was *bona fide* and true, and whether it was a question the answer to which would criminate or tend to criminate him, and those questions would in each case have to be submitted to the jury or the Court. Is this conceivable? Suppose, again, that the witness gave a mistaken answer, who can so well judge as to that as the commissioners who heard him? and to whose judgment can such matters be removed from the judgment of the commissioners? Another matter seems to me to support this view. Suppose that a *mandamus* would lie to these commissioners, would one lie to a committee of the House of Commons? Is it likely that the Legislature intended that this should be so? It may be said that the committee of the House would be *functus officio* before the *mandamus* could go, but then so would these commissioners be *functi officio*. Then, if a certificate can be enforced from one body, would not the Legislature have provided that it should be capable of enforcement from another body?—and yet a *mandamus* could not issue to a committee of the House of Commons to give that certificate which it is yet supposed a witness is in justice entitled to have. Is it not then reasonable to suppose that the Legislature never contemplated that a *mandamus* should issue in connection with this certificate?

Further, if this *mandamus* will lie, it is because the appellant has a legal right which has been denied him; and if so, then, as is admitted, an action will lie; but again, is it conceivable that such an action for damages for the not granting a certificate could be brought against a committee of the House or against these commissioners? If, moreover, the withholding of the certificate is a judgment of the commissioners, must not that judgment be conclusive? and if their judgment is not conclusive, would their certificate be more conclusive? The reasoning which has been used on behalf of the appellant would be equally applicable to shew that the certificate was not binding. If the negative judgment of the commissioners—that is, the refusing the certificate—may be overhauled, it appears to me that their affirmative judgment—the granting of the certificate—might equally be enquired into. Another thing appears to me to tend in the same direction: the certificate is for certain purposes, something like a pardon; now the hearing of this case has in fact been expedited, but if we were to give judgment that the *mandamus* should issue there would be an appeal to the House of Lords, and in a year's time, in all probability, judgment would be given, let us assume, to the effect that the *mandamus* should issue. There would then be a return and a trial, and some time in the course of the next decade we should learn whether the answer under the discussion were true or not. I think that this is the least forcible of the reasons I have adduced; but still one may ask whether the Legislature could have contemplated such a process. I am of opinion that no *mandamus* lies, that the certificate is a certificate of the judgment of the commissioners, and that it cannot be enquired into, so that the judgment of the Court below must be affirmed.

BRETT, L.J.—I am also of opinion that

this judgment should be affirmed. The first question is, whether we are prepared to differ from the decision in *The Queen* v. *Price* (3). I do not say that I should not, if it were necessary, be prepared to consider whether that decision can be upheld, but I do not think it is necessary to do so now. The decision in *The Queen* v. *Price* (3) was that, upon the existence in fact of certain circumstances, a witness who has been examined is entitled, as a matter of law, to his certificate, that the existence in fact of the circumstances to entitle him is not to be conclusively decided by the commissioners, and that their decision upon whether those circumstances do exist or not is not of necessity conclusive. If their decision is a matter of judicial decision, I think it would come within the rule that, there being no appeal, the Court would only grant a *mandamus* requiring them to exercise their jurisdiction with regard to the facts of the case, supposing always that they have failed to do so. If the commissioners had declared that they had come to a conclusion as to the existence of the facts, but had, for other reasons, refused to grant a certificate, then a *mandamus* might, I think, lie; so that I agree in a great part of the decision in *The Queen* v. *Price* (3), but I am not sure I agree with the whole of it. But it is not, in my opinion, necessary to decide the present case against the authority of *The Queen* v. *Price* (3), because, even assuming that the existence of the facts necessary to entitle a party to have a certificate may be reviewed, still I think that in this case the *mandamus* was rightly refused.

I should have expected to find that the Legislature had given an almost absolute right to a certificate to a witness giving evidence before one of these commissions, because it has made bribery a crime, creating thereby a crime which was not a crime at common law, and has then proceeded to invade the fundamental rule of the criminal law of England, whereby no person is bound to answer any question which may criminate himself. But for the purpose of finding out whether bribery has existed, Parliament has taken away that protection from certain persons who may thus become liable to punishment as criminals. Therefore I should not be inclined to differ from the view of Mr. Justice Blackburn, that the Legislature meant that if the facts did exist, then the witness should be entitled to a certicate; but I desire to reserve for further consideration the question whether the decision in *The Queen* v. *Price* (3) can be upheld.

What, then, are the facts which it is necessary to shew existed in order to entitle the witness to a certificate? Those facts are, I think, stated in the proviso of the statute. The first thing necessary is that the question should relate to a matter connected with some corrupt practices committed in an election under enquiry; then there must be a requirement by the commissioners that the witness should answer, and the answer must be to a question which may criminate or tend to criminate him; this answer further must be given truly. The question to be determined is, whether upon a charge of corrupt practices a question was asked the answer to which might criminate or tend to criminate the witness.

It seems to me that the meaning of these words was given by Mr. Justice Blackburn in *The Queen* v. *Hulme* (4), when he said that an answer may furnish a link in the chain of testimony which may implicate a man in a criminal charge; so that an answer may be one of a set of answers, which set of answers may in the end tend to criminate him. It is unnecessary to say what questions might tend to criminate; but I do not think a question as to a crime of which the witness was convicted many years before, put to test his credit, would be such a question. I think that the Legislature intended that a witness should answer truly almost every question which might be put to him. I do not think that the statute intended that an election agent should be allowed to answer falsely questions which might tend to criminate not only himself, but also others, and yet that he should have his certificate. I do not see any difficulty in holding that, if the answer to a question put to him might be one link of a chain, then he must answer that question, or he has not satisfied the con-

dition. Now, let us take one of those instances now before us. Supposing an election agent is called before the commissioners, who are about to enquire into the corruption of the constituency, and he is asked these questions: "Did you see the candidate on the eve of the nomination? Yes, I did.—Did he give you a sum of money? Yes.—What did he give you? He gave me 100*l.*;"—and it should be proved to the satisfaction of the commissioners that instead of 100*l.* he received 1,000*l.*, I take that answer and stop there. I should say that a more probable link in a chain which would end in shewing that he had spent 900*l.* in corruption could not be suggested. He would have told a falsehood, because he said "I only received 100*l.*;" ought he then to have a certificate, having given that answer, because he could shew that he did not spend the 900*l.* in bribery, but that he cheated the candidate? I do not think so. I think the witness is not to answer falsely: I think that he must answer truly any question which may reasonably be a link in the chain, or else he is not entitled to a certificate at all. With regard to the 900*l.* of which he has cheated the candidate, he does not require the certificate; but if he has committed bribery with other money then he requires a certificate, but he ought not to have it, because he has not fulfilled the requirements of the statute.

In the present case the commissioners produced to the appellant a bill in favour of a man named Brown for 14*l.* They asked him in substance whether that was a true voucher, and he replied that it was. Now that was untrue; the bill was really only for 4*l.*, and I think the answer might well be the first link in a chain of answers which might shew that he received 14*l.*, and which might account for the expenditure during the election of 10*l.* I think, therefore, the answer was one which might be a link in a chain to shew that the appellant was guilty of a corrupt practice. This meaning of the words "which may criminate or tend to criminate," seems to me to be strengthened by the different form of the expression which is used in the form given for the certificate. That form states that the witness was required to answer a question relating to the matters aforesaid, the answers to which criminated or tended to criminate him. I think that the answers and the questions mentioned in the form of the certificate are not the same answers and questions as those to which I have referred. They are the answers to the questions for which answers the witness requires a certificate, and the certificate states that the witness has answered questions not which might, but which did criminate him. With regard to this, I must say, with deference, that I do not see that the commissioners are likely to have to certify anything which they do not believe. If the witness has not answered any questions which tend to criminate him he does not need a certificate at all. The certificate is as to those answers, and there can be no difficulty in the commissioners giving the certificate.

I think the difference in the phraseology was intentional, and that the questions and answers dealt with in the certificate are different from those which give the witness a right to a certificate; and I am of opinion that the judgment of the Queen's Bench Division can be affirmed without overruling *The Queen* v. *Price* (3), on the ground that the Court may be satisfied, and was satisfied, that the appellant gave a false answer to a question which was reasonably an answer which might be one in a link of a chain of answers which would criminate him, and for that reason I think he was not entitled to the certificate as to the answers to questions which did criminate him. Reserving, therefore, my opinion as to the case of *The Queen* v. *Price* (3), but doubting whether it can be supported, I think that, on this other ground, the judgment should be affirmed.

COTTON, L.J.—In this case the Queen's Bench Division discharged a rule for a *mandamus*; and the question arises, whether the Court can, in any circumstances, interfere with the discretion exercised by the commissioners by issuing a *mandamus*; and, in my opinion, in the circumstances of the present case, there is no power in the Court to interfere with the exercise of their discretion. If,

indeed, it was admitted by the commissioners that facts existed which would entitle the applicant to a certificate, and they refused it, then they would not have exercised the discretion which, in my opinion, was given to them by the section, and in such a case a *mandamus* might probably issue. In this case, however, the commissioners have come to the conclusion that the appellant has not performed the condition necessary to entitle him to a certificate, and they have consequently refused to give him a certificate. The certificate which he asks for is a certificate to be given with reference to matters which took place before the commissioners. It is conceded that it has reference not only to the fact that he has or has not answered questions put to him, but also as to whether he has honestly answered those questions. The commissioners are to give him a certificate, if he has fulfilled certain conditions, and the certificate is to the effect that he has honestly—for this is also conceded—answered the questions put to him relating to corrupt practices at the elections under enquiry, which questions tended to criminate him.

Of necessity, in my opinion, the commissioners must be intended by the statute to be the judges of that which takes place before them, and to say whether they, in their opinion, considered that the witness not only purported to answer, but whether he honestly answered, the questions which were put to him, and which they are to certify he honestly and fairly answered; and that they should certify when they do not think such is the case, because there is some finding of a jury or a Court that he had done so, would, as it seems to me, lead to a somewhat absurd conclusion, because why should the commissioners certify that a jury or Court had so found? The statute does not make the pardon or certificate of the witness depend on the finding of a jury; but it is to be certified by the commissioners that the witness has honestly answered questions relating to corrupt practices which tended to criminate.

That must mean that if, in their opinion, the witness has honestly answered the questions relating to corrupt practices at the election, and which tend to criminate him, they are to give him a certificate.

To certify means to state that that is the opinion which they have derived from the matters before them. It is true, as Lord Justice Brett has said, that the questions to which their certificate is to go are not necessarily all the questions which the witness must answer in order to be entitled to the certificate; but the certificate must have reference to some of the questions. In the present case, the questions the answers to which do not warrant the commissioners in giving a certificate, are questions which are not only included in the earlier part of the section, but also questions to which the certificate would have to refer. I think that if, upon the form of the certificate and upon the nature of the certificate, the commissioners are to be the judges as to whether that certificate can be properly and truly given as regards the facts to which it relates—namely, the answering by a witness the questions as to which the certificate refers—they must, on a fair construction of this Act of Parliament, also decide whether he has fairly and honestly answered the questions referred to in the previous part of the section, the answers to which are the conditions of his obtaining that certificate. In my opinion that would dispose of this case.

I may say one word on the case of *The Queen* v. *Price* (3). No doubt our decision is against the decision of the Court in that case; and it is against, I am bound to admit, the express opinion of Mr. Justice Blackburn, when the case came before the Court on the rule. When the rule was made absolute, the Chief Justice said, "This will not bind us with reference to our ultimate decision of the question upon the return to the *mandamus* afterwards." It was not argued out. Apparently the counsel for the Crown under the circumstances did not wish to argue it further, and the rule was made absolute subject to this observation: "We will consider this further when it comes before us." To my mind, that decision is not so satisfac-

tory as it might otherwise have been, if the case had been fully argued with a view to finally determining the question whether the Court would on a *mandamus* interfere with the discretion of the commissioners. That, in my opinion, determines the present case. Under the circumstances of the case the commissioners have exercised a discretion which is entrusted to them, and, in my opinion, the Court has no right to interfere by a *mandamus*.

But, if necessary, I should be also willing to decide the case, and to affirm the decision of the Queen's Bench Division, on other grounds, because, in my opinion, here, if we are to judge from what is before us, the appellant has not performed the conditions which are necessary in order to entitle him to a certificate; that is to say, I, for my part, cannot in any way see that the decision that the commissioners arrived at was an erroneous one. Now, the conditions on which he is to be entitled to a certificate are these: "Where any witness shall answer every question relating to the matters aforesaid which he shall be required by such commissioner or committee to answer, and the answer to which may criminate or tend to criminate him." Now I think it unnecessary to express an opinion upon the point, but I am not satisfied that the words which may "criminate or tend to criminate him" are to restrict the number of questions which he must answer honestly in order to entitle him to a certificate, and if that is not the case there is an end of this case. The Divisional Court expressed a strong opinion, and in my opinion it can hardly be gainsaid, that this witness had not answered the questions honestly, and that those questions did relate to corrupt practices at this election. If those words, "the answers to which may criminate or tend to criminate him," were not imported into the conditions, the fulfilling of which would entitle him to his certificate, there is an end of all question in the matter; but I am of opinion, and I agree with Lord Justice Brett in that, that the questions were questions the answers to which, within the words of the section, might tend to criminate him when they were put. First of all, one must not, I think, consider that evidence may be given to shew that when the facts were known, or when the facts were brought forward, the answers would not tend to criminate him, because a witness might refuse to answer questions the obvious tendency of which would be to get an answer from him which would tend to criminate him; but having refused to answer that question, he might afterwards come and say, "I am nevertheless entitled to my certificate, because I will prove by evidence that though I refused to answer that question, the obvious tendency of which was to criminate me or to get out a fact which would criminate me, as a matter of fact no criminal charge could be made against me in reference to it." Here the question was one the answer to which had a tendency to criminate him, which may reasonably have been expected to be a link in a chain of answers which would criminate him. The commissioners were enquiring into the charges which were sent in as to the expenses in the course of the election. They had before them various bills which had been sent in to the agent, and among others there was a printer's bill for 14*l*. That was a charge for work and labour done. The commissioners were investigating and enquiring into the question whether the sums entered in those bills were really *bona fide* charges for work and labour done, or whether they were charges in excess of what would be payable for the work and labour done; and in order to swell the charge the appellant increased the amount for some purpose which it is necessary to disguise by attributing it to a purpose other than the actual purpose to which it was to be applied; and he says, when asked, that that bill for 14*l*. represented a payment for work and labour done, which, in fact, it does not. He is refusing to answer a question which might tend to criminate him by shewing that, to his knowledge, money was to be obtained for the purpose of corrupt practices under the guise of obtaining it for the purpose of discharging legitimate expenses incurred in this election. Therefore, if it were

necessary to rely on that part of the case, I should agree with the view of Lord Justice Brett; but as the question arises before us I think we ought, notwithstanding that decision of *The Queen* v. *Price* (3), to express an opinion that the commissioners have exercised their judgment in the matter left to them to decide, and that the Court has no right by *mandamus* to interfere and to substitute the decision of a jury or any other tribunal, or of the commissioners, on a matter which the Act of Parliament has, in my judgment, left to them.

I therefore agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors—Mercer & Mercer, agents for Mercer & Edwards, Deal, for appellant; Solicitor to the Treasury, for respondent.

[IN THE QUEEN'S BENCH DIVISION.]

1881. Jan. 14. May 14. DIXON *v.* THE METROPOLITAN BOARD OF WORKS.

Negligence—Damage caused by Discharge of Water from Sewer—Continuous Rainfall—Act of God—Liability of Metropolitan Board of Works for Damage caused by Sewer—18 *&* 19 *Vict. c.* 120 (*Metropolis Management Act*, 1855), *ss.* 135 *and* 136.

The Metropolitan Board of Works, under the powers of the Metropolis Management Act, 1855, *constructed a sewer draining a large area, with an outfall into a creek of the Thames. At the outfall were gates, which were ordered to be opened when the water in the sewer rose to a certain height. A heavy but not unprecedented rainfall filled the sewer to the marked height, and the gates were opened. The rainfall continued to increase, and the rush of water from the sewer drove barges from their moorings in the creek, and against a wharf, which was partly swept away, the barges being also injured. The sewer was properly constructed, and it was absolutely necessary, in order that it should not cause enormous damage throughout the area which it was constructed to drain, that it should be relieved in time of heavy rain by the opening of the gates. When, under such circumstances, the gates were once opened it was impossible to close them until the rush of water should cease.*

On action by the owner of the wharf and barges for damages against the board,—

Held (*by* LORD COLERIDGE, C.J.), *first, that the injury was the natural and direct result of the act of the defendants in opening the gates, and was not occasioned by the act of God, so as to relieve them from liability on that ground; secondly, the discharge of the water being the act of the defendants themselves, and the rain not being unprecedented, the defendants were prima facie liable for damage caused by the escape of the water within the rule laid down in* Rylands *v.* Fletcher (37 Law J. Rep. H.L. Cas. 161); *thirdly, the defendants were excused from their prima facie liability, because what happened was the inevitable result of what Parliament authorised them to do in making and maintaining the sewer.*

This was an action tried before Lord Coleridge, C.J., in the course of which, there being a practical agreement on the facts, the jury were discharged, and the case was reserved for further consideration by the learned Judge.

The action was by a merchant to recover damage for injury to some barges, a wharf, and a store of coal belonging to the plaintiff, caused by the alleged negligence of the defendants.

The case was argued on the 14th of January by *Philbrick*, *Willis* and *Biron*, for the plaintiff; and by *F. Meadows White*, *Lumley Smith* and *Finlay*, for the defendants.

Cur. adv. vult.

The facts and arguments are fully stated in the judgment, which was delivered on

May 14.—LORD COLERIDGE, C.J.—This case was tried before me and a special jury at considerable length, but the evidence was so fairly given on both sides that it appeared at last there was really no question of fact in dispute. The jury were therefore discharged, and the case was left to me to decide after hearing argument upon the legal questions raised

by the undisputed facts. Inferences of fact, if any were required, were to be drawn by me.

It was an action to recover compensation for damage undoubtedly done to the plaintiff's property—a barge and coals, and a wharf and warehouses and buildings which stood by the side of Deptford Creek, and which were destroyed or very seriously injured by the rush of water from the outfall of a sewer of the defendants' on the 29th of August, 1879. Speaking broadly, there is no doubt that anyone would so describe what then happened. But apart from a serious point of law which goes to the root of the matter and involves the question of the right to maintain the action, there are one or two lesser and subordinate questions of which it may be as well to dispose in the beginning.

The facts were shortly these: This was a sewer constructed by the defendants under powers given them by the 18 & 19 Vict. c. 120. ss. 135 and 136. It drains a large area, and its outfall is at the head of Deptford Creek. There are watergates, the construction of which it is not necessary to describe, which let the water out, and which it is the duty of the man in charge of the outfall to open when the water in the sewer just above these watergates becomes eight feet deep. This is a depth not often reached, but it is reached in heavy rainfalls. There was a very heavy rainfall during the night and on the morning of the 29th of August, and the depth of water rose to eight feet and more in the sewer about a quarter to ten o'clock in the morning of that day. Then one of the two watergates was opened. The second was opened twenty minutes or half-an-hour later. The rain continued to fall, and it fell with increasing and excessive violence between eleven and twelve o'clock. The rush of water increased consequently in force and volume, and increased very rapidly; and somewhere about noon it drove the barges from their moorings one against the other. The effect of this was to dam up the water in one direction and to drive it with fierce force in another; and soon after noon, from the combined effects of what I have described, a large portion of the wharf, and the coals and other things deposited upon it, were swept away, and several of the barges were greatly injured.

No complaint was made of the construction of the sewer in itself, nor probably could there be; and it was admitted or proved, that if the water had not been let go from the sewer at the time it was let go, the damage to houses and property in Brixton, Stockwell and Deptford itself would have been, in the language of one of the plaintiff's witnesses, "enormous." Indeed, it was proved that, unless some such power existed of relieving the sewer in times of heavy rain, a system which drained from sixteen to twenty miles of area would be impossible or be frustrated.

Several points were made by the defendants upon the facts proved by the witnesses, on which, so far as I have power, I find and decide against them. It was contended that, inasmuch as the wharf did not fall till the water was directed upon it by the barges, which the water itself had torn from their moorings and driven upon it, it was the barges and not the outfall which did the damage. I think not. The water poured in excessive torrents into the creek; it threw all things into confusion there; and, as the direct result of the confusion which it caused, it was itself driven with concentrated force upon the wharf and swept it away. This is, I think, the true effect of the evidence. The whole was one unbroken rush of water, and the barges, apart from the water, were no more the cause of the damage done than, supposing the water had torn away the gates and the gate-posts and hurled them against the wharf, and so knocked it down, it could be said with any propriety that these instruments carried by the water, and not the water itself, had swept away the wharf.

Again, it was contended that, as the act for which the defendants were to be held responsible, if at all, was the act of opening the watergates; as, once opened, they could not be shut till the tide rose against them; as they were open for near an hour before the damage followed; as during that hour the storm increased, and increased rapidly, in violence; and as what

swept the wharf away was not the first rush of the water but the rush an hour later;—it was not the act of the defendants, but the act of God, which in fact did the damage. On this point, however, so far as it is one of fact, I am against the defendants. On the assumption that the defendants may be liable in point of law, it seems to me that the rush of water was one, that no distinction can be drawn between one minute and another of a continuous rush, which acted as it did not only from its strength but from its continuity, and that, the gates being opened while a storm was raging, the violence of which, though unusual, was proved to be by no means unprecedented; these things being facts in the case, I think the defendants cannot escape responsibility, if it lies on them in law, because in fact no harm was done at the very moment when they first set open gates, which once opened could not be closed for many hours, but was done by an unusual, but not unprecedented body of water, which it was not unreasonable, under the then atmospheric conditions, to anticipate might come down the sewer, and which, if it did come down, they were entirely without the means to arrest or control. Nor is this, as was suggested, an indirect way of attacking the construction of the sewer and its outfall works. These may have been perfectly proper and sufficient, but one incident of them was, that, once set running, the flow of water could not be stayed; and the knowledge of this fact is, in my opinion, one circumstance at least to make the opening of such an outfall at such a time an act for which the defendants might be responsible.

I assent entirely to the view taken by Mr. Justice Fry, and, as I understand, approved of by the Court of Appeal in *The Nitro-Phosphate Company* v. *The St. Katharine Docks Company* (1) as to what constitutes an act of God in the legal sense; and I am of opinion that what took place here was the natural and direct result of the act of the defendants in opening the watergates when they did, and was not an act of God, so as to relieve them from liability, if otherwise they lay under it.

(1) Law Rep. 9 Ch. D. 503, at p. 515.

Then comes the question, Are they liable in point of law under the circumstances I have described? This raises a different set of considerations. If the case of *Rylands* v. *Fletcher* (2) applies, then they are liable. The defendants have, in the words of Mr. Justice Blackburn, afterwards adopted in the House of Lords, "brought upon their land, collected and kept there something likely to do mischief if it escape." They must, therefore, keep it at their peril; and if they do not they are *prima facie* answerable for all the damage which is the natural consequence of its escape. It was argued that the defendants are within the principle of *Nichols* v. *Marsland* (3), which is said to qualify or limit the principle of *Rylands* v. *Fletcher* (2). I do not feel sure that I have mastered the distinction between these cases in principle, though the facts in them somewhat differed. To store water artificially so that it escapes through fissures and does damage is actionable; to store water artificially so that when a thunderstorm comes the water overflows and does damage, which but for the artificial storing it would not do, is not actionable. But it is not very material whether I understand the cases or no, because, first, the water was here discharged by the act of the defendants themselves, and even if the watergates had burst or overflowed, the rain which fell was not, within any reasonable definition of the words, "the act of God"; and, secondly, as this case will probably go to the Court of Appeal, that Court will no doubt understand the distinction between those cases and will be able to say at once by which authority the case before me is to be governed. I therefore hold this case to be *prima facie* within the decision of the House of Lords in *Rylands* v. *Fletcher* (2), and that the defendants are *prima facie* liable. But it was said that they are to be excused from this *prima facie* liability because they are a public body acting in the discharge of a public duty, and that what has happened is only the inevitable result of what Parliament has authorised them to do. Not entirely without hesitation I am of that opinion.

(2) 3 H.L. Cas. 330; 37 Law J. Rep. Exch. 161.
(3) 46 Law J. Rep. Exch. 174.

Dixon v. *Metropolitan Board of Works, Q.B.*

My doubts arise from a few words in the 135th section of 18 & 19 Vict. c. 120, to which I will advert in a moment. But for those words I should hold, without doubt, that what the defendants have done falls within the authority of *Vaughan* v. *The Taff Vale Railway Company* (4), *Dunn* v. *The Birmingham Canal Company* (5), *Brand* v. *The Hammersmith Railway Company* (6) and a case of *Broughton* v. *The Midland Great Western Railway Company* (7), decided in the Common Pleas in Ireland by Chief Justice Monahan, Mr. Justice Morris and Mr. Justice Lawson, in which, though the Chief Justice expressed doubts, they were doubts on a point of fact only and not at all on the principle of the decision. To these must be added the *dicta* to be found in the judgments, in the House of Lords, of the Lord Chancellor Selborne, Lord Blackburn and Lord Watson in the case of *The Metropolitan Asylum District* v. *Hill* (8), concerning the Hampstead Smallpox Hospital. In that case the noble and learned lords expressly uphold the authority of the cases to which I have referred, though in the particular case before them they held the defendants liable (although a public body), because they thought, upon the words of the statute they were construing, no absolute duty to maintain such a hospital in such a place was cast upon the defendants.

In the case before me I think that the duty of making, and maintaining when made, the sewer in question was absolutely imposed upon the defendants by the 135th section (no question arose as to the 136th); and if so, the cases I have referred to are in point, and the defendants would be protected. The duty being imposed upon them of making the sewer, it followed necessarily that from time to time a very large body of water would be discharged from the outfall of the sewer into the head of Deptford Creek, and if this were not done, a large and densely populated area would be heavily and injuriously flooded.

(4) 5 Hurl. & N. 743; 29 Law J. Rep. Exch. 247.
(5) 42 Law J. Rep. Q.B. 137; Law Rep. 8 Q.B. 217.
(6) 38 Law J. Rep. Q.B. 265; Law Rep. 4 H.L. Cas. 171.
(7) 1 Ir. Law Rep. 169.
(8) *Ante*, p. 353.

My doubt arises from the words of the 135th section, that the "sewers are to be constructed, covered and kept so as not to be a nuisance nor injurious to health." I think, having regard to the latter part of the same clause, where the same words are used with reference to sewage and refuse, that it is probable this provision has no reference to a case of damage arising from flood, to which, indeed, it can be applied only by some straining of the language—see upon this subject the case of *The Great Western Railway Company* v. *Bishop* (9), decided upon the words of the 8th section of the Nuisances Removal Act, 1855.

But if the question of nuisance be one of fact, and therefore in this case for me to find, I find without hesitation, that there was no evidence that this sewer had been constructed, covered or kept so as to be a nuisance or injurious to health.

The amount of damage (if any) was to be referred; but my opinion being what it is, no question of damage arises, and I give judgment for the defendants. I give this judgment without costs, as I do not think it is a case in which the plaintiff should pay them.

Judgment for defendants.

Solicitors—J. T. Moss, for plaintiff; Reginald Ward, for defendants.

[IN THE QUEEN'S BENCH DIVISION.]

1881. June 15. } HARMON (*petitioner*) *v.* PARK (*respondent*).

Municipal Election — Nomination of Councillor — Form of Nomination — Subscription of Proposer and Seconder, when to be made—Assenting Burgesses, when to sign —38 & 39 *Vict. c.* 40 (*Municipal Elections Act*, 1875), *s.* 1. *sub-s.* 2.

It is required by the Municipal Elections Act, 1875, *that every candidate at a municipal election shall be nominated in writing,*

(9) 41 Law J. Rep. M.C. 120; Law Rep. 7 Q.B. 550.

and that the writing shall be subscribed by two enrolled burgesses as proposer and seconder, and by eight others as assenting to the nomination.

At a ward election a candidate was nominated by a proposer and seconder, who signed the paper, as did also eight others, as assenting to the nomination. After delivery to the town clerk, another duly enrolled burgess substituted his name for that of the proposer on the paper, thinking that the latter was not qualified, but without consulting him or the assenting burgesses:—

Held, *that the nomination was invalid.*

This was a Special Case stated for the opinion of the Court.

The borough of Sunderland, Durham, is divided into wards, one of which is called the West Ward. The West Ward is represented in the council of the borough by six councillors. Owing to the death of one of the councillors representing the ward, an extraordinary vacancy occurred in the representation in or about October, 1880. Mark Harmon, the petitioner, at the time of the signing of the nomination paper hereinafter mentioned, and at the time of the election, was a person enrolled on the burgess roll of the borough, and was entitled to be so enrolled, and was qualified to be elected to the office of town councillor for the ward.

The name and qualification of the petitioner appeared on the burgess roll as follows:—

No. 1 Polling District. West Ward. Division I.

No.	Name of voter in full, surname being first	Place of abode	Nature of qualification	Name and situation of qualifying property
110	Harmond, Mark .	5 Hylton Road West .	House . .	5 Hylton Road West

The petitioner was at the time of the nomination a person well known in the borough, and his description on the burgess roll, although inaccurate in that his name appeared on the roll as "Harmond" instead of "Harmon," was such as commonly to be understood as applying to the petitioner.

No person of the name of "Harmond" then lived or now lives at No. 5 Hylton Road West, and there was no person in the borough answering to the said description on the burgess roll other than the petitioner.

The petitioner and Robert Park, the respondent, were the only persons nominated as candidates at the election for the ward.

The following is a copy of the nomination paper of the petitioner:—

"Nomination Paper.

"Borough of Sunderland.

"Election of one councillor for West Ward in the said borough, to be held on the 15th day of October, 1880.

"We, the undersigned, being respectively enrolled burgesses for West Ward in the said borough, hereby nominate the following person as a candidate at the said election:—

Surname	Other names	Abode	Description
Harmon . . .	Mark . . .	Hylton Road West . .	Licensed Victualler

"(Signed)

"1. John Green, of *1,595, 4 Lime Street.

"2. William Anthony Hope, of *197, 9 Holly Terrace.

"We, the undersigned, being respectively enrolled burgesses for the said ward, do hereby assent to the nomination of the above person as a candidate at the said election.

"Dated this 6th day of October, 1880.

"(Signed)

"1. Thomas Doxford, of *2,514, 13 Wales Street.

"2. George Dobling, of *2,480, 10 Siksworth Row.

"3. John Sedgwick, of *106, 44 Franklin Street.

"4. Abel Mills, of *2,838, 3 Hodgson's Buildings.

"5. Charles Lusk Bailey, of *198, 2 Alexander Terrace.

"6. William Cordell, of *204, 11 Alexander Terrace.

"7. Paul Stabler, of *184, 2 Holly Terrace.

"8. William Graham Appleby, of *248, 13 Gilsland Street South.

"* The number on the burgess roll of the burgess subscribing, with the situation of the property in respect of which he is enrolled on the burgess roll.

"N.B.—Only one person must be nominated by this paper. Delivered by the proposer, Mr. John Green, on the 6th day of October, 1880, at 4.40 P.M.

"Thomas Maxfield."

The nomination paper was brought to the town clerk's office by a person of the name of Graham, who was not the proposer or seconder of the petitioner, or one of the assenting burgesses, and who asked the clerk in attendance to see if it was in order. Such nomination paper when so brought to the town clerk's office had on it the name of "William Ball" as the proposer, but without any number on the burgess roll or situation of qualifying property. It had also on it the name of a seconder, and was also subscribed by eight assenting burgesses. The clerk on looking at the burgess roll found the name of "William Ball" on the list, but it was noted in the margin "Not entitled to vote here," and the name of William Ball was not on any other part of the burgess roll. John Green, a duly enrolled burgess of the West Ward, happened to come into the town clerk's office at the time, and on seeing the nomination paper in Graham's hands signed by Ball, and knowing that the name of William Ball was not on the burgess roll as a person entitled to vote, struck out Ball's signature and inserted his own name in lieu thereof, adding his own number on the burgess roll and the situation of the property in respect of which he was enrolled a burgess, Ball and the seconder and assenting burgesses not being present, and thereupon Green handed in the nomination paper to the town clerk.

The nomination paper, subscribed as aforesaid, was delivered by Green to the town clerk of the borough on the 6th of October, 1880, before five o'clock in the afternoon, the said 6th of October, 1880, being at least seven days before the day of election, and the town clerk sent notice of such nomination to the petitioner, and caused the name of the petitioner with his place of abode and description, as a person duly nominated, to be printed and placed on the notice board at the outer door of the town clerk's office, where such notices are usually displayed, and also on or near the door of the corporation buildings, and in other conspicuous parts of the borough and ward.

On the 7th of October, 1880, the respondent objected in writing to the nomination of the petitioner, on the grounds—First, that the name of Mr. Mark Harmon, the candidate proposed, did not appear on the burgess list in force for the election; secondly, that the nomination paper of the said Mark Harmon is bad on the ground that the signatures of the seconder and assenting parties were placed thereto, whilst the name of William Ball (a person not on the register) appeared therein as proposer; thirdly, that such nomination was bad on the ground that the signature of William Ball was struck out without his consent being first obtained, and the signature of John Green inserted in its place.

William Ball was a person not on the burgess roll for the borough as a person entitled to vote, and he was not on the burgess roll for the ward, and was a person not entitled to vote at the election.

The mayor of the borough, on the 7th of October, 1880, attended, pursuant to notice, to decide upon the objections; and after due consideration decided that the nomination of the petitioner was bad by reason of its non-compliance with section 1 (sub-section 2) of the Municipal Elections Act, 1875, and the respondent was subsequently declared duly elected, as being the only person duly nominated.

The question for the opinion of the Court is, whether, under the circum-

stances, the mayor was right in deciding that the nomination of the petitioner was bad.

Gainsford Bruce (*J. Robins* with him), for the petitioner.—The burgess roll and nomination paper must be made pursuant to the Municipal Corporation Act, but as the list has to be made by the town clerk, a public officer, no one should suffer for his mistake, if the description is such as could be understood; and it is found in paragraph 4 of the case that the description would be understood as applying to the petitioner.

As to the other objection—that the assenting burgesses signed the nomination paper when another proposer's name appeared on it—that is not fatal, because the act requires only that they should be assenting to the nomination. It is submitted that they can assent before there is a proposer, so long as the candidate's name is there; all that is necessary is that they should sign the paper, which is evidence of their assenting to the nomination.

Ridley, for the respondent, was not called on to argue.

GROVE, J.—I am quite clear on the second point that has been argued, and this renders it unnecessary to express any opinion on the first.

It seems to be perfectly clear when the words of section 1 (sub-section 2) of the Municipal Elections Act, 1875, are looked at, which enact that every candidate shall be nominated in writing, and the writing shall be subscribed by two enrolled burgesses as proposer and seconder, and by eight others as assenting to the nomination, that nomination involves being nominated by some other person. Then the form in the schedule runs thus: "We, the undersigned, hereby nominate the following person as a candidate at the election;" and then follow the signatures of the proposer and seconder, and then those of the eight burgesses assenting to the nomination. I think that there is no doubt or ambiguity about the directions in the Act. The candidate is to be nominated—that is, proposed and seconded—by two persons; and the nomination paper so subscribed by the two persons naming the candidate is an essential part of and constitutes the nomination. Then are to follow the signatures of the eight others assenting to the nomination. They subscribe the paper, which has become a nomination paper by having the name of the candidate with those of his proposer and seconder upon it. They assent not to the person nominated, but to the nomination; and I cannot agree with Mr. Bruce's argument, that all that is necessary is that they should assent to the candidature of the petitioner. If this were so, the Act would be satisfied by the eight burgesses subscribing a blank form having only the name of the candidate on it, whereas I think it is intended that they shall see who are the proposer and seconder—a matter which may well weigh with them, as they may give or withhold their assent according to their trust in the proposer and seconder.

I think, therefore, that this nomination was bad, and that the name of the petitioner was properly rejected from the list of candidates.

LINDLEY, J.—I am of the same opinion. By the Act it is required that eight burgesses shall assent to the nomination of a candidate; and that the nomination shall be in writing. What then is the nomination in writing to which they assent? It must be the name of the candidate on the form with the signatures of the proposer and seconder. So that I think it is clear that the nomination must precede the assent, and not, as the argument of Mr. Bruce necessarily involves, the assent precede the nomination.

LOPES, J., concurred.

Solicitors—Brownlow & Howe, agents for Ritson, Sunderland, for petitioner; Bell, Brodrick & Gray, agents for Snowball, Sunderland, for respondent.

[IN THE QUEEN'S BENCH DIVISION.]

1881. May 23, 27. } HARDY *v.* ATHERTON.

Bastardy Order—Subsequent Marriage of Mother—Ability of Husband to support —35 & 36 *Vict. c.* 65. *s.* 3.

[For the report of the above case, see 50 Law J. Rep. M.C. 105.]

[IN THE QUEEN'S BENCH DIVISION.]

1881. May 31. } CULLEY (*appellant*) *v.* CHARMAN (*respondent*).

Husband and Wife—Adultery of Wife —Liability of Husband for Maintenance— Poor Law Amendment Act, 1868 (31 & 32 *Vict. c.* 122), *s.* 33.

[For the report of the above case, see 50 Law J. Rep. M.C. 111.]

[IN THE QUEEN'S BENCH DIVISION.]

1881. June 29. { THE GUARDIANS OF THE FULHAM UNION *v.* THE GUARDIANS OF THE PORTSEA UNION.

Poor—Settlement—Illegitimate Children —Subsequent Marriage of Mother—Derivative Settlement—39 & 40 *Vict. c.* 61. *s.* 35 *—Retrospective Effect.*

[For the report of the above case, see 50 Law J. Rep. M.C. 144.]

[IN THE QUEEN'S BENCH DIVISION.]

1881. June 21. { THE SCHOOL BOARD FOR LONDON (*appellants*) *v.* JACKSON (*respondent*).

Elementary Education Act, 1870 (33 & 34 *Vict. c.* 75), *s.* 3—*Absence of Child from School—Residence apart from Parent— Liability of Parent.*

[For the report of the above case, see 50 Law J. Rep. M.C. 134.]

[IN THE QUEEN'S BENCH DIVISION.]

1881. June 25. July 2. } WILSON *v.* STRUGNELL.

Municipal Corporation—Power of Mayor to act as Justice of Peace for Borough— 5 & 6 *Will.* 4. *c.* 76—(*Municipal Corporation Act*, 1835), *s.* 57—*Illegal Contract —Indemnifying Bail — Recovering back Money paid as Security to Bail.*

[For the report of the above case, see 50 Law J. Rep. M.C. 145.]

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ARBITRATION—*motion to set aside award: time: making "complaint"*]—A motion to set aside an award made in an action in July may be made on notice of motion given on the 24th for the 27th of November. *Smith* v. *The Parkside Mining Co. The Parkside Mining Co.* v. *Smith*, 144

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ASSAULT—*coercion: consent: submission*] — The plaintiff's mistress requested a doctor to examine the plaintiff, who was a domestic servant, in order to ascertain whether she was pregnant. The plaintiff objected to the examination, but undressed by the doctor's orders, and submitted to be examined. The doctor examined her, and ascertained that she was not pregnant. He used no violence or threats and did nothing more than was necessary for the examination. The mistress was not present. The plaintiff sued her master and mistress and the doctor for assault. At the trial the Judge directed a

verdict for the master and mistress, and the jury found a verdict for the doctor:—*Held* (affirming the order of the Common Pleas Division), that there was no evidence against the master and mistress, that the verdict in favour of the doctor was right, and that a rule for a new trial was rightly discharged. *Latter* v. *Braddell and Wife*, 166 (App.), 448

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BANKRUPTCY—*bankruptcy act: execution creditor: title of trustee: notice of act of bankruptcy*]—A judgment creditor, after seizure of the debtor's goods in execution, but before sale, received a letter from the debtor's solicitors giving notice that a petition in bankruptcy had been filed against the debtor in a County Court. The debtor having, on the hearing of the petition, been adjudged bankrupt,—*Held* (affirming the judgment of the Common Pleas Division), that the letter was sufficient notice of an act of bankruptcy committed by the debtor within the meaning of section 95 of the Bankruptcy Act, 1869, so as to deprive the execution creditor of the protection of the section. *Hocking* v. *Acraman* (12 Mee. & W. 170; 13 Law J. Rep. Exch. 34) commented on. *Lucas* v. *Dicker* (App.), 190

—— *disclaimer of onerous property by trustee: lease: sub-lease: rights of sub-lessee: bankruptcy act*] — A lessee who had granted a sub-lease of part of premises demised to him became bankrupt. The trustee of the bankrupt's estate obtained from the Court of Bankruptcy, after notice to the sub-lessee, leave to disclaim the interest of the bankrupt in the demised premises, and disclaimed such interest accordingly. The owner in reversion demanded of the sub-lessee possession of the premises comprised in the sub-lease, and, upon refusal by the sub-lessee, brought an action to recover possession:—Held (by the Court of Appeal), that the action could not be maintained, inasmuch as a disclaimer is in such cases equivalent to a surrender. *Smalley* v. *Hardinge* (App.), 367

—— *property held by bankrupt on trust: principal and agent: goods in order or disposition of bankrupt: bankruptcy act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 15. *sub-ss.* 1 *and* 5]—Brewers had a malting agent, who acted for them alone. He had power, for the purpose of purchasing barley for malting, to draw on certain banking accounts of the brewers. He drew out money fraudulently, and bought barley on credit, which, by his conduct, he represented to the brewers to be barley paid for with their money. He also bought malt, which he represented to have been made from barley bought with their money. He became bankrupt. The brewers seized all barley and malt upon his premises, the value of which was less than the moneys he had drawn out. The trustee in his bankruptcy sued the brewers for the value:—*Held*, that, as the bankrupt could not have been heard to say he was not trustee of the barley and malt for the brewers, the trustee in his bankruptcy likewise (the bankrupt not having been reputed owner) could not dispute the equitable right of the brewers, and that the brewers were consequently entitled to judgment. *Harris* v. *Truman, Hanbury & Co.*, 633

—— *trustee: resignation or removal: default in accounting: committal to prison: bankruptcy rules*, 1870, *rule* 126: "*shall enforce obedience*"] —The Comptroller in Bankruptcy reported to the Court having jurisdiction in a certain bankruptcy, that an ex-trustee in the bankruptcy had, contrary to rule 126 of the Bankruptcy Rules, 1870, failed to render to the Registrar an account shewing what he had done while trustee, and to account for the property of the bankrupt, and had not, upon being required by the Comptroller, given satisfactory explanation of his conduct. The trustee was summoned to attend at the Court, and did not do so. The Court committed him for contempt. Upon application for a *habeas corpus* to discharge him out of custody,—*Held*, that rule 126, in directing the Court to "enforce obedience" to the requisitions of the rule, did not justify a committal without a previous order of the Court requiring obedience to such requisitions, and that the prisoner must accordingly be discharged out of custody. *In re Royle*, 656

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BASTARDY — Order: subsequent marriage of mother: liability of putative father: statute 35 & 36 Vict. c. 65. s. 3. *Southeran* v. *Scott* (M.C. 56), 535

—— affiliation order: limiting duration of order: marriage of mother: 35 & 36 Vict. c. 65 (the Bastardy Laws Amendment Act, 1872), ss. 4 and 5. *Pearson* v. *Heys* (M.C. 124), 762

—— order: subsequent marriage of mother: ability of husband to support: 35 & 36 Vict. c. 65. s. 3. *Hardy* v. *Atherton* (M.C. 105), 779

BILL OF EXCHANGE—*prior indorser: consideration: parol agreement: guarantee: statute of frauds: right of holder who is prior indorser of bill to sue intermediate indorser: circuity of action*]—The plaintiffs having supplied goods to E., drew

two bills of exchange upon him for the price. E. accepted the bills, and the plaintiffs indorsed them to the defendant, who, in pursuance of a verbal agreement to become surety for E., in respect of the price of the goods, re-indorsed them to the plaintiffs, who, as indorsees of the bills, sued the defendant:—*Held* (affirming the judgment of BOWEN, J.), that the plaintiffs could set up the verbal agreement to shew that the defendant could not have sued them as prior indorsers, and that, as no circuity of action would result, the plaintiffs were entitled to maintain their action. *Wilkinson & Co.* v. *Unwin* (App.), 338.

BILL OF LADING—*pledge by consignee before arrival: delivery order to third party: title of indorsee: liability of warehouseman: merchant shipping amendment act*, 1862]—Goods shipped to C., as owner, were before arrival pledged by him to the plaintiffs as security for an advance. The bill of lading was, as is customary, in three sets, "the one being accomplished the rest to stand void," and made the goods deliverable to "C. or assigns," freight payable in London. C. indorsed one copy of the bill of lading marked "first," to the plaintiffs, and also gave them a letter of charge, making the bill of lading a collateral security for the advance, and empowering them to sell the goods represented by the bill of lading should default be made in the repayment of the advance. The vessel went on arrival into the dock of the defendants. C. duly entered the goods at the Custom House, and they were afterwards, at the request of C., landed and deposited with the defendants, the freight being unpaid. The manifest, a copy of which the captain lodged with the defendants, authorised the defendants to deliver the goods to the holders of the bill of lading. On the following day the captain lodged with the defendants a stop order for freight, pursuant to the Merchant Shipping Act, 1862. C. then produced and gave to the defendants, unindorsed, the second part of the bill of lading; the defendants then entered C. as the proprietor of the goods. C. paid the freight, the stop was taken off, and the defendants delivered the goods to W., on the production by him of a delivery order from C. C. shortly after went into liquidation, when the plaintiffs, producing the indorsed bill of lading, in vain demanded the goods of the defendants. In an action for conversion,—*Held* (by the Court of Appeal—BRAMWELL, L.J., and BAGGALLAY, L.J.; *dissentiente* BRETT, L.J.), that the defendants were not liable. (By BRAMWELL, L.J.), that the property in the goods did not pass, but that there was a pledge of them with a right of redemption in C.; that the duty of the defendants was the same as that of the shipowner would have been had the goods remained on board; that the plaintiffs assented to C.'s retaining the other parts of the bill of lading, and to the receipt by the defendants of the goods to hold, after freight paid to the order of C., so that there was no conversion. (By BAGGALLAY, L.J.), that the property in the goods passed by the delivery of the indorsed bill of lading; that the landing of the goods was the result of an arrangement between the shipowner, C. and the defendants; that the Merchant Shipping Act did not effect that the defendants thereafter held the goods for the plaintiffs, but that they received them to hold to an order of C., and that in the absence of any notice of title in anyone else, the defendants were bound to deal with them as directed by the ostensible owner. (By BRETT, L.J.), that the defendants were liable; that C. by indorsing the bill of lading to the plaintiffs passed the legal property to the plaintiffs, only reserving to himself an equity of redemption; that the shipowner was therefore bound to deliver to the plaintiffs, subject to the provisions of the Merchant Shipping Act as to warehousing the goods; that the defendants were, as such warehousemen, bound to hold the goods till freight was paid, and then to deliver to the plaintiffs as holders of the bill of lading. *Glyn, Mills, Currie & Co.* v. *The East and West India Dock Co.* (App.), 62

BILL OF SALE—*attestation: insufficiency of, if by solicitor who is also grantee*]—A solicitor who is the grantee of a bill of sale cannot also be the attesting solicitor of that bill of sale so as to satisfy the requirements of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 10. *Seal* v. *Claridge* (App.), 316

—— *priority: registered and unregistered bills of sale: seizure*]—The provision in section 10 of the Bills of Sale Act, 1878, as to the priority of bills of sale, applies only where there has been a bankruptcy or execution, and does not determine the relative rights of the holder of an unregistered bill of sale and the holder of a registered bill of sale in the absence of bankruptcy or execution. Such rights are unaffected by the statute. *Lyons* v. *Tucker*, 322. Judgment reversed on appeal, 661

—— *priority of competing bills of sale: registered and unregistered: bills of sale act*]—The provision in section 10 of the Bills of Sale Act, 1878, as to the priority of bills of sale, applies to all competing bills of sale in all cases in which registration is necessary. It is a provision independent of section 8 of the Act, and applies equally in such cases whether there has or has not been a bankruptcy or an execution, and whether there are or are not two or more registered bills of sale:—*So held* by the Court of Appeal. *Conelly* v. *Steer* (App.), 326

—— *property in goods assigned: power of grantee to seize goods removed from grantor's premises*]—By the provisions of a bill of sale assigning to the plaintiff all the goods and chattels on

the grantor's premises, the latter and his assigns were to be allowed to hold and possess the said goods, so long as no default in payment was made, nor any act occasioning the proviso for entry to be put in force by the grantee was done by the grantor or his assigns. The grantee had the power of entry on to the grantor's premises and of taking possession of the goods in the event of the grantor making default in payment, or in the event of the grantor removing the goods before the money secured by the bill of sale should be fully paid. While part of the money remained unpaid the grantee sold some of the goods to the defendant, and delivered them to him off the premises:—*Held*, in an action for conversion of the grantee's goods, that the grantor could not give to the defendant any valid title to the goods, the general property in which had been conveyed to the grantee, and that the latter was entitled to demand them wherever they might be. *Payne* v. *Fern*, 446

Bill of Sale (continued)—*sale by sheriff: receipt and inventory: bills of sale act*, 1878 (41 & 42 *Vict. c.* 31), *ss.* 3, 4, 8]—The sheriff, under a writ of *fieri facias*, seized goods of the defendant, and sold them to the claimant, who paid part of the purchase-money at the sale and the remainder next day, and the sheriff thereupon sent him an inventory of the goods with a receipt for the purchase-money attached to it. The receipt and inventory were not registered as a bill of sale under section 8 of the Bills of Sale Act, 1878. The goods remained in the defendant's possession until again seized in execution on a judgment obtained by the plaintiffs:—*Held* (reversing the judgment of the Queen's Bench Division), that the receipt and inventory did not constitute a bill of sale, so as to require registration under the Bills of of Sale Act, 1878, because the title of the claimant was complete without them, and they were not intended by the parties to be a record of the transaction, and therefore that the claimant was entitled to the goods as against the plaintiffs. *Marsden* v. *Meadows. Salmon, claimant* (App.), 536

—— *statement of consideration: bills of sale act*]—A bill of sale recited that the plaintiffs had agreed to lend to the grantor a sum of money; that he was already indebted to them in certain other sums; and that it had been agreed that he should execute the bill of sale as a security for the first-named sum. The bill of sale then witnessed that in pursuance of the agreement, and in consideration of the sum then paid by the plaintiffs to the grantor, the receipt of which he admitted, he assigned the goods therein mentioned to the plaintiffs. The receipt indorsed on the bill of sale acknowledged that the grantor had received the sum therein mentioned. The evidence shewed that this sum was the balance due on advances made by the plaintiffs to the grantor during several years, and that no money passed at the time of the giving of this bill of sale:—*Held* (by the Court of Appeal), that the bill of sale truly set forth the consideration for which it was given, and satisfied the requirements of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 8. *The Credit Co.* v. *Pott* (App.), 106

—— *statement of consideration: prior unregistered bill of sale*]—A bill of sale was expressed to be "in consideration of the payment of 81*l.* 18*s.* by the grantee to the grantor, and in further consideration of the payment of 16*l.* 3*s.* by the grantee to the sheriff of Surrey for and at the request of the grantor." The former sum was a past payment and the latter sum was a present payment made in discharging an execution levied on the goods of the grantor:—*Held*, a sufficient setting forth of the consideration within section 8 of the Bills of Sale Act, 1878. *Carrard* v. *Meek*, 187

Section 9, by which a subsequent bill of sale executed within or on the expiration of seven days after the execution of a prior unregistered bill of sale is, under certain circumstances, void, does not affect a subsequent bill of sale executed after the expiration of that time. Ibid.

—— *statement of consideration: bills of sale act*]—In a bill of sale the consideration was stated to be "700*l.*, now in hand, paid." On the making of the bill of sale the grantee gave the grantor two cheques amounting to 700*l.*, and, under a previous arrangement between them, the cheques were cashed, and out of the proceeds the sum of 7*l.* 10*s.* cash, together with a promissory note for 10*l.*, was paid to the grantee for "commission on the loan and expenses":—*Held* (affirming the judgment of the Queen's Bench Division), that the consideration was not truly stated so as to satisfy section 8 of the Bills of Sale Act, 1878. *Hamilton* v. *Chaine. (Morgan, claimant)* (App.), 456

—— *transfer of: bills of sale act*]—In 1877 Edward Clark by deed assigned by way of mortgage certain household goods to a loan company for securing a loan of 500*l.*; this deed was duly registered as a bill of sale. In 1878 the company and Edward Clark, in consideration of 500*l.* paid by one Joseph Clark to the company, by deed transferred the said mortgage to Joseph Clark. On the 20th of February, 1880, the said mortgage debt having been reduced to 348*l.*, Joseph Clark and Edward Clark, in consideration of the plaintiff paying 348*l.* to Joseph Clark and 113*l.* to Edward Clark, which, together with expenses, raised the amount then paid by the plaintiff to substantially the same sum as that secured by the original bill of sale, assigned by deed to the plaintiff all the said goods by way of mortgage and security for the total sums of money so advanced by him:—*Held*, that the deed of

the 20th of February, 1880, was a transfer of a bill of sale within the meaning of section 10 of the Bills of Sale Act, 1878, and did not require registration. *Horne* v. *Hughes*, 403

BUILDING SOCIETY—*charge upon "all the funds, assets and effects of the society": foreclosure: winding-up: building societies act: companies acts*]—The winding-up provisions of the Companies Acts, 1862 and 1867, are applicable to societies registered under the Building Societies Act, 1874. The defendants were an incorporated society established under the Building Societies Act, 1874. The directors, being empowered by the rules of the society to borrow money, accepted a loan from the plaintiff, giving as security a bond, by which it was declared that "all the funds, assets and effects of the society shall be held liable for the repayment." The defendants failing to repay the loan, the plaintiff sued them on the bond, and having recovered judgment commenced an action of foreclosure in the Court of Chancery, which action was pending when a petition was filed in the County Court, and an order was made for the winding up of the defendant society. The County Court Judge having refused to grant the plaintiff leave to continue the action of foreclosure,—*Held*, that the appeal would lie by virtue of section 43 of the Companies Act, 1867, but that the action of foreclosure ought not to be allowed to proceed, for that the security did not amount to a mortgage. *Andrew* v. *The Swansea Cambrian Benefit Building Society*, 428

—— See Principal and Agent.

BURIALS. See Grave.

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CARRIER. See Railway Company.

CERTIFICATE—to witness. See Corrupt Practices.

CERTIORARI—defect in conviction by justices: conviction drawn up and filed: application for rule: return: right of justices to substitute fresh conviction. *Ex parte Austin* (M.C. 8), 108

CHAMPERTY—*loan to be repaid by the result of litigation*]—An agreement for the repayment of a loan was as follows: "In consideration for your advancing my solicitors 30*l.* I agree to pay you one-third of the amount of any damages recovered in my action now pending against the London and North Western Railway Company. In case I should not obtain a verdict you are not to have any claim whatever on me in respect of such advance, and in case a verdict is obtained the one-third above mentioned is to be in full discharge of the said advance of 30*l.*":—*Held*, void on the ground of champerty, and that an undertaking to continue the suit until its termination was not essential in order to complete the offence. *Ball* (*trustee of Loe*) v. *Warwick*, 382

CHEAP TRAINS. See Railway Passenger Train.

CHOSE IN ACTION—*right to sue: assignment by way of mortgage of a mortgage debt: judicature act*]—An assignment by deed of a mortgage debt of 1,380*l.*, with the interest and all securities, and all right, title, interest and property of the assignor therein, to secure the repayment of a sum due from the assignor to the assignee, and any further sum which might be due, not exceeding in the whole 1,200*l.*, is not an "absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only)" of a debt, and the assignee cannot sue upon it. *The National Provincial Bank of England* v. *Harle*, 437

CHURCH AND CLERGY—*presentation: simony*]—The plaintiff, who was incumbent and patron of a living, put the rectory into repair, and, with the sanction of the bishop of the diocese, let it to a tenant for a certain period. Before the termination of the tenancy the plaintiff resigned the living, and presented the defendant thereto. The presentation was made upon an understanding and agreement between the plaintiff and the defendant that the defendant should, in consideration of having received the benefit of the said repairs, hand over to the plaintiff any rent which he should receive in respect of the said tenancy between the date of the presentation and the termination of the tenancy:—*Held*, a simoniacal agreement, and therefore void under 31 Eliz. c. 6. *Mosse* v. *Killick*, 300

CLAIM AND COUNTER-CLAIM. See Practice.

COERCION. See Assault.

COMMITTAL. See Justice of the Peace.

COMMON INFORMER. See Parliamentary Oaths Act. Penalty, Action for.

COMPANY—*counter-claim: companies act*, 1862: *calls: judicature act*]—A person who has been duly settled on the list of contributories of a company, and on whom calls have been duly made, cannot (even in the case of a voluntary liquidation) in an action for calls by the liquidators of the company counter-claim for a debt or damages

due to him from the company. Defendant, a newspaper proprietor, agreed to take fully paid-up shares in payment of advertisements inserted in his newspaper by the company, and duly performed his part of the contract, but the company omitted to register the contract. The company went into voluntary liquidation, and the defendant was settled on the list of contributories as the holder of shares not paid for in cash. Calls were duly made, and the defendant sought, in answer to an action by the liquidator for money due on calls, to counter-claim the price of the advertisements or damages for neglect to register the agreement to give him fully paid shares. *Held* (on appeal from chambers), that no such set-off or counter-claim could be pleaded. *Mumford's Case* (49 Law J. Rep. Chanc. 452; Law Rep. 14 Ch. D. 643) followed. *Government Security Investment Co.* v. *Dempsey*, 199

COMPANY (continued)—*directors: trust: contract*]—The defendants were directors of a company, formed for the purpose of receiving and investing upon security moneys received from depositors. The plaintiff deposited 1,000*l.* with the company, upon the terms that it should remain in their hands for five years; that the company should pay interest on the whole sum at the rate of six per cent. from the receipt of the money until the end of the five years, and should, at the end of the five years repay the 1,000*l.* out of their own funds, if it should not be otherwise realised for the plaintiff; that the company should, as soon as possible after the receipt of the 1,000*l.*, place in the hands of the plaintiff, to secure that sum, a colonial mortgage, not to be effected in the plaintiff's name; and, in case the mortgage should become ineffective before the end of the five years, the company were to replace it by another. The company accordingly transferred to the plaintiff a mortgage debt for 1,000*l.*, secured by a mortgage to the company of lands in Canada. The mortgagor paid off the debt to the company before the expiration of the five years, and the company dealt with the proceeds as part of their general funds, and did not procure another mortgage security for the plaintiff. The company subsequently went into liquidation, and the plaintiff sued the defendants to recover from them the 1,000*l.*, on the ground that he had lost it through their gross negligence. At the trial the defendants were shewn to have been present at meetings of directors, when a letter from the company's agent in Canada enclosing a bank draft for the amount of the paid-off mortgage debt was entered as read, and the company's balance-sheet for the year in which the mortgage debt was paid off contained an item on the debit side, "directors' fees, 1,000*l.*" Evidence was tendered that at the time the proceeds of the bank draft were paid into the company's bank, the company was insolvent. The Judge at the trial rejected this evidence as immaterial, and directed a verdict and judgment for the defendants:—*Held* (by BRAMWELL, L.J., and BRETT, L.J., *dissentiente* BAGGALLAY, L.J.), that the evidence was properly rejected; that there was no evidence upon which the defendants could be made liable, and therefore that the judgment was rightly entered. *Wilson* v. *Lord Bury* (App.), 90

COMPENSATION. See Railway Company.

COMPOSITION. See Debtor and Creditor.

CONSENT. See Assault.

CONSIDERATION. See Bill of Sale.

CONSTRUCTION. See Landlord and Tenant.

CONTRACT—*measure of damages: remoteness*]—The plaintiff sent some horses to stables with which the defendant had contracted to supply him during a fair. Another person to whom the defendant had subsequently let the same stables, turned, with the assistance of the defendant's servants, the plaintiff's horses out of the stables without their clothing, and while they were standing in the defendant's yard until other stables could be procured, some of them caught cold and became depreciated in value. The jury found that the depreciation in value was the result of the breach of contract by the defendant:—*Held* (by the Court of Appeal—*dubitante* BRAMWELL, L.J.), that the defendant was liable for the depreciation thus caused, and that the damage was not too remote. *Hobbs* v. *The London and South Western Railway Company* (44 Law J. Rep. Q.B. 49; Law Rep. 10 Q.B. 111) questioned. *M'Mahon* v. *Field*, 311 (App.), 552

—— *parol agreement to devise realty: part performance: statute of frauds*]—In an action by the plaintiff, as heir-at-law of A., to recover the title-deeds of a farm, the defendant counter-claimed for a declaration that she was entitled to a life estate in the farm. At the trial the jury found that the defendant was induced to serve A. as his housekeeper for many years, and to give up other prospects of establishment in life, by a promise made by him to her to make a will, leaving her a life interest in the farm. The promise was a verbal one, and A. died intestate:—*Held* (reversing the judgment of STEPHEN, J.), that there had been no part performance necessarily referable to the agreement, so as to exclude the operation of the Statute of Frauds; and therefore that the plaintiff was entitled to succeed upon the claim and counter-claim. *Alderson* v. *Maddison* (App.), 466

—— *writing: statute of frauds* (29 *Car.* 2. *c.* 3), *s.* 4: *parol identification of "arrangement" with agreement in writing*]—In an action for

breach of an agreement for the hire, at a monthly payment, of a carriage of the plaintiff for more than a year from the agreement, in which the Statute of Frauds, s. 4, was relied on as a defence, it appeared that an agreement, such as the one sued on, was made, the terms of which were contained in a memorandum signed by the plaintiff but not by the defendant; that in a letter to the plaintiff, signed by the defendant, the defendant referred to "our arrangement for the hire of your carriage," and to "my monthly payment," and that the only arrangement which he could mean was the agreement contained in the memorandum signed by the plaintiff:—*Held*, that there was a sufficient memorandum in writing signed by the defendant. *Cave* v. *Hastings*, 575

—— See Corporation. Damages. Master and Servant. Sale of Goods.

CONVERSION—*allowance out of property to bankrupt: resolution of creditors: bankruptcy act*]—B., an undischarged bankrupt, to whom his creditors had given, by a resolution duly passed, a certain quantity of his furniture, assigned that furniture by bill of sale to the plaintiff, and afterwards sent it to the defendant, an auctioneer, who sold it and paid the money received to the bankrupt. In an action for conversion,—*Held*, that the plaintiff was entitled to the furniture, for that the bankrupt could, under the resolution of his creditors, dispose of it to the plaintiff, and that there was no *jus tertii* which the defendant could set up. *Brown* v. *Hickinbotham* (App.), 426

CORPORATION—*contract not under seal: local authority: public health act: "contract whereof the value or amount exceeds 50l."*]—An urban sanitary authority, upon an outbreak of scarlet fever in its district, agreed with the plaintiff, a medical practitioner, by a contract not under seal, to pay him for attending to the fever patients at the rate of 5*s.* 3*d.* per day for each of the tents in which the patients were received. There were at first two tents, but others were afterwards added. His charges amounted to 97*l.* 7*s.* 9*d.* In an action against the urban authority to recover this amount,—*Held* (reversing the judgment of STEPHEN, J., reported *Ante*, p. 194), that the agreement between the plaintiff and the defendants was not a contract "whereof the value or amount exceeds 50*l.*," within the meaning of the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 174, and therefore the plaintiff was entitled to recover. *Hunt* v. *The Wimbledon Local Board* (48 Law J. Rep. C.P. 207; Law Rep. 4 C.P. D. 48) distinguished. *Eaton* v. *Basker* (App.), 444

—— *malice: railway company: ultra vires: employment of police*]—A corporation may be liable for malicious prosecution. The employment of police is within the scope of the business of a railway company. *Edwards* v. *The Midland Rail. Co.*, 281

—— See Income Tax. Prohibition.

CORRUPT PRACTICES PREVENTION ACT (26 Vict. c. 29), s. 7: *enquiry into corrupt practices by commissioners: power of commissioners to refuse certificate to witness: mandamus to review decision of commissioners*]—By 26 Vict. c. 29. s. 7, it is enacted that no person called before commissioners appointed to enquire into corrupt practices at an election shall be excused from answering any question relating to any corrupt practice on the ground that the answer may criminate or tend to criminate him, provided that where any witness shall answer every question which he shall be required to answer, and the answer to which may criminate or tend to criminate him, he shall be entitled to receive a certificate stating that he was so required to answer, and had answered all such questions. A witness before such commissioners answered all the questions put to him, but did not, in the opinion of the commissioners, answer truly certain questions which might tend to criminate him, and they refused to grant him a certificate. On an application by him for a *mandamus* to compel them to grant him a certificate,—*Held*, by the Court of Appeal (affirming the judgment of the Queen's Bench Division), that no *mandamus* ought to issue to review the decision of the commissioners, for that, as they had exercised their discretion on the facts before them, their conclusion founded on those facts was conclusive; and further, that the circumstances of the case afforded good ground for the conclusion at which they had arrived. *The Queen* v. *Price* (Law Rep. 6 Q.B. 411) overruled. *Reg.* v. *Holl* (App.), 763

COSTS—*practice: county courts admiralty jurisdiction act*, 1868]—Order LV. rule 1 of the Rules of the Supreme Court, 1875, which provides that "where any action is tried by a jury the costs shall follow the event," has repealed section 9 of the County Courts Admiralty Jurisdiction Act, which enacted that a plaintiff who should not recover a sum exceeding the amount to which the County Court has jurisdiction in Admiralty causes, should not be entitled to costs without a certificate from the Judge who tried the action. *Tennant & Co.* v. *Ellis Kislingbury & Co.*, 143

—— *shorthand notes of evidence: direction as to costs of*]—The Court will in its discretion order the allowance on taxation between party and party of the expense of shorthand notes of evidence at the trial as part of the costs of a rule for a new trial, when such notes are essentially necessary for the disposal of the motion for a rule for a new trial. *Watson* v. *The Great Western Rail. Co.*, 302

Costs (continued)—*taxation between solicitor and client: county court act: action in high court*]—Section 36 of the County Court Act, 1856, which limits the amount of costs payable to a solicitor by his client in any action where not more than 20*l.* is claimed, does not apply to actions in the High Court. Judgment of the Common Pleas Division reversed. *In re Copp* (App.), 233

Co-surety. See Practice.

—— See County Court. Parliament. Practice.

Counter-claim. See Practice.

County Court—*admiralty jurisdiction: action in rem for necessaries: owner domiciled in Great Britain: county courts admiralty jurisdiction act*]—A County Court exercising Admiralty jurisdiction under the provisions of the County Courts Admiralty Jurisdiction Act, 1868, cannot, as such, entertain a claim for necessaries against a British ship, whose owner is domiciled in Great Britain, for the Admiralty Court could not itself entertain such a claim, and the jurisdiction of a County Court is not more extensive in this respect. *The Dowse* (39 Law J. Rep. Adm. 46) followed and approved. *Allen* v. *Garbutt*, 141

—— *costs of action remitted under: rules of court*]—The costs of an action remitted by the Superior Court to the County Court for trial under 19 & 20 Vict. c. 108. s. 26 are not within the jurisdiction of the County Court. The action remains in the Superior Court; it is remitted to the County Court for trial only, and the power over costs conferred by Order LV. still remains in the Superior Court. *Farmer* v. *May*, 295

—— *rules regulating: practice: effect of nonsuit: 19 & 20 Vict. c. 108. s. 32: county court rules, 1875, order XVI. rule* 17]—A nonsuit in a County Court is a bar to a subsequent action in the High Court for the same cause of action. By the County Courts Act, 1856 (19 & 20 Vict. c. 108), s. 32, five County Court Judges may be appointed "to frame rules and orders for regulating the practice of the Courts, and forms of proceedings therein," and the rules so framed are to be approved by the Lord Chancellor. By Order XVI. rule 17 of the County Court Rules, 1875, "any judgment of nonsuit, unless the Judge otherwise directs, shall have the same effect as a judgment upon the merits for the defendant." The plaintiff sued in a County Court while abroad, without giving security for costs, as required by the rules, and was nonsuited, the nonsuit not to be a bar to the re-entry of the cause. He afterwards sued in the High Court for the same cause of action. The Judge held that the above rule applied only to nonsuits on the merits, and gave judgment for the plaintiff:—*Held* (by the Court of Appeal), that the rule applies to all nonsuits. *Held* (by Baggallay, L.J., and Lush, L.J., Bramwell, L.J., dissenting), that the County Court Judges had power to make the rule, and that the defendant was entitled to judgment. *Poyser* v. *Minors* (App.), 555

—— See Interpleader. Costs.

Covenant. See Mines.

Criminal Law—*practice: joinder of several misdemeanours in one indictment: perjury: power to award successive terms of penal servitude exceeding in the aggregate the maximum punishment for any one of the offences charged: 2 Geo. 2. c. 25. s.* 2]—In an indictment for perjury, C. was charged in one count with committing the offence in an action in the Court of Common Pleas, and in another count with the like offence in a Chancery suit brought by him to prevent the setting up of certain defences. The indictment did not contain the words "against the form of the statute," &c. C. was tried at bar and the jury found him guilty of the offences "charged in and by both counts of the indictment," whereupon he was sentenced to the maximum term of seven years' penal servitude on each count, the second term to commence at the expiration of the first:—*Held*, that the verdict was a sufficient finding of guilty on each count; that since the passing of the Act 14 & 15 Vict. c. 100, an indictment not concluding with the words "against the form of the statute," &c., was sufficient to warrant a statutory punishment for what was also a common law offence; that the Act 2 Geo. 2. c. 25 does not necessarily require the infliction of a sentence under the previous law as well as that authorised by the Act; that the perjury committed in the Chancery suit was a separate and distinct offence from that committed in the action at common law; that separate judgments might be awarded upon several counts in one indictment charging distinct misdemeanours; and that successive maximum terms of penal servitude might be inflicted in respect of each count. *Castro* v. *The Queen* (H.L.), 497

Crimping. See Shipping.

Cruelty—domestic animals: young parrots: omission to supply water: jurisdiction of justices: statute 12 & 13 Vict. c. 92. s. 2. *Swan* v. *Sanders* (M.C. 67), 544

Custom. See Sale of Goods.

Damages—*measure of: debtor and creditor: bankruptcy: action by trustee for breach of contract made with debtor*]—The defendant contracted with a firm to purchase their business, and, in

consideration, to pay certain trade debts of the firm. Subsequently the firm went into liquidation, and a trustee was appointed. The defendant having failed to pay the debts, in an action for damages by the trustee it was,—*Held* (reversing the judgment of HUDDLESTON, B.—BAGGALLAY, L.J., *dubitante*), that the measure of damages which the plaintiff was entitled to recover for the breach was the whole amount of the unpaid debts. *Porter* v. *Vorley* (9 Bing. 93; 1 Law J. Rep. C.P. 170) discussed and disapproved. *Ashdown* v. *Ingamells* (App.), 109

—— measure of. See Contract.

DAY—fraction of. See Practice.

DEBENTURE. See Stamp Act.

DEBTOR AND CREDITOR—*bankruptcy: composition: debtor's statement: non-assenting creditor: bankruptcy act*]—Under section 126 of the Bankruptcy Act, 1869, a debtor must, in order to bind a non-assenting creditor by a composition, shew in his statement the whole of every debt due to the creditor, so that if the debtor states one and omits another of the debts, the creditor is not bound in respect of the debt stated. Judgment of the Common Pleas Division affirmed. *Macdonald* v. *Chesney* (App.), 87

DEFAMATION—*privilege: parliamentary committee: protection of witness*]—A witness summoned to give evidence before a select committee of the House of Commons is privileged as to anything he may say while under examination by the committee, and no action will lie for any slander uttered by him under such circumstances. *Goffin* v. *Donelly*, 303

DEMURRER. See Railway Commissioners.

DIRECTORS. See Company.

DISCLAIMER. See Bankruptcy.

DISCOVERY. See Practice.

DUTY. See Inhabited House Duty.

EASEMENT. See Lateral Support.

ECCLESIASTICAL COURT—*power to append a monition to a definitive sentence: mode of enforcing: suspension ab officio et a beneficio for contumacy in disobeying such a monition: prohibition: 53 Geo. 3. c. 127: 3 & 4 Vict. c. 86*]—A beneficed clerk was found guilty in the Arches Court of ecclesiastical offences, and suspended *ab officio* for a certain time, and a monition was appended to the sentence requiring him not to offend again in like manner. He disobeyed the monition, and a second monition was thereupon issued by the Dean of the Arches, which he also disobeyed. An application was then made to the Court by motion for his suspension. He was served with notice of the motion but did not appear, and the Court suspended him *ab officio et a beneficio* for three years. The clerk applied for a prohibition:—*Held* (affirming the judgment of the Court of Appeal), that a monition could be appended to a definitive sentence; that disobedience to such a monition could be punished as contumacy by suspension *ab officio et a beneficio*; that in order so to punish such disobedience it was not necessary to institute a fresh suit, but that suspension was properly awarded upon motion in the original suit. *Mackonochie* v. *Lord Penzance* (H.L.), 611

EDUCATION ACT, 1870 (33 & 34 Vict. c. 75), s. 91: school board election: corrupt practices: penalty and disqualification on conviction: summary jurisdiction of justices. *Reg.* v. *Gaunt* (M.C. 32), 174

—— 1870 and 1876: compliance with attendance order: attendance without fees: liability of parent to conviction under 39 & 40 Vict. c. 79. s. 12: remission of fees, 33 & 34 Vict. c. 75. s. 17. *Richardson* v. *Saunders* (M.C. 65), 661

—— 1870 (33 & 34 Vict. c. 75), s. 3: absence of child from school: residence apart from parent: liability of parent. *The School Board for London* v. *Jackson* (M.C. 134), 779

—— 1870 and 1876: "causing children to attend school": attending without fee: by-laws of School Board. *Saunders* v. *Richardson* (M.C. 137), 762

EJECTMENT. See Limitation.

ELECTION PETITION. See Parliament.

ELEGIT. See Judgment Creditor.

EMPLOYERS AND WORKMEN ACT, 1875 (38 & 39 Vict. c. 90), ss. 3 and 10: definition clause: sub-workmen. *Grainger* v. *Aynsley and Another*. *Bromley* v. *Tams* (M.C. 48), 425

—— See Master and Servant.

EQUITY OF REDEMPTION. See Judgment Creditor.

ESTOPPEL—*res judicata*: public health: highway repairable by inhabitants at large: whether decision of justices as to character of street conclusive: public health act, 1875 (38 & 39 Vict. c. 55), s. 150: 11 & 12 Vict. c. 43. *Reg.* v. *Hutchins* (M.C. 35), 315

EVIDENCE. See Costs. Sale of Goods. Defamation.

EXECUTION. See Railway Company. Sheriff.

EXECUTION CREDITOR. See Bankruptcy.

EXTENSION OF TIME. See Practice.

FEES. See Sheriff.

FELONY. See Policy.

FENCES. See Railway Company.

FICTION OF LAW. See Practice.

FIRE. See Policy.

FIRE INSURANCE—*contract of indemnity: landlord and tenant: covenant to repair: insurer's right to benefit of covenant to repair where premises repaired by tenant*]—The defendant demised premises for years by a lease containing a covenant by the tenant to repair in case of injury by gas, and he insured the same premises under a fire policy. The premises having been injured by an explosion of gas the defendant obtained payment from the insurer, and, subsequently, the tenant, having recovered damages against the persons who caused the explosion, repaired the premises. In an action by the insurer to recover from the defendant the sum paid under the policy, it was,—*Held* (reversing the judgment of LUSH, J.), that the policy was a contract of indemnity; that on payment of the insurance-money a promise by the defendant to repay it in the event of the tenant repairing the premises must be implied; and therefore that the plaintiff was entitled to maintain his action. *Darrell* v. *Tibbits* (App.), 33

FISHERY. See Trespass.

FORECLOSURE. See Building Society. Limitation.

FOREIGN ATTACHMENT. See Prohibition.

FOREIGN CORPORATION. See Income-Tax.

FOREST OF DEAN. See Statutory Duty.

FRAUD. See Marine Insurance.

FRAUDS, Statute of. See Bill of Exchange. Contract.

FREIGHT. See Marine Insurance.

GARNISHEE. See Prohibition.

GARNISHEE ORDER. See Practice.

GASWORKS CLAUSES ACTS, 1847 and 1871: 10 Vict. c. 15, ss. 38 and 49: 34 & 35 Vict. c. 41. ss. 1, 3, 35, 44: penalty for not supplying copy of accounts: time when offence complete: effect of incorporation of gasworks clauses act, 1847, by company constituted prior to 1871. *The Dudley Gas Co.* v. *Warmington* (M.C. 69), 529

GENERAL AVERAGE. See Shipping.

GIFT, REVOCABLE. See Undue Influence.

GOLDSMITHS' COMPANY. See Penalty, Action for.

GRANT. See Trespass.

GRAVE—*metropolitan burial act: real estate: heir: certain grave*]—Spaces were granted in perpetuity by a burial board pursuant to the Metropolitan Burial Act to E. and her heirs. E. died intestate:—*Held*, that the exclusive right of burial in the spaces vested in her heir. *Mathews* v. *Jeffery*, 164

GUARANTEE. See Bill of Exchange.

HABEAS CORPUS—*lunatic charged with a crime in India: removal to England: Indian criminal code*]—By 14 & 15 Vict. c. 81. s. 1, "If any person shall be indicted for or charged with any crime or offence in any Court in India, and shall be acquitted of or not be tried for such crime or offence on the ground of his being found to be of unsound mind, and shall by reason of the premises be lawfully in custody in India, it shall be lawful for the persons having the government of the presidency in which such person shall be so in custody to order such person to be removed from India to any part of the United Kingdom, there to abide the order of Her Majesty concerning his or her safe custody." The magistrate of a district in India proceeding to investigate a charge of murder preferred against M., a British subject, and finding him apparently suffering from mental derangement, caused an enquiry into his state of mind to be made by two medical men, under section 423 of the Indian Criminal Code, 1872. They reporting M. to be of unsound mind, and incapable of conducting his defence, the magistrate stayed proceedings under section 423, and reported the case to the Madras Government. The Madras Government ordered M. to be removed to Madras, and on making further enquiry into his state of mind, ordered his removal to England under 14 & 15 Vict.

c. 81. s. 1. On arrival in England M. was confined in a private lunatic asylum by order of the Secretary of State:—*Held*, that M. was, within the meaning of 14 & 15 Vict. c. 81. s. 1, a person charged with a crime before a Court in India, and not tried because found to be of unsound mind; that he was therefore lawfully in custody in India, and that his subsequent removal to England and confinement by order of the Secretary of State were therefore legal. *In re Maltby*, 413

—— See Public Worship Regulation Act.

"HIGH PEAK" CUSTOMS. See Mines.

HIGHWAY—highways and locomotives amendment act, 1878 (41 & 42 Vict. c. 77), s. 23: excessive weight and extraordinary traffic: industry of neighbourhood: stone quarries. *Wallington* v. *Hoskins*. *Stone* v. *same*. *Pictor* v. *same* (M.C. 19), 218

—— liability to repair: main road: road ceasing to be a turnpike road: highways and locomotives (amendment) act, 1878 (41 & 42 Vict. c. 77), s. 13. *The Mayor, &c., of Rochdale* v. *The Justices of Lancashire* (M.C. 97), 541

—— repair of: 5 & 6 Will. 4. c. 50. ss. 51, 53, 54: gathering stones on enclosed land: licence to surveyor to "gather" stones without making satisfaction to owner. *The Alresford Rural Sanitary Authority* v. *Scott* (M.C. 103), 664

—— See Locomotive.

HOSPITAL. See Nuisance.

HOUSE DUTY. See Inhabited House Duty. Revenue.

HOUSE TAX. See Inhabited House Duty.

HUSBAND AND WIFE—*power of married woman to sue alone: practice: leave, when to be obtained: agent: right of to set up jus tertii: rules of court*]—Leave for a married woman to sue alone can be obtained under Order XVI. rule 8, after action commenced, as well as before. The plaintiff, a widow, being entitled absolutely to certain leaseholds and being trustee of certain other leaseholds, married in a colony K., then and at the time of action brought an infant. He agreed with her the day before marriage to settle her property upon her, but no settlement was ever made. He deserted her shortly afterwards, and she returned to England. Before this marriage she had appointed the defendant to receive the rents arising out of both these properties, and he continued to do so after he was aware of her marriage. K. never claimed any of the rents so received, but the defendant having declined to pay them to the plaintiff, she, without obtaining leave, brought an action for them in her own name alone. The defendant took out a summons under Order XVI. rule 8 to oblige her to give security or join a next friend. This summons was dismissed:—*Held* (by the Court of Appeal), that the effect of the dismissal of the summons was to give the plaintiff leave to sue alone; that she could therefore recover in this action the rents received by the defendant from the trust property; but (*dissentiente* BRETT, L.J.) that, the agreement for a settlement being void, she could not recover the rents received since her marriage from the property to which she was, prior to her marriage, absolutely entitled. (By BRETT, L.J.), that she could recover these also, for that the defendant could not allege that he retained them by the right title and authority of her husband. *Kingsman* v. *Kingsman* (App.), 81

—— *wife's authority to pledge husband's credit for necessaries: secret revocation of authority*]—Where a husband and wife live together and the husband has forbidden the wife to buy goods on credit, without giving notice to anyone of the fact, he is not liable for the price of goods supplied to her order by a tradesman with whom she had not dealt before being forbidden to buy on credit, although the goods consist of clothes for the wife and children suitable to their position in life. *Jolly* v. *Rees* (15 Com. B. Rep. N.S. 628; 33 Law J. Rep. C.P. 177) approved and followed. *Debenham* v. *Mellon* (H.L.), 155

—— adultery of wife: liability of husband for maintenance: poor law amendment act, 1868 (31 & 32 Vict. c. 122), s. 33. *Culley* v. *Charman* (M.C. 111), 779

INCOME-TAX—*foreign corporation with English agency: telegraph company transmitting messages to foreign countries: 16 & 17 Vict. c. 34. s. 2. sched. D: "profits accruing from any trade exercised within the United Kingdom"*]—A foreign telegraph company had an agency in this country and, besides cables and lines abroad, three marine cables with shore ends landed here, through which it despatched and received messages between this country and various parts of the world. The total charges for messages hence were paid by the senders, and the amount, after deduction by the Post Office, which received the charges in the first instance, of sums due to it on messages from or to this country, was paid to the agency, which in its turn retained the sum due to the company for the transmission of messages over the cables and lines of the company and paid over the residue to various foreign governments and companies entitled thereto. The agency was

assessed to income-tax upon the profits of the company from the sums so received by it. Upon appeal by the agency from a confirmation of such assessment,—*Held*, that the company exercised a trade, employment or vocation in the United Kingdom, within the meaning of 16 & 17 Vict. c. 34, sched. D, and that income-tax was payable by the agency upon the profits accruing to the company therefrom. *Erichsen* v. *Last*, 570

INCOME-TAX (continued)—"*profits*": *statutory restrictions*: *corporations*]—The appellants were constituted, by Act of Parliament, a corporation for the management of the Mersey Dock Estate. Under the Act the surplus revenue of the appellants, which was derived from dock dues, &c., after payment of interest on moneys borrowed, was to be applied towards a sinking fund for the extinguishment of the principal moneys spent in the construction of the dock, and for no other purposes whatsoever:—*Held*, that these surplus moneys, which, under the statute, could only be applied in a particular manner for the purpose of reducing the past debt, and were not available as profits, could not be assessed to the income-tax. *The Mersey Docks and Harbour Board* v. *Lucas*, 449

INCUMBENTS' RESIGNATION ACT, 1871. See Practice.

INDEMNITY. See Fire Insurance.

INDIAN CRIMINAL CODE. See Habeas Corpus.

INDICTMENT. See Criminal Law.

INDORSEMENT. See Bill of Exchange.

INHABITED HOUSE DUTY—*business purposes, tenements used for*: *separate tenements*: *partial occupation by landlord*]—A building divided into different sets, but having one entrance and one staircase, was occupied as follows: The ground floor by the appellants and other firms for business purposes; the first floor entirely for business purposes; the second floor as a residence by the tenants and the caretaker and his wife, who acted as servants to the tenants of the residential and business premises. The appellants sought exemption from assessment in respect of the ground floor, first floor and part of the second floor, as being used solely for the purposes of trade or business, or of profession or calling, within the meaning of 41 Vict. c. 15. s. 13:—*Held*, that the house was not divided into, and let in, different tenements within the meaning of the section; that there was a common user of the house by the landlords and the tenants for residential purposes, since the landlords occupied part of the house otherwise than by caretakers, and that the exemption did not apply to rooms in a house as distinguished from separate and distinct tenements. *The Yorkshire Fire and Life Ins. Co.* v. *Clayton*, 471

—— *house used solely for trade*: *meaning of "house"*: *exemption from duty*: *house let into tenements*: *absence of structural division*: *statutes*, 48 *Geo.* 3. *c.* 55. *sched. B.*; 57 *Geo.* 3. *c.* 25. *s.* 1; 41 *Vict. c.* 15. *s.* 13. *sub-s.* 1]—By 48 Geo. 3. c. 55, certain duties are imposed on inhabited dwelling-houses. By 57 Geo. 3. c. 25. s. 1, houses are exempted from all duties payable under 48 Geo. 3. c. 55, when used solely for the purposes of trade. By 41 Vict. c. 15. s. 13. sub-s. 1, where any house being one property shall be divided into and let in different tenements, and any of such tenements are occupied solely for the purposes of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit, or are unoccupied, the person chargeable as occupier shall be at liberty to give notice in writing, at any time during the year of assessment, to the surveyor of taxes, stating therein the facts; and after the receipt of such notice by the surveyor, the commissioners acting in the execution of the Acts relating to the inhabited house duties shall, upon proof of the facts to their satisfaction, grant relief from the amount of duty charged in the assessment, so as to confine the same to the duty on the value according to which the house should, in their opinion, have been assessed, if it had been a house comprising only the tenements other than such as are occupied as aforesaid, or are unoccupied. The ground floor and basement of certain premises were in the occupation of the respondents, and were used by them solely as a bank for the purpose of carrying on their business as bankers. The premises in question consisted of the ground floor and basement aforesaid and upper floors, but such ground floor and basement had no internal communication whatever with the rest of the building, being separated by a party-wall from the basement to the first floor, and approached by a separate entrance from the street:—*Held*, that the portion of the premises so used by the respondents for banking purposes was a separate house within 48 Geo. 3. c. 55, and was exempt from inhabited house duty under 57 Geo. 3. c. 25. The first and second floors of the above premises run over the whole of the building, and were occupied by several traders and used entirely for business purposes. The third floor was occupied by traders, with the exception of two rooms in the occupation of D., a clerk in the employ of the respondents, who resided therein at night. The fourth floor was in the occupation of the housekeeper, wife and family. The whole of the upper floors was approached by one entrance from the street:—*Held*, that the different rooms or portions of the premises occupied as above mentioned were liable to inhabited house duty, inasmuch as they did not

come within 41 Vict. c. 15. s. 13. sub-s. 1, which contemplated some structural division of the different tenements. *Chapman* v. *The Royal Bank of Scotland*, 670

—— *revenue: tenements used for trade purposes only: exemption: caretakers*]—Section 11 of the 32 & 33 Vict. c. 14 enacts that "any tenement or part of a tenement occupied as a house for the purposes of trade only . . . . shall be exempt from inhabited house duties, although a servant or other person may dwell in such tenement or part of a tenement for the protection thereof." A clerk, in receipt of a salary of 150*l.* a year, resided in part of his employer's trade premises for their protection, occupying with his wife, five children, and a servant, five rooms and two attics in the upper part of the building:—*Held* (reversing the judgment of the Exchequer Division), that the building was not exempt from duty within section 11. *Yewens* v. *Noakes* (App.), 132

—— *tenement occupied solely for business: caretaker: "servant or other person" dwelling in house for protection thereof*]—Exemption from inhabited house duty was claimed under 41 Vict. c. 15. s. 13. sub-s. 2, in respect of a building which was used only for business purposes save that there resided in it, as caretaker, occupying a sitting-room and bedroom, a cashier receiving a salary of 200*l.* a year. The commissioners found as a fact that the cashier was a "servant or other person" within the meaning of the Act:—*Held*, that the commissioners might so find. *Yewens* v. *Noakes* (*Ante*, p. 132) discussed. *Rolfe* v. *Hyde & Co.*, 481

INJUNCTION. See Statutory Duty.

INSPECTION. See Practice.

INSURANCE—*policy, construction of: death or injury by accident: drowning*]—A policy of insurance against death or injury by accident contained a proviso that "the insured shall not be entitled to make any claim under this policy for any injury from any accident, unless such injury shall be caused by some outward and visible means of which proof satisfactory to the directors can be furnished"; and that "this insurance shall not extend to . . . . any injury caused by or arising from natural disease or weakness, or exhaustion consequent upon disease, . . . or to any death arising from disease, although such death may have been accelerated by accident." The insured was seized with an epileptic fit whilst crossing a shallow stream, and fell down in the water and was drowned. He did not sustain any personal injury to occasion death other than drowning:—*Held* (affirming the judgment of the Exchequer Division), that the circumstances of the insured's death were not such as to relieve the insurance company from liability within the terms of the proviso. *Winspear* v. *The Accident Ins. Co.* (App.), 292

—— *death by accident: epileptic fit: "death arising from fits or any disease arising before, or at the time, or following accidental injury": construction of policy*]—L., holder of a policy granted by the defendant company, insuring him against accidental injury, whilst standing on the platform at a railway station was seized with an epileptic fit, fell forward on to the rails and was killed by an engine passing over his neck and body. The policy contained a proviso that it did "not insure in case of death or disability arising from fits or rheumatism, gout, hernia, erysipelas or any disease whatsoever, arising before, at the time, or following such accidental injury (whether consequent upon such accidental injury or not, and whether causing such death or disability directly or jointly with such accidental injury)":—*Held*, in an action brought on the policy by the administrator of L., that the company was liable to pay the amount insured by the policy. *Lawrence* v. *The Accident Ins. Co.* (*Lim.*), 522

—— See Policy.

INTERPLEADER—*county court: sale of claimant's goods:* 19 & 20 *Vict. c.* 168. *s.* 72: 30 & 31 *Vict. c.* 142. *s.* 31: *county court rules, order XXI. rule* 1]—A claimant to goods seized in execution under County Court process, may, by 19 & 20 Vict. c. 108 (the County Courts Act, 1856), s. 72, prevent their sale by depositing with the bailiff either the value of the goods or possession-money; in default of so doing the bailiff is compelled to sell, and he is not bound previously to make a request for such deposit, notwithstanding Order XXI. rule 1 of the County Court Rules, 1875, nor to apply for an interpleader summons under 30 & 31 Vict. c. 142 (the County Courts Act, 1867), s. 31, in order to justify the sale. *Davies* v. *Wise. Cramer & Co.* (*claimants*), 651

—— See Practice.

ISSUE. See Practice.

JETTISON. See Shipping.

JUDGMENT CREDITOR—*equity of redemption the sole property of judgment creditor: receiver: time and mode of application for: interlocutory order*]—A judgment creditor who has sued out an *elegit* against his judgment debtor, whose only property is an equity of redemption, is entitled to obtain the appointment of a receiver on motion after judgment, in the division in which he has obtained judgment, and it is not necessary for him to bring a fresh action for that purpose. *Smith* v. *Cowell* (App.), 38

JURISDICTION. See Railway Commissioners.

JUSTICE OF THE PEACE—*expenses of conveying prisoners to gaol: period of committal: prison authority*]—The liability to pay the expenses of conveying prisoners committed to prison by a magistrate to the gaol named in the warrant of of commitment is, by section 4 of the Prisons Act, 1877, transferred, in all counties except Middlesex, from the county treasurer to the Secretary of State. Judgment of the Queen's Bench Division reversed. *Mullins* v. *Treasurer of the County of Surrey* (App.), 181

LAND—Recovery of. See Practice.

LANDLORD AND TENANT—*covenant: "duties": tenant's covenant to pay "duties" charged on premises or on landlord in respect thereof: construction: public health act*, 1875]—The defendant was tenant for years to the plaintiffs under a lease containing a covenant by the tenant to "bear, pay and discharge" certain specified rates and taxes, "and all other taxes, rates, duties and assessments whatsoever, whether parliamentary, parochial or otherwise, taxed, charged, rated, assessed or imposed upon the said demised premises or any part thereof, or upon the landlords or tenants in respect thereof." The sanitary authority duly obtained an order of Justices, under section 96 of the Public Health Act, 1875, against the plaintiffs, as owners, directing them to abate a nuisance arising from defective drainage, and for that purpose to make certain drains. The plaintiffs made the drains accordingly, and sued the defendant for the cost thereby incurred:—*Held* (by BRAMWELL, L.J., and BAGGALLAY, L.J.; BRETT, L.J., *dissentiente*), that the plaintiffs were entitled to recover the cost from the defendant under his covenant. *Budd* v. *Marshall* (App.), 24

—— *lease: collateral stipulation: weekly tenancy: inconsistent stipulation enlarging term on happening of event: construction*]—The plaintiffs, a railway company, let premises, through an agent, to the defendants on the terms, which were reduced to writing and signed by both parties, of a weekly tenancy to be determined by a week's notice on either side. At the same time the agent wrote, signed and handed to the defendants the following memorandum: "Messrs. Lewis & Co. You may have the premises as per agreement until the railway company require to pull them down." The defendants took possession of the premises, and the plaintiffs, who subsequently required them for their own occupation, but had no intention of pulling them down, gave the defendants a week's notice to quit, and after the notice had expired brought ejectment. The defendants pleaded that the plaintiffs did not require the premises in order to pull them down, and, by counter-claim, asked for a declaration that the representation by the agent was binding upon the plaintiffs, and for an injunction restraining them from acting upon the notice, or determining the tenancy, until they required the premises for the purpose of pulling them down:—*Held* (affirming the judgment of LUSH, J.), that the plaintiffs were entitled to maintain the action, and that the defendants were not entitled to any of the equitable relief claimed. *The Cheshire Lines Committee* v. *Lewis & Co.* (App.), 121

—— See Fire Insurance. Railways Clauses Act.

LANDS CLAUSES ACT. See Statute, Construction of.

LATERAL SUPPORT TO BUILDINGS—*ancient messuage: prescription: alterations of structure causing increase of burden: open enjoyment: liability of principal for damage caused by contractor's negligence*]—Where the owner of land builds a house on the extremity of his land, the house acquires at the end of twenty years a right to the lateral support it derives from the adjacent soil belonging to another proprietor. Per LORD SELBORNE, L.C.: The case falls within section 2 of the Prescription Act (2 & 3 Will. 4. c. 71). The *dictum* of ERLE, C.J., in *Webb* v. *Bird*, that that section is confined to rights of water, disapproved. Per LORD PENZANCE: "This right to the lateral support of the soil for an ancient house stands upon the positive authority of a series of cases, and a long acceptance in the Courts of law; and the ratification of it by the House of Lords ought not to be considered as the adoption of principles which might have a wide application in analogous cases." *The Commissioners of Her Majesty's Works and Public Buildings* v. *Angus & Co. Dalton* v. *Angus & Co.* (H.L.), 689

If, owing to the peculiar construction of a house, a burden is imposed on the adjoining land greater than would be imposed by a house built in the ordinary way, it is not necessary to prove that the owner of the adjoining land had notice of the peculiar construction. In the absence of fraudulent concealment on the part of the owner of the house his enjoyment of the lateral support will be deemed to be open. Ibid.

If, by reason of excavations in the adjacent land, a house entitled to support from such land suffers injury, the owner of the land is not relieved from his liability for damages by the fact that he has employed a contractor to make the excavations, and bound him by contract to take all necessary precautions to avoid injury to the house. Ibid.

LEASE. See Bankruptcy. Mines.

LEGACY DUTY. See Revenue.

LICENSING ACT—death of licensed person during continuance of licence: expiration of licence: application to special sessions: 9 Geo. 4. c. 61. ss. 4, 13, 14. *White* v. *The Justices of Coquetdale* (M.C. 128), 762

—— excise licence: sale during closing hours: 37 & 38 Vict. c. 49. s. 3. *Martin* v. *Barker* (M.C. 109), 551

—— 128 (9 Geo. 4. c. 61), s. 14: 1874 (37 & 38 Vict. c. 49), s. 15: conviction of licensed person: application by owner for authority to carry on business: discretion of justices at special sessions to refuse. *Reg.* v. *The Justices of Hertfordshire. In re Wroughton and Another* (M.C. 121), 762

LIMITATION. See Penalty, Action for.

LIMITATION, STATUTES OF—*mortgage: mortgagee out of possession: foreclosure: decree for foreclosure absolute, effect of: ejectment*]—S., in 1856, mortgaged lands in fee to the plaintiffs, and in 1859 sold his equity of redemption to the defendant. In 1877 the plaintiffs obtained, in the usual course and form, a foreclosure decree absolute, and in 1878 brought an action of ejectment against the defendant. The plaintiffs had never been in possession, and there had been no payment at any time of any principal or interest due on the mortgage, nor any acknowledgment in writing of their title by the defendant:—*Held* (reversing the judgment of the Common Pleas Division), that the plaintiffs' right to bring the action was not barred by the Statute of Limitations (3 & 4 Will. 4. c. 27). *Heath* v. *Pugh* (App.), 473

LIQUIDATION. See Sheriff.

LOCAL AUTHORITY. See Corporation.

LOCAL GOVERNMENT. See Nuisance.

LOCOMOTIVE—*tricycle: highway, locomotive on: the locomotive act*, 1861 (24 & 25 *Vict. c.* 70), *s.* 12: *the locomotives act*, 1865 (28 & 29 *Vict. c.* 83), *ss.* 3, 4, 7: *the highways and locomotives (amendment) act*, 1878 (41 & 42 *Vict. c.* 77), *ss.* 28, 29, 38]—A motor tricycle was capable of being propelled by steam alone at the rate of ten miles an hour, but when so propelled there was no noise or escape of steam, and nothing which could frighten horses or cause danger to the public using the highway beyond any ordinary tricycle. The weight was 2 cwt., and the wheels having indiarubber tires would not injure the surface of the road. The person riding on the tricycle could work it by his feet, either independently of, or in conjunction with the application of the steam power, and by an automatic brake the machine could be stopped in a very few yards. On a summons against the rider for non-compliance with the rules and regulations for the use of locomotives on highways prescribed by the Locomotive Acts, 1861, 1865 and 1878, the magistrate convicted the appellant. On appeal it was,—*Held*, that the conviction was right, as the tricycle was a locomotive within the definition in section 38 of the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77). *Parkyns* v. *Preist*, 648

LONDON AGENT. See Solicitor and Client.

LOTTERY. See Practice.

LUNATIC. See Habeas Corpus.

MAINTENANCE. See Champerty.

MALICE. See Corporation. Sheriff.

MANAGING OWNER. See Ship and Shipping.

MANDAMUS. See CORRUPT PRACTICES.

MARINE INSURANCE—*concealment: material facts: fraudulent declarations of value upon policies: facts material to the risk: evidence for the jury*]—The defendants effected two open policies of marine insurance, dated the 1st and 5th of October respectively, with the plaintiff and other underwriters to follow other named policies covering shipments of fruit, "to be hereafter declared and valued as interest may appear, from ports in Greece to London. In an action by the underwriters claiming a declaration that the policies of the 1st and 5th of October were obtained by fraud and concealment of material facts, and to set them aside, it was proved that upon the policies prior to the 1st and 5th of October, the defendants had declared shipments after the arrival of the goods at much smaller sums than the value at which the shipments had been at risk and insured by those policies. The jury found that those declarations were made falsely and fraudulently, and were material to the subscription of the policies of the 1st and 5th of October; that the underwriters were induced to subscribe those two policies by the declarations of value made by the defendants upon the former ones; that the defendants concealed and abstained from declaring the amounts which had been at risk and insured by the previous policies, and that it was material to the risk taken by the underwriters to be informed of the matters so concealed. Judgment having been entered for the plaintiff, it was,—*Held*, that there was evidence for the jury of such a concealment of material facts as would tend directly to affect the mind of a reasonable underwriter in determining him whether or not to underwrite the policies of the 1st and 5th of October, and whether or not he would accept the premiums offered; that judgment was, therefore, rightly entered for the plaintiff; and that, fraud having been proved, the defendants

were not entitled to a return of premiums paid on the two later policies. Judgment of FIELD, J., affirmed. *Rivas* v. *Gerussi Brothers & Co.* (App.), 176

MARINE INSURANCE (continued)—*risk: attachment of policy: re-insurance: effect of, where voyage covered by previous policy is completed*]—The defendant underwrote a policy of insurance of goods on a voyage from Philadelphia to Rochfort, "lost or not lost," and he subsequently re-insured the same goods under a policy "lost or not lost," made with the plaintiff, and describing the same voyage. When the second policy was made the ship had already arrived in safety, and her cargo had been landed undamaged, though these facts were unknown to the plaintiff and defendant. In an action to recover a premium from the defendant as assured under the second policy, it was,—*Held* (affirming the judgment of LORD COLERIDGE, C.J.), that when the second policy was made the defendant had an insurable interest in the subject-matter; that the policy attached to the risk of the voyage insured by the first policy, and therefore that the plaintiff was entitled to recover. *Bradford* v. *Symondson* (App.), 582

——*war risks: valued policy: money paid by state to owner after destruction of cargo: difference between real and insured value of cargo: right of underwriters to recover*]—The defendants insured with the plaintiffs, by valued policies, a cargo which was destroyed by the *Alabama* by risks within the policies. The plaintiffs paid to the defendants the sum insured, which was stated in the policies to be the value of the cargo. The United States Government having received compensation from Great Britain for damage caused by the *Alabama*, an Act of Congress was passed constituting a Court to distribute the money to claimants whose loss might not be covered by their insurance. The defendants made a claim for a sum representing the difference between the sum insured and the real value of the cargo. This claim was allowed and a sum of money was paid to them. The Act contained a clause by which the insurers were prevented from obtaining any money from the Court, either by applying in their own names or in the names of the assured. The plaintiffs sought to recover from the defendants the money received by them from the United States Government:—*Held* (by the Court of Appeal, *dissentiente* BAGGALLAY, L.J.), that the plaintiffs were not entitled to recover, that the money received by the defendants was paid to them as a free gift and not as portion of the salvage. *Burnand* v. *Rodocanachi & Co.* (App.), 284

——*time freight: perils of the seas: option to charterer to discharge ship if unseaworthy*]—The Government chartered a ship from the plaintiffs on monthly hire for the space of three months certain, and thenceforward until the Government should cause notice of discharge to be given, such notice to be given when the ship was in port in the United Kingdom. Payment was to be made monthly during such time as the ship should remain in the Government employ, and should efficiently perform the service, one month's freight to be paid in advance, the second payment at the end of two months, and to be a moiety of one month's freight. The Government were empowered, if the ship should become incapable, to retain two months' payment, to put the ship out of pay, or to make an abatement. The plaintiffs insured with the defendants, for three months, the ship and freight outstanding against perils of the seas. The ship sailed on the 22nd of February, one month's freight having been paid in advance. She struck on a rock on the 21st of March, and was so much damaged as to require repairs. These repairs were completed by the 14th of May, but on the 17th of April the Government had discharged the ship at the Cape, and put her out of pay since the 21st of March. In an action to recover the two months' freight,—*Held*, that the insurers were not liable to the assured, because although the policy included the freight in question yet the loss was not proximately caused by the perils of the sea. *Inman & Co.* v. *Bischoff* (App.), 440

——*time policy: perils insured against: loss caused by explosion in steamer*]—Action by the assured on a time policy which contained a clause rendering the insurers liable for perils of the seas, fire and all perils, losses and misfortunes that should come to the hurt of any part of the subject matter of the insurance. The vessel insured was a steamer, and was damaged by an explosion caused by the bursting of the boiler:—*Held* (by the Court of Appeal), that the assured were entitled to recover, for that the policy covered the risk of such damage as that which had occurred. *The West India and Panama Telegraph Co.* (*Lim.*) v. *The Home and Colonial Marine Ins. Co.* (*Lim.*) (App.), 41

MARRIAGE—Promise of. See Practice.

MARRIED WOMAN. See Acknowledgment.

MASTER AND SERVANT—*contract of service: weekly hiring: piece work: forfeiture of wages: the employers and workmen act*]—By section 11 of the Employers and Workmen Act, 1875, "in the case of a . . . . woman subject to the provisions of the Factory Acts, 1833 to 1874, any forfeiture on the ground of absence or leaving work shall not be deducted from or set off against a claim for wages or other sum due for work done before such absence or leaving work, except to the amount of the damage (if any) which the employer may have sustained by reason of such

absence or leaving work." The appellant, a woman subject to the provisions of the Factory Acts, 1833 to 1874, worked in a cloth factory on the terms that the employment should be terminated by either party on giving fourteen days' notice, to be given on a Saturday; and that any person leaving his or her work without giving this notice, or before the expiration thereof, should forfeit or lose all wages then due or earned or unpaid. The appellant was paid for each piece of work done, the practice being that all the work completed was carried into the warehouse and booked up at three o'clock on Wednesday, and paid for on the Saturday following, work done after three o'clock being carried forward to the following week. The appellant left her work without notice before three o'clock on a Wednesday, having carried in the work she had completed up to twelve o'clock. No damage was caused to her employer by reason of her so leaving. On a complaint made by her in order to recover for the work so carried in, Justices stated a case setting out the foregoing facts, and containing a finding that she was employed on a weekly hiring:—*Held* (reversing the judgment of the Queen's Bench Division), that the appellant was employed to do piece work, and not on a weekly hiring; that the price of the work was due when she left her employment, so that section 11 applied to prevent a forfeiture; and therefore that she was entitled to recover. (Per BRETT, L.J., and COTTON, L.J.), where there is a weekly hiring, and the operative leaves work before the end of the week, no wages are "due" within section 11, which, therefore, does not apply. *Gregson* v. *Watson* (34 Law Times Rep. N.S. 143) distinguished. *Warburton* v. *Heyworth* (App.), 137

—— *negligence: scope of authority*]—The plaintiffs, booksellers, occupied the basement of a house, and the defendants, a firm of solicitors, occupied the floor above. Water overflowing from a lavatory in the private room of one of the defendants, escaped through the floor to the basement below, injuring the plaintiffs' stock-in-trade. The overflow was caused by a clerk of the defendants', who, after the defendant W. had left for the day, had gone into the private room to use the lavatory, and had left the tap open. The clerk had no right to use the lavatory, and no business to go into the private room after the defendant W. had left, and the defendant W. had given orders to this effect:—*Held*, that the defendants were not liable, for that the act of the clerk was not incidental to his employment, and he was not acting within the scope of his authority. *Stevens* v. *Woodward*, 231

—— *contract: breach: contract to render exclusive personal service: action for procuring breach of contract with employer, when maintainable*]—F. contracted to make and glaze bricks, &c., at agreed prices, for the plaintiff exclusively, during a period of five years:—*Held* (by LORD SELBORNE, L.C., and BRETT, L.J., LORD COLERIDGE, C.J., dissenting), that, the contract being for exclusive personal service, the plaintiff could maintain an action against the defendant for maliciously procuring F. to break it, notwithstanding that the strict relation of master and servant did not exist between the plaintiff and F. Judgment of the Queen's Bench Division affirmed. *Lumley* v. *Gye* (2 E. & B. 216; 22 LAW J. Rep. Q.B. 463) followed. *Bowen* v. *Hall* (App.), 305

MAYOR'S COURT. See Prohibition.

MERCHANT SHIPPING. See Bill of Lading. Ship.

METROPOLITAN BOARD OF WORKS. See Negligence.

METROPOLITAN BUILDING ACT, 1855 (18 & 19 Vict. c. 122), ss. 72, 73, 97: dangerous structure: party wall: expenses of securing dangerous structure, how estimated: liability of one owner of party wall. *Debenham* v. *The Metropolitan Board of Works* (M.C. 29), 226.

METROPOLITAN BURIAL ACT. See Grave.

METROPOLITAN MANAGEMENT ACTS (18 & 19 Vict. c. 120; 25 & 26 Vict. c. 102: contribution towards a new street: "house and land": dissenting chapel. *Caiger* v. *The Vestry of St. Mary, Islington* (M.C. 59), 507

—— See Negligence.

MINES—*"High Peak" mining customs: buildings erected for mining purposes: right to remove: 14 & 15 Vict. c. 94*]—By certain customs established as law by statute, miners in a certain district have, on following certain procedure, a right paramount to the title of the landowner to enter and work for ore, and to impose on the surface, for the purposes of mining operations, pursuant to the customs, the burden of carrying such buildings and machinery as may be necessary. In such a case the miner is not tenant to the landowner, and neither the doctrine of waste nor the law of fixtures as between landlord and tenant applies; but the miner has an easement over the land to put on it for mining purposes what buildings he pleases, and he has also a right to remove those buildings at the close of his mining operations within a reasonable time, and before anything has occurred which would make him a trespasser on the land. *Wake* v. *Hall* (App.), 545

—— *mining lease: damage to surface*]—The mines under certain lands were demised to D., who covenanted to work them "in the usual and

most approved way in which the same is performed in other works of the like kind in the county of G." The surface was let upon building leases to T., reserving the minerals to the lessor, with power to enter upon the land for the purpose of working the mines and to erect buildings, &c., "and do and execute all such other acts, works and things upon, in or under or above the said premises as shall be necessary or convenient for working and carrying away the same," making compensation "for all damage occasioned by the exercise of the rights hereby reserved":—*Held*, that by the "usual and most approved manner of working" in the county of G. was not meant such a mode of working as would let down the surface, and that the lessee was not thereby absolved from the obligation to support the surface. *Held* also, that the reservation in the building leases did not include the right to let down the surface. *Davis* v. *Treharne* (H.L.), 665

—— See Statutory Duty.

MISTAKE OF FACT. See Money Paid.

MONEY PAID under Mistake of Fact—*impossibility of restoring parties to original position*]—The plaintiff, an occupier of land subject to tithe rent-charge, made over payments to the defendants, as owners of the rent-charge, under mistake of fact, supposing, without enquiry, that the amounts claimed in notices served upon him by the defendants were correct, whereas such amounts erroneously included rent-charge on land not in his occupation. When the plaintiff, having discovered the mistake, claimed repayment, the time for levying the rent-charge upon the land actually liable thereto had run out, so that the defendants had lost all remedy for the non-payment of it:—*Held*, that the plaintiff was, nevertheless, entitled to recover from the defendants the amounts which he had paid them by mistake. *Durrant* v. *The Ecclesiastical Commissioners for England and Wales*, 30

MONITION. See Ecclesiastical Court.

MORTGAGE. See Building Society. Chose in Action. Limitation.

MORTGAGEE. See Statutory Duty.

MUNICIPAL CORPORATION—power of mayor to act as justice of peace for borough: 5 & 6 Will. 4. c. 76 (municipal corporation act, 1835), s. 57: illegal contract: indemnifying bail: recovering back money paid as security to bail. *Wilson* v. *Strugnell* (M.C. 145), 779

MUNICIPAL ELECTION — *practice: interlocutory order: appeal: mayor: respondent: conduct of returning officer*]—An appeal lies from an order of a Divisional Court on an interlocutory question with regard to a municipal election petition. *Harmon* v. *Park* (App.), 227

By the Corrupt Practices (Municipal Elections) Act, 1872 (35 & 36 Vict. c. 60), s. 2, "Returning officer means a person under whatever designation presiding at an election." Ibid.

By section 13, sub-section 6, "Where a petition complains of the conduct of a returning officer he shall be deemed to be a respondent." Ibid.

The mayor of a borough, divided into wards, decided, under 38 & 39 Vict. c. 40. s. 1. sub-s. 3, that one of two candidates for the office of town councillor for one of the wards was disqualified, and the other was declared to be elected. The defeated candidate petitioned, making the mayor a respondent. On application to strike out the mayor's name,—*Held* (by LORD SELBORNE, L.C., and BRETT, L.J.), that the mayor was not returning officer. (BAGGALLAY, L.J., doubting.) *Held* (by the whole Court), that, if the mayor were returning officer, the petition questioning his decision did not complain of his conduct within section 13, sub-section 6, and therefore he was wrongly made respondent. Decision of the Common Pleas Division (*Ante*, p. 185) reversed. Ibid.

—— *nomination of councillor: form of nomination: subscription of proposer and seconder, when to be made: assenting burgesses, when to sign*: 38 & 39 *Vict. c.* 40 (*municipal elections act*, 1875), *s.* 1. *sub-s.* 2]—It is required by the Municipal Elections Act, 1875, that every candidate at a municipal election shall be nominated in writing, and that the writing shall be subscribed by two enrolled burgesses as proposer and seconder, and by eight others as assenting to the nomination. At a ward election a candidate was nominated by a proposer and seconder, who signed the paper, as did also eight others, as assenting to the nomination. After delivery to the town clerk, another duly enrolled burgess substituted his name for that of the proposer on the paper, thinking that the latter was not qualified, but without consulting him or the assenting burgesses:—*Held*, that the nomination was invalid. *Harmon* v. *Park*, 775

NAVIGABLE RIVER. See Trespass.

NECESSARIES. See County Court. Ship and Shipping.

NEGLIGENCE—*horse bolting without assignable cause*]—A horse being driven in a public thoroughfare, suddenly, and from no apparent or assignable cause, bolted, and notwithstanding the efforts of the driver, who was not shewn to be lacking in skill, became totally unmanageable and caused injury to plaintiff:—*Held*, that there was no evidence for the jury. *Held*, further, that there was no evidence of negligence for the jury arising

from the fact that the horse cast a shoe directly after he bolted, and that the driver did not call out or give any warning. *Hammick* v. *White* (11 Com. B. Rep. N.S. 588; 31 Law J. Rep. C.P. 129) confirmed. *Manzoni* v. *Douglas*, 289

—— *householder: defective railings: injury to child in charge of his sister: trap*]—The plaintiff, a boy of four years, accompanied his sister, who was going on business to the defendant's house. A flight of steps, protected on either side by railings, led up to the front door. One of these railings had been for some time displaced, leaving a gap of eighteen inches between the rails on either side of it. Across this gap rope had been interlaced, but had worn away and had not been renewed. The sister had frequently been to the house, and had shortly before noticed that the rail was missing. On the day in question the sister went up the steps, but the plaintiff in following fell through the gap and was injured:—*Held*, that the plaintiff could maintain no action against the defendant for the injury he had sustained, as the only duty on the part of the defendant towards him was to take care that there was no concealed danger, and of this there was no evidence. *Burchell* v. *Hickisson*, 101

—— *damage caused by discharge of water from sewer: continuous rainfall: act of God: liability of metropolitan board of works for damage caused by sewer:* 18 & 19 *Vict. c.* 120 (*metropolis management act*, 1855), *ss.* 135 *and* 136]—The Metropolitan Board of Works, under the powers of the Metropolis Management Act, 1855, constructed a sewer draining a large area, with an outfall into a creek of the Thames. At the outfall were gates, which were ordered to be opened when the water in the sewer rose to a certain height. A heavy but not unprecedented rainfall filled the sewer to the marked height, and the gates were opened. The rainfall continued to increase, and the rush of water from the sewer drove barges from their moorings in the creek, and against a wharf, which was partly swept away, the barges being also injured. The sewer was properly constructed, and it was absolutely necessary, in order that it should not cause enormous damage throughout the area which it was constructed to drain, that it should be relieved in time of heavy rain by the opening of the gates. When, under such circumstances, the gates were once opened it was impossible to close them until the rush of water should cease. On action by the owner of the wharf and barges for damages against the board,—*Held* (by LORD COLERIDGE, C.J.), first, that the injury was the natural and direct result of the act of the defendants in opening the gates, and was not occasioned by the act of God, so as to relieve them from liability on that ground; secondly, the discharge of the water being the act of the defendants themselves, and the rain not being unprecedented, the defendants were *prima facie* liable for damage caused by the escape of the water within the rule laid down in *Rylands* v. *Fletcher* (37 Law J. Rep. H.L. Cas. 161); thirdly, the defendants were excused from their *prima facie* liability, because what happened was the inevitable result of what Parliament authorised them to do in making and maintaining the sewer. *Dixon* v. *The Metropolitan Board of Works*, 772

—— See Master and Servant. Railway Company. Solicitor.

NEW ZEALAND. See Acknowledgment.

NOMINATION, FORM OF. See Municipal Election.

NONSUIT. See County Court.

NOTICE. See Bankruptcy.

NOVELTY. See Patent.

NUISANCE—*statutory authority to establish hospitals: power of statutory superior to sanction an act resulting in a nuisance: authority given by statute, how to be pursued: liability for nuisance of local authority acting under direction of local government board: small-pox asylum under metropolitan poor act*]—The appellants, a body incorporated under the Metropolitan Poor Act, 1867, erected a small-pox hospital under powers conferred by that Act, and with the sanction of the Local Government Board. In an action for an injunction and damages by occupiers of neighbouring houses, it was found by a jury that the hospital was a nuisance:—*Held* (affirming the judgment of the Court of Appeal), that the Metropolitan Poor Act, 1867, did not authorise the appellants to create a nuisance, whether with or without the sanction of the Local Government Board. *The Managers of the Metropolitan Asylums District* v. *Hill* (H.L.), 353

ORDER XIV. See Practice.

OWNER. See Shipping.

PARLIAMENT—*county vote: 12l. occupier omitted from list: proof of notice of claim*]—The revising barrister is entitled under sections 37 & 38 of 6 Vict. c. 18 to require proof that a person, who claims in consequence of the omission of his name from the 12*l.* occupiers' list, gave due notice of his claim to be inserted in such list. The fact that the overseers have inserted his name in the list of claimants for that franchise is not sufficient proof that he has given due notice of claim. *In re Sale* (App.), 113

PARLIAMENT (continued)—*county vote: land occupied together with house in a borough: reform act*]—The object of sections 24 and 25 of the Reform Act, by which a person entitled to vote for a borough in respect of a house, &c., shall not be entitled to vote for the county in respect of any land occupied by him together with such house, &c., is, that a borough voter shall not utilise any land occupied by him as part of the occupation of the house, in order to obtain a vote for the county. Where a tenant in occupation of land within a borough of sufficient value to confer a county vote, by a separate taking became tenant and occupier of a dwelling-house within the borough, which was totally distinct and separate from the land, he was held to be entitled to a county vote for the land, and was not restricted to his borough vote for the house, though both tenancies were under the same landlord. *Saunders* v. *Searson*. *Saunders* v. *Smith* (App.), 117

Collins v. *Thomas* (12 Com. B. Rep. 639; 22 LAW J. Rep. C.P. 38); *Capell* v. *Aston* (8 Com. B. Rep. 1; 19 Law J. Rep. C.P. 28). Ibid.

—— *election petition: costs as to witnesses: parliamentary elections act*, 1868 (31 & 32 *Vict. c.* 125), *ss.* 34 *and* 41]—In taxing under the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), s. 41, costs between the parties to an election petition under that Act, the Master disallowed part of what had been allowed by certificate of the Registrar under section 34 for the reasonable expenses of witnesses, and in particular taxed the allowance *per diem* to certain witnesses down to a smaller sum. Upon application to review the taxation,—*Held*, that the Master was not bound by the certificate of the Registrar. *M'Laren* v. *Horne*. *Berwick-upon-Tweed* (*Borough*) *Election Petition*, 658

—— See Defamation.

PARLIAMENTARY OATHS ACT—*promissory oaths act: evidence amendment act: right of a member of parliament to affirm instead of taking the oath: penalty for sitting without taking the oath: by whom to be recovered*]—Members of the Houses of Parliament are required by 29 Vict. c. 19 to take an oath before sitting or voting, and section 5 provides that if any member of the House of Peers votes or sits without taking the oath, he shall be subject "to a penalty of 500*l.* to be recovered by action in one of Her Majesty's Superior Courts at Westminster, and that if a member of the House of Commons votes or sits without taking the oath, he shall be subject to a like penalty." By section 4, "Quakers and every other person for the time being by law permitted to make a solemn affirmation or declaration instead of taking an oath," may on taking their or his seat in Parliament make an affirmation in a form prescribed by the Act, instead of taking the oath. The Evidence Amendment Act, 1869 (32 & 33 Vict. c. 68), provides that a person called to give evidence in a Court of justice shall, if he objects to take an oath, and if the presiding Judge is satisfied that the taking of an oath would have no binding effect upon his conscience, make a promise and declaration instead. To an action by a common informer for a penalty alleged to have been incurred by the defendant, a member of the House of Commons, who had sat and voted without having taking the oath, the defendant pleaded that he was a person on whose conscience an oath would have no binding effect, and that he had made an affirmation pursuant to the provisions of the Parliamentary Oaths Act, 1866. The plaintiff demurred:—*Held* (by the Court of Appeal), that the penalty could be recovered by a common informer; that the defendant was not entitled to make an affirmation instead of taking the oath; and that the provisions of the Evidence Amendment Act, 1869 (32 & 33 Vict. c. 68), are confined to witnesses, and do not apply to the taking an oath by members of Parliament as a qualification for sitting in either House. *Clarke* v. *Bradlaugh* (App.), 342

PAROL AGREEMENT. See Bill of Exchange.

PARTIES. See Practice.

PARTNERSHIP. See Practice.

PARTY GRIEVED. See Penalty, Action for.

PASSENGER DUTY. See Revenue.

PATENT—*infringement of patent rights: combination of prior inventions: novelty*]—The plaintiffs brought an action to recover damages for the infringement by the defendants of letters patent granted to the plaintiffs in 1874, for an invention of improvements in interlocking apparatus for railway points and signals. The invention in respect of which the patent had been granted was the combination of two prior inventions, which the defendants proved any person of ordinary knowledge on the subject would be able to effect by only placing the two inventions side by side, without making any further experiments or gaining any further information:—*Held*, that the plaintiff's invention was not of sufficient novelty, and did not require such an amount of skill and ingenuity as to render it the proper subject of a patent. *Saxby* v. *The Gloucester Waggon Co.* (*Lim.*), 577

——, USE OF. See Tramways.

PATIENT AND MEDICAL MAN. See Undue Influence.

PENALTY—*action for: limitation: "party grieved": common informer: goldsmiths' company: counterfeit hall marks:* 31 *Eliz. c.* 5. *s.* 5: 3 & 4 *Will.* 4. *c.* 42. *s.* 8: 7 & 8 *Vict. c.* 22. *s.* 8]—An

action by an officer of one of the Companies of Goldsmiths, suing for penalties under section 3 of the 7 & 8 Vict. c. 22, is not an action by a "party grieved," within 3 & 4 Will. 4. c. 42. s. 3, and consequently can be brought more than two years after the cause of action accrued; nor does the limitation of one year imposed upon informers suing for penalties by the 31 Eliz. c. 5. s. 5 apply to such an action. Judgment of the Queen's Bench Division (reported *Ante*, p. 9) reversed. *Robinson* v. *Curry* (App.), 561

—— See Parliamentary Oaths Act.

PENZANCE, LORD. See Public Worship Regulation Act.

PERILS, Insurance against. See Marine Insurance.

—— OF THE SEAS. See Marine Insurance.

PERJURY. See Criminal Law.

PILOTAGE. See Shipping.

PLEADING—*set-off: joint and several covenant: debt due to co-surety*]—To an action on a covenant by the defendant to discharge certain liabilities incurred by the plaintiff, the defendant pleaded that he had entered into the covenant jointly and severally with one Wilson, that a debt exceeding the amount of the plaintiff's claim was owing by the plaintiff to Wilson, and that Wilson had assigned this debt to himself and the defendant in equal shares as tenants in common. To one moiety of the plaintiff's claim the defendant claimed to set off his share of the plaintiff's debt to Wilson, and to the other moiety of the plaintiff's claim the defendant claimed to set off the other share of Wilson's debt on the ground that he was entitled to be exonerated by Wilson and to call on him to contribute in equal shares to the payment of the plaintiff's claim:—*Held*, that the defence shewed no right of set-off or counter-claim and was no answer to the plaintiff's claim. *Bowyear* v. *Pawson*, 495

—— See Company. Practice.

PLEDGE. See Bill of Lading.

POLICY—*insurance against fire: wilful destruction of property by wife of assured: rights of insurers: action founded on felony*]—An insurance company had granted a fire policy to S., and during the currency of the policy S.'s wife feloniously burnt the property insured. The company, not admitting any claim on the policy, brought an action against S. and his wife for the damage done by the act of the wife:—*Held*, first, that the action could not be maintained as the insurer has no rights other than those of his assured, and can only enforce those in the name of the assured, and after admitting the claim on the policy; secondly, that the action to recover damages for a wrongful act amounting to a felony was maintainable without shewing that the felon had been prosecuted. *The Midland Counties Ins. Co.* v. *Smith*, 329

Semble, that a felonious burning by the wife of the assured without his privity is covered by the ordinary fire policy. Ibid.

POLICY, CONSTRUCTION OF. See Insurance.

POOR LAW—divided parishes, &c., act, 1876 (39 & 40 Vict. c. 61), s. 34: residence: order of removal made without corroborative evidence: appeal to sessions: fresh evidence on appeal: jurisdiction of sessions. *Reg.* v. *The Guardians of the Abergavenny Union* (M.C. 1), 101.

—— maintenance of grandchild: coverture: married woman having separate property: statutes 43 Eliz. c. 2. s. 7 and 33 & 34 Vict. c. 93. ss. 13 and 14. *Coleman* v. *The Churchwardens and Overseers of Birmingham* (M.C. 92), 664

—— rate: appeal to quarter sessions: notice of appeal: reasonable time: 17 Geo. 2. c. 38. s. 4; 12 & 13 Vict. c. 45. s. 1. *Reg.* v. *The Justices of Surrey* (M.C. 10), 136

—— rateable occupation: sale of grass: licence of exclusive pasturage for ten months. *Mogg* v. *The Overseers of Yatton* (M.C. 17), 170

—— the rating act, 1874 (37 & 38 Vict. c. 54), s. 4, sub.-s. (*a*): valuation of land used as a plantation: assessment of sporting rights. *Eyton* v. *The Overseers, &c., of Mold* (M.C. 39), 321

—— rating: statute 6 & 7 Will. 4. c. 96. s. 6: special sessions: right of appeal by assessment committee against order of special sessions: union assessment committee act, 1864 (27 & 28 Vict. c. 39), s. 2. *Reg.* v. *The Justices of Montgomeryshire* (M.C. 52), 403

—— refreshment contractor: quarter sessions: appeal against assessment: admissibility of evidence: annual value less than rent: case stated by sessions: costs: removal of order without *certiorari*: summary jurisdiction act, 1879 (42 & 43 Vict. c. 49), s. 40: rules of court, 1880: order LXII. *Clark* v. *The Assessment Committee of the Alderbury Union and Others* (M.C. 33), 305

Poor Law (continued)—settlement: residence for three years: "parish": 39 & 40 Vict. c. 61. s. 34. *Plomesgate Union* v. *West Ham Union* (M.C. 51), 446

—— settlement: children under sixteen: 39 & 40 Vict. c. 61. s. 35. *Hollingbourne Union* v. *West Ham Union* (M.C. 74), 544

—— settlement: irremovability: penitentiary supported by subscriptions: *bona fide* charitable gift: 54 Geo 3. c. 170. s. 6; 9 & 10 Vict. c. 66. s. 1; 39 & 40 Vict. c. 61. s. 34. *Fulham Union* v. *Isle of Thanet Union* (App.) (M.C. 101), 544

—— settlement: illegitimate children: subsequent marriage of mother: derivative settlement: 39 & 40 Vict. c. 61. s. 35: retrospective effect. *Fulham Union* v. *Portsea Union* (M.C. 144), 779

Postmaster-General. See Telegraphs.

Practice—*action for the recovery of land: pleading: rules of court*]—Under the Rules of Court, Order XIX. rule 15, the mere statement by a defendant to an action for the recovery of land that he is in possession, puts the plaintiff to the proof of his case. So held by the Court of Appeal. *Danford* v. *M'Anulty* (App.), 294

—— appeal: public health act, 1875 (38 & 39 Vict. c. 55), ss. 91, 94, 95, 96, 251: appeal from order of justices to abate nuisance: "criminal cause or matter": the judicature act, 1873, s. 47. *Ex parte Whitchurch; in re An order made by Justices of Nottingham* (M.C. 99), 664

—— *attachment of debts: garnishee order: partnership firm: rules of court*]—A garnishee order will not be granted on partners in the name of their firm. *Walker* v. *Rooke*, 470

—— *award: costs to follow event: meaning of "event"*]—Where costs are to follow the event the word should be read distributively, as if it were "events." Where an action, in which the defendant counter-claimed, and all matters in difference were referred by an order providing that costs should follow the event, unless otherwise ordered, and the arbitrator awarded that a certain balance was due from the plaintiff to the defendant,—*Held* (affirming the judgment of the Queen's Bench Division), that the arbitrator ought to have found the issues specifically, and that the award must be referred back to him for that purpose. *Ellis* v. *Desilva* (App.), 328

—— *bringing in third party: position of third party when the whole matter cannot be disposed of by one trial: judicature act*, 1873, *s.* 24. *sub-s.* 3: *rules of court, order XVI. rules* 17 *and* 18]—In an action against the defendants for breach of contract they served P., as third party, with a notice under rule 18 of Order XVI. The defendants then applied to the Court to give directions as to mode of trial; but the Court held that the matters could not all be decided at one trial, and declined to give any directions. Pleadings having been, by direction of the Queen's Bench Division, delivered between the defendants and the third party, the defendants then gave the third party notice of trial, the action between the plaintiff and the defendants having been already tried:—*Held* (affirming the judgment of the Queen's Bench Division), that as the Court had decided that all the questions could not be determined in one trial, the third party ought to be dismissed from the action, and that the notice of trial should therefore be set aside. *Schneider* v. *Batt & Co. Pawels (third party)*, (App.), 525

—— *costs: claim and counter-claim: rules of court*]—In an action for a liquidated money claim, after trial with a jury, judgment was entered for the plaintiff on his claim, but for the defendants for a balance on a counter-claim for goods sold, the amount of which exceeded that of the claim. The judgment directed that the "plaintiff should recover against the defendants his costs of suit, and that the defendants recover the costs of the counter-claim":—*Held* (reversing the judgment of the Exchequer Division), that the plaintiff was entitled to the general costs of the cause. *Baines* v. *Bromley* (App.), 465

—— *costs: taxation of costs where plaintiff succeeds only on part of his claim: apportionment of costs*]—In an action to recover the price of work done in and about a house the plaintiff claimed for three distinct items of work, and recovered a sum of 37*l.* in respect of one of the items. An order was thereupon made "that the plaintiff recover against the defendant such costs as one of the Masters may find that he has rightly incurred in recovering the above amount to be taxed; and that the defendants recover against the plaintiff such costs as they have rightly incurred in defending themselves on those points on which they have succeeded to be also taxed":—*Held* (reversing the decision of the Common Pleas Division), that upon the true construction of the order the plaintiff was entitled, upon taxation, to be allowed the general costs of the cause, excluding only such costs as were applicable exclusively to the two items on which he failed, and that the defendants were entitled to be allowed such costs only as were incurred exclusively with respect to the two items on which their defence was successful. *Sparrow* v. *Hill* (App.), 675

—— *costs taxed on higher scale: rules of supreme court (costs)*]—Judgment for nominal damages was obtained by the plaintiff in an action for an

alleged trespass on the part of the defendant who sought to justify under a claim of right. An injunction was also claimed and granted. The trial lasted a long time, and involved much expense, and a large body of evidence was adduced as to the title to the property on which the trespass was alleged to have been committed:—*Held*, not a case in which a Court would exercise the discretion given to it by Rules of the Supreme Court (Costs), Order VI. rule 3, and order the costs to be taxed on the higher scale. *Held*, further, that the discretion given by that order is not limited to costs in actions in the Chancery Division or to actions involving matters of equity, but applies to all actions. *The Duke of Norfolk* v. *Arbuthnot*, 384

—— *costs following the event: claim overtopped by counter-claim: costs of the cause: rules of the supreme court*]—In an action for a liquidated money claim, after a trial with a jury, judgment was entered for the plaintiff on his claim, but for the defendants on a similar counter-claim (for goods sold) overtopping the claim. A Master taxed to the defendants the costs of the cause, and to the plaintiff only the costs of witnesses to establish his claim:—*Held*, upon application by the plaintiff to review the taxation, and objection that the plaintiff was entitled to all costs of the cause incurred in respect of the claim, and the defendants only to such costs of the cause as were incurred in respect of the counter-claim, that the taxation was right. *Baines* v. *Bromley*, 129

—— *costs: order depriving of: application for: appeal from: alternative jurisdiction of judge and court: rules of court, order LV.*]—The plaintiffs, after a trial with a jury, recovered 5*l.* beyond 100*l.* paid into Court. The Judge immediately gave judgment for the plaintiffs 105*l.* without costs. Counsel on both sides were present. No application was made, and no cause was shewn. Counsel for the defendants intended to apply to deprive the plaintiffs of costs had not the Judge anticipated him. The Exchequer Division rescinded the order:—*Held* (by the Court of Appeal), that the appeal from the order of the Exchequer Division was not an appeal from an interlocutory order; that the appeal (if any) from the order of the Judge was to the Court of Appeal, and not to the Divisional Court. *Held* also (reversing the judgment of the Exchequer Division), that the jurisdiction given by Order LV. to the Judge or the Court is an alternative and not an appellate jurisdiction, and that the circumstances of the case shewed a substantial compliance with the requirements of Order LV. as to application at the trial. *Marsden* v. *The Lancashire and Yorkshire Rail. Co.* (App.), 318

—— *county courts act: general request to county court judge to take notes: signature of judge: county court rules: adjournment of trial*]—In order to entitle a party to obtain signature of a County Court Judge's notes under section 6 of the County Courts Act, 1875, there should be a request to make a note of the questions of law intended to be raised. A mere general request to the Judge upon a case coming on for hearing to take notes of the evidence is not sufficient. *Morgan* v. *Rees* (App.), 491

The parties to an action in a County Court cannot adjourn the trial by consent, under Order XXXVII. rule 26 of the County Court Rules, 1875, without the leave of the Judge. Ibid.

—— *discovery: inspection of documents: privilege: sufficiency of affidavit*]—An affidavit of documents made pursuant to Order XXXI. rule 12 is conclusive against the party seeking discovery, not only generally, but also in respect of the assertion by the party making the affidavit that certain documents, admitted to be in his possession and to be relevant, relate solely to his own case, and not to the case of the other party, and do not tend to support it, and that to the best of his knowledge, information and belief they do not contain anything impeaching his own case. Where therefore an affidavit claimed privilege from production and inspection for documents on the above ground without any further description of their character,—*Held* (by DENMAN, J., and POLLOCK, B., *dissentiente* WILLIAMS, J.), that, on the authority of *Taylor* v. *Batten* (48 Law J. Rep. Q.B. 73) and *Jones* v. *The Monte Video Gas Company* (49 Law J. Rep. Q.B. 627), inspection of such documents could not be ordered. *Held* (by the Court of Appeal, affirming the decision of the Queen's Bench Division), that, both on principle and on the construction of rule 11 of Order XXXI., inspection ought not to be ordered. *Bewicke* v. *Graham* (App.), 396

—— *incumbents' resignation act*, 1871 (34 & 35 *Vict. c.* 44), *s.* 10: *pension of retired clergyman: set-off: counter-claim*]—In an action brought by a retired clergyman against his successor in the incumbency for arrears of the pension allowed under the Incumbents' Resignation Act, 1871, the defendant claimed to set off against such arrears, and also to recover, by way of counter-claim, a judgment debt due to him from the retired clergyman:—*Held* (reversing the judgment of LORD COLERIDGE, C.J.), that the pension was inalienable, and therefore the defendant's claim could not be set off, and the plaintiff was entitled to a separate and independent judgment for the arrears due. *Held* (by BAGGALLAY, L.J., and LUSH, L.J.), that the defendant's claim was in fact a set-off, and must be dismissed. *Held* (by BRAMWELL, L.J., dissenting), that the defendant's claim was a counter-claim, on which he was entitled to judgment. *Gathercole* v. *Smith* (App.), 681

—— indictment for obstruction of highway: new trial: acquittal of defendant: misdirection on criminal trial. *Reg.* v. *Duncan* (M.C. 95), 522

PRACTICE (continued)—*interpleader issue: mode of trial: "action," meaning of: judicature act: rules of court*]—An interpleader issue having been directed, the issue was drawn up for trial with a jury, and the trial took place before a Judge and a jury. A new trial having been ordered, the plaintiff gave notice of trial before a Judge alone. The defendant did not give a counter notice, but objected at the trial to the jurisdiction of the Judge to try the case without a jury:—*Held*, that it was not competent for the plaintiff to give such notice, and that the issue could not be tried by a Judge without a jury. *Hamlyn* v. *Betteley* (App.), 1

An interpleader issue is not an action within the meaning of section 100 of the Judicature Act, 1873, and the rules of Court made under that Act. Ibid.

—— *judicature acts: mortgage: lottery: penalty*]—The time for appealing from an order of a Judge in chambers expired in the long vacation, during which no Divisional Court was sitting:—*Held*, that the time ought to have been enlarged almost as of course, though execution had been levied under the order. The defendant applied to a Judge for an enlargement of time, which was refused. He then appealed against the order to a Divisional Court. By consent the appeal was treated as being also an appeal from the refusal to enlarge the time. The Divisional Court dismissed the appeal on the merits. An appeal to the Court of Appeal was dismissed, on the ground that there was no appeal from the order refusing to enlarge the time:—*Held*, that the Court of Appeal were bound to treat the question of time as open, it having been treated as open in the Court below. In an action by a mortgagee in possession against a mortgagor for the mortgage debt, the writ was specially indorsed for a certain sum. Upon an affidavit that there was no defence, notwithstanding counter affidavits alleging questions of account, an order was made that unless the defendant paid 5,000*l.* into Court by a given day, the plaintiff might sign judgment. Judgment was signed and execution levied under the order:—*Held*, that the defendant ought to have been allowed to defend, for the purpose of taking an account, without any payment into Court, and that judgment ought to have been signed as security only for what should be found due on the account, without power to issue execution except by leave of the Court, the defendant being required as a condition to consent to the immediate taking of such account. *Wallingford* v. *The Mutual Society* (H.L.), 49

A provision in a mortgage making the whole debt due on failure to pay one instalment, is not in the nature of a penalty, but may be enforced. Ibid.

A society formed for making advances to its members, which selects by lot the members who are to receive advances, is not illegal under the Lottery Acts. Ibid.

—— *notice to third parties: directions as to mode of trial: judicature act*]—In an action against the defendants for non-delivery of certain iron rods of the quality contracted for, the defendants proceeded to bring in H., a foreigner, as a third party, under Order XVI. rule 18, on the ground that they had contracted with him in respect of the iron rods so supplied and upon the same terms. It was not denied that the clause as to quality was the same as between the plaintiff and the defendants on the one hand and the defendants and H. on the other. The plaintiff, however, relied upon certain admissions made by the defendants as regards the subject-matter of the contract, which shewed that the action was, as between the plaintiff and the defendants, an undefended one. It further appeared that the case had already been set down for trial, and would be reached in a day or two. Upon application made by the defendants, under Order XVI. rule 21, to give directions as to the mode of trial,—*Held*, that the Court had power to consider whether the case was one in which a third party ought to be allowed to come in, and ought to refuse the application where the effect of such third party being introduced would be to embarrass and delay the plaintiff. *Schneider* v. *Batt & Co.* (App.), 389

—— *order dismissing action: extension of time for appealing from: jurisdiction: discretion: order*]—A Master having made an order dismissing an action unless the plaintiff filed an answer to interrogatories within seven days, the plaintiff swore his affidavit in answer on the seventh, but did not file it until the eighth day from the date of the order. After taking out intermediate summonses to extend the time for delivering notice of trial, and to rescind the Master's order, the plaintiff took out two summonses—one to extend the time for appealing from that order, the other to vary it by extending the time for answering interrogatories; and a Judge made the order asked for on each of these two summonses:—*Held* (affirming the judgment of the Common Pleas Division), that the Judge had jurisdiction to make the order under rule 6 of Order LVII.; and that no sufficient ground had been shewn for interfering with the discretion exercised. *Carter* v. *Stubbs* (App.), 161

—— *parties: bankruptcy of defendant: trustee in bankruptcy: order L. rule* 2]—In an action upon a bill of exchange against a sole defendant, after issue joined, the defendant filed his petition for liquidation, and a trustee was appointed:—*Held* (affirming the judgment of the Queen's Bench Division), that the trustee ought not to be made a defendant under Order L. rule 2. *Barter & Co.* v. *Dubeux & Co.* (App.), 527

—— *pleading: embarrassing statement of claim: breach of promise of marriage*]—The statement of claim in an action for breach of promise of

marriage stated the promise and breach, and alleged that "the plaintiff, relying on the said agreement, permitted the defendant to debauch and carnally know her, whereby the defendant infected the plaintiff with a venereal disease": —*Held* (by the Common Pleas Division), that this allegation must be struck out, as tending to prejudice and embarrass the fair trial of the action. *Held* (by the Court of Appeal, reversing the decision of the Common Pleas Division), that the allegation could properly be pleaded under Order XIX. rule 4, and ought not to be struck out under Order XXVII. rule 1. *Millington* v. *Loring* (App.), 214

—— *taxation of costs where plaintiff succeeds only on part of his claim: apportionment of costs which cannot be separated: allowance of those which can: rules of the supreme court*]—Where a plaintiff succeeded on one out of three heads of his claim, and an order was made that "the plaintiff be allowed such costs as one of the Masters may find that he has rightly incurred, in recovering a certain amount, and the defendants be allowed such costs as they have rightly incurred in defending themselves on the points on which they have succeeded," the principle that should be followed in taxing the costs is to allow to each party the costs of such items of the claim as he has succeeded on, so far as they can be separated, and to apportion the general costs of the cause which cannot be separated, and not to give those general costs to the plaintiff because he has partly succeeded on his claim. *Sparrow* v. *Hill*, 410

—— *writ: time from which it dates: issued same day as cause of action: fractions of a day: fiction of law*]—A statement of claim alleged that the cause of action accrued on the 2nd of July, and before the issuing of the writ, which as a fact was issued the same day. Demurrer on the ground that the writ being a judicial act must be taken to date from the earliest moment of the day, and therefore to have been issued before the cause of action accrued:—*Held*, that the doctrine on which the demurrer was founded did not apply, and that the plaintiff was entitled to shew that the cause of action accrued before the issuing of the writ. *Clarke* v. *Bradlaugh*, 678

—— *writ for service out of jurisdiction: slander: publication abroad with damage in England: order II. rule 4; order XI. rule 1*]—Where a charge of misconduct made out of the jurisdiction against an officer of an English vessel to the captain is reported to the owners in England, who dismiss the officer, "the act or thing for which damages are sought to be recovered" is not done within the jurisdiction, so as to admit of a writ in an action for slander against the person making the charge being issued for service out of the jurisdiction under Order XI. rule 1. *Bree* v. *Marescaux* (App.), 676

—— See Chose in Action. County Court. Criminal Law. Municipal Election. Husband and Wife.

PRESCRIPTION. See Lateral Support.

PRINCIPAL AND AGENT—*building society: certified rules: borrowing in excess of authority: liability of society and directors*]—By the certified rules of an unincorporated building society the directors were empowered to borrow money up to a prescribed limit. The course of business was for the treasurer of the society to receive the loan and give the lender a receipt, together with an undertaking on behalf of the directors to give a promissory note of the directors for the amount; and these notes were subsequently exchanged for the receipt. The plaintiffs advanced 100*l.* to the society, paying the amount to the treasurer, and receiving from him a receipt and undertaking. This sum was never paid over to the society, but was appropriated by the treasurer to his own use, and no promissory note for the amount was procured for the plaintiffs. At the time of this loan the society had borrowed in excess of the limit allowed by the rules. The plaintiffs having sued the society and the directors to recover the amount, —*Held*, that the individual directors were personally liable to the plaintiffs for the amount of the loan; but that the society was not so liable. *Chapleo* v. *The Brunswick Benefit Building Society and Smith* (App.), 372

—— *relation of sub-agent to undisclosed principal: consignor and consignee: right to follow proceeds of consignment in the hands of third parties*]—The plaintiffs sent goods to London to M. & T. for sale. M. & T., having no London house, sold the same through the defendants, indorsing to them the bills of lading which the plaintiffs had previously indorsed to M. & T. The defendants paid the proceeds of these sales into their general account at the bank, but kept the result of such sales distinct in their own books. M. & T. had one house at Glasgow and another at Leith. The plaintiffs dealt with the Glasgow house alone; the defendants with both. M. & T. stopped payment at a time when the Glasgow house was not and the Leith house was indebted to the defendants. The plaintiffs sued the defendants to recover a balance, the result of sales of their produce which the defendants had not remitted to M. & T. The jury found that the plaintiffs did not through M. & T. employ the defendants to sell and act for them, but that the defendants knew that M. & T. were acting as agents:—*Held* (reversing the judgment of FIELD, J.), that the plaintiffs could not recover; that there was no privity of contract between the plaintiffs and the defendants, that the defendants were not in a fiduciary position to the plaintiffs, and therefore that the plaintiffs could not follow the identified

proceeds of their goods in the hands of the defendants. *The New Zealand and Australian Land Co.* v. *Watson* (App.), 433

—— See Bankruptcy.

PRIORITY. See Bills of Sale.

PRISONERS—maintenance of insane: by whom expenses to be paid: 3 & 4 Vict. c. 54. s. 2: 27 & 28 Vict. c. 29: 40 & 41 Vict. c. 21. ss. 4 and 57. *Reg.* v. *Oastler and Mews, Justices of Surrey* (App.) (M.C. 4), 103

—— See Justice of the Peace.

PRIVILEGE. See Defamation.

'PROFITS." See Income-Tax.

PROHIBITION—*mayor's court of London: foreign attachment: corporation garnishee*]—Process of foreign attachment cannot be enforced by distress against the garnishee, but only by arrest of his person. It cannot, therefore, be enforced at all against a corporation aggregate, which is by its nature incapable of being arrested. *The Mayor and Aldermen of the City of London* v. *The London Joint-Stock Bank* (H.L.), 594

—— See Ecclesiastical Court. Railway Clauses Act.

PROMISSORY NOTE. See Stamp Act.

PUBLIC HEALTH — *urban sanitary authority: street, subsidence of, raising of: rights of owner of premises abutting*]—The plaintiffs were owners of houses abutting on the High Street in the town of Northwich. Northwich is situate on a bed of rock salt, and in consequence of the exhaustion of the salt by natural and other causes, the surface of the ground from time to time subsides to a considerable extent. In 1870 the surface of High Street had subsided; it was then raised to what was estimated to have been its former level, and the plaintiffs' houses were built at the same time. In 1876 the surface of the High Street, together with the plaintiffs' houses, had again subsided. The defendants, a local board, acting under the Public Health Act, 1875, restored the road to the level it was in 1870—a height which was found, having regard to the obstruction caused by occasional floods, to be reasonably necessary for the ordinary traffic, but putting floods out of the question, and having regard only to the inconvenience caused to the ordinary traffic in times other than the times of flood, was not necessary to so great an extent. The plaintiffs raised their houses to the same level by means of expensive machinery, and sought by arbitration proceedings under sections 179 and 180 of the Public Health Act, 1875, to recover from the defendants the expenses thereby incurred: —*Held*, that the plaintiffs could not recover from the defendants, for that they possessed no rights which the defendants had infringed; nor had the plaintiffs any right to compensation under section 308 of the Public Health Act, 1875, for that the acts done by the defendants were not "an exercise of any of the powers of the Act," but a fulfilment of their duty as surveyors of highways conferred on them by section 144. *Burgess and Another* v. *The Northwich Local Board*, 219

—— (38 & 39 Vict. c. 55), s. 150—sewering of streets: recovery of expenses incurred by local board: notice not in accordance with statute: private improvement expenses: summary procedure before justices. *Gould and Others* v. *The Bacup Local Board* (M.C. 44), 421

—— See Corporation. Landlord and Tenant.

PUBLIC WORSHIP REGULATION ACT—*disobedience to inhibition: power to signify for contempt: jurisdiction of court of arches: form of requisition, monition and inhibition: authority of forms given by rules and orders: official principal appointed by public worship regulation act, not bound by 127th canon: writ de contumace capiendo: costs*]—A representation under the Public Worship Regulation Act, 1874, having been made by the churchwardens against the incumbent of a parish to the Bishop of the diocese, as the Bishop and the Archbishop of the province were both interested in the patronage of the living, another Bishop, namely, the Bishop of E., was appointed by sign manual to act for the Bishop and Archbishop in the matter of the representation under section 16. The Bishop of E. having considered the representation and communicated with the parties in accordance with section 9, sent a requisition to the Judge to hear the case in London or Westminster, or within the diocese. The requisition, with the exception of an alteration, rendered necessary by the double patronage, followed the form given by the Rules and Orders of 1875. Though reciting that the parties had failed within the prescribed time to state their willingness to submit to the Bishop's directions, it did not allege that a copy of the representation had been sent to the incumbent, or that he had been required to state whether he would submit to the Bishop's directions in the matter of the representation:—*Held*, on objection to the requisition as conferring no jurisdiction on the Judge, that it was valid; because, first, the Bishop of E. was properly appointed within the meaning of section 16 to act for both Archbishop and Bishop; second, the requisition suffi-

ciently shewed that all preliminaries had been complied with; third, the incumbent could not object to the form of the requisition if the facts essential to the jurisdiction existed; fourth, the requisition need not name the particular place of hearing, only the limits within which the hearing is to be. The Rules, Orders and Forms issued by Her Majesty in Council, with the advice of certain persons, under section 19 of the Public Worship Regulation Act, 1874, for regulating the procedure under the Act, being sanctioned by Parliament, are of statutory authority, and proceedings which follow such Rules and Orders and the forms thereby prescribed cannot be impeached. Lord Penzance, when appointed under section 7 of that Act as "the Judge of the Provincial Courts of Canterbury and York," became, on the occurrence of a vacancy, *ex officio* Official Principal of those Courts, and was therefore under no obligation to take the oath or subscribe the articles as required of every "chancellor, commissary and official" by the 127th of the Canons of 1603–4. Such Judge on becoming Official Principal of the Provincial Court of Canterbury (the Court of Arches) was not thereby constituted a new Court with a new jurisdiction, but succeeded to and his Court was merged in the old Court of Arches, with all the jurisdiction and authorities inherent in that Court, and with such additional jurisdiction as is conferred by the Act. A monition, commanding an incumbent to abstain from certain specified unlawful practices and other practices and matters of a like nature, is good in form; and on proceedings taken against the incumbent for disregarding the monition in respect of matters alleged to be of a like nature with those specifically named, it is a question of fact, to be determined by the Judge or Bishop who issued the monition, whether the matters complained of are of a like nature, and from his finding an appeal will lie. The Petty Bag Office and Enrolment Amendment Act, 1849 (12 & 13 Vict. c. 109), s. 26, repeals so much of the 5 Eliz. c. 23. s. 3, and 53 Geo. 3. c. 127. s. 1, as requires the writ *de contumace capiendo* to be issued in term time, but does not repeal so much of the same Acts as requires that writ to be brought into Court and opened in the presence of the Justices. By the 13th section of the Public Worship Regulation Act, 1874, obedience to a monition under the Act is to be enforced by an order of inhibition, and in certain events the living is to become void, but the section does not point out how obedience to the inhibition is to be enforced. An incumbent having disregarded an order of inhibition issued against him under the 13th section of the Act, the Judge issued a *significavit* against the incumbent for contempt, and a writ *de contumace capiendo* was issued under which the incumbent was arrested and imprisoned. The writ was issued and made returnable, and was enrolled and delivered of record in the Crown Office out of term, and was not brought into or opened in Court. On writ of *habeas corpus* by the incumbent to be discharged from custody on the ground (amongst others) that the Judge had no power to signify, and that the formalities required by 5 Eliz. c. 23, and 53 Geo. 3. c. 127, had not been complied with,—*Held*, that the Judge in the exercise of his general jurisdiction had power to signify, and that the writ had been properly issued; but *Held*, that as the writ had not been brought into Court and opened in the presence of the Justices, the arrest thereunder was bad, and that the incumbent was entitled to his discharge. *Held* also, that the proceedings in respect of which the incumbent was arrested being civil and not criminal, he was entitled to his costs under the writ of *habeas corpus*. *In re the Rev. T. P. Dale. The Queen* v. *Lord Penzance. In re the Rev. R. W. Enraght. The Queen* v. *Lord Penzance*, 234

RAILWAYS CLAUSES CONSOLIDATION ACT—1863 (26 & 27 *Vict. c.* 92), *s.* 27: *revision of working agreement: regulation of railways act*, 1873, *s.* 10: *jurisdiction of railway commissioners: prohibition*]—In 1858 two railway companies entered into a working agreement under a special Act, which enabled them so to do, with this proviso, "That no such agreement shall be valid until the same has been approved, both as to the period of its continuance and in other respects, by the Board of Trade." The 17th clause of the agreement empowered the Board of Trade once in every ten years "to cause this agreement to be revised, but in the interest of the public only." In 1873 the powers and duties of the Board of Trade "under any special Act with respect to the approval of working agreements between railway companies" were transferred to the Railway Commissioners:—*Held*, that the power given under clause 17 of the agreement to the Board of Trade was a power with respect to the approval of a working agreement, and was also a power under a special Act, so that the Railway Commissioners had power to revise the agreement, and to consider it in the interest of the public. *The Corporation and the Chamber of Commerce of Huddersfield* v. *The Great Northern Rail. Co., and the Manchester, Sheffield and Lincolnshire Rail. Co.* 587

RAILWAY COMMISSIONERS—*jurisdiction of: regulation of railways act: railway company: duty of, under railway and canal traffic act: prohibition: demurrer*]—The 2nd section of the Railway and Canal Traffic Act (17 & 18 Vict. c. 31) requires every railway and canal company to afford, according to their respective powers, all reasonable facilities for the receiving, forwarding and delivering of traffic upon and from their railways and canals. Section 3 empowers any company or person complaining of anything done or any omission made in violation or contravention of the Act by such companies, to apply for relief to the Court of Common

Pleas. The Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), transferred to the Railway Commissioners all the jurisdiction of the Court of Common Pleas in the above-mentioned matters. A complaint was made to the Railway Commissioners pursuant to the provisions of these Acts by the Corporation of H. as to the condition of the stations of the S. E. Railway Company at H. and L., and application was made for an order requiring the railway company to enlarge the station at H., to provide better booking-office, waiting-room, refreshment-room and general accommodation therein; to alter the existing platforms and to provide new ones; to improve the warehouse and cattle accommodation; and at L. to enlarge the platform and to provide a new road of approach. The commissioners delivered a judgment setting out the order which they proposed to make. This order, the operation of which was suspended for a named time, required the railway company to extend the platform accommodation at H. according to a specified plan, to cover over the platforms and part of the carriage yard, to add four waiting-rooms of a specified size, to reserve a portion of the station for refreshments, to increase the accommodation for the delivery of tickets, and to increase and improve the accommodation for cattle. With respect to the station at L. the order required the company to increase and improve the platform and waiting-room accommodation, to cover over the bridge, to make fresh openings into and to widen the road of approach to that station. The railway company declared generally in prohibition on the ground that the commissioners had no jurisdiction to hear the application or any part thereof. The commissioners demurred generally to the whole of the declaration:—*Held* (reversing the judgment of the Queen's Bench Division), that the subject-matter of the complaint and application was not beyond the scope of the jurisdiction of the commissioners, but that the commissioners had no power peremptorily to order particular works to be executed according to a specified plan. (By LORD SELBORNE, L.C., and LORD COLERIDGE, C.J.), that the orders with respect to the platforms and goods yard at H., and the approach road at L., were in excess of jurisdiction; that the orders as to refreshment accommodation and the covering over of platforms, carriage yard and bridge, were not "facilities" within the statute; but that the orders as to booking-office, waiting-room and cattle accommodation were such facilities, and that the demurrer ought to be allowed generally. (By BRETT, L.J.), that all the orders except those relating to the cattle accommodation and the delivery of tickets at the booking-office, were in excess of jurisdiction, that the judgment on the demurrer should be distributive, and that the demurrer should be overruled as to all the orders except [illegible] *Eastern Rail. Co.* v. *The Railway Commissioners*; *in re the Mayor and Corporation of* [illegible] 201

RAILWAY COMMISSIONERS (continued)—*jurisdiction of: charge by railway in excess of parliamentary limit: reasonable facilities: railway and canal traffic act: regulation of railways act*]—A complaint having been made to the railway commissioners of fares demanded by a railway company which exceeded by a small amount the sum fixed for such fares by Act of Parliament,—*Held* (affirming the judgment of the Queen's Bench Division), that the railway commissioners had no jurisdiction to entertain the application, and that a writ of prohibition ought to issue; for that, although the sums demanded for fares were in excess of the statutory limit, still there was no allegation that the sums were so fixed and so demanded with a view to prevent passengers from travelling or trains from running, nor was there any allegation or evidence that the fares so fixed and demanded did in fact have that effect. *The Great Western Rail. Co.* v. *The Railway Commissioners; in re Brown* (App.), 483

—— See Railway Clauses Act.

RAILWAY COMPANY—*duty to erect and maintain fences: protection for owners of adjoining lands: release by owner of right of protection: effect on right of occupier: railways clauses consolidation act*]—The plaintiff was in 1846, and continued to the time of action brought, tenant from year to year of certain lands, part of which the defendants acquired in 1847 for the purposes of their line. The defendants then paid the landlord of the plaintiff compensation for his statutory right to have his land fenced off from the railway, and he released them from all obligation to fence. The defendants planted a hedge, with posts and rails on either side, and made a ditch between their line and the land occupied by the plaintiff. This fence was not kept in repair, in consequence of which a cow belonging to the plaintiff fell into the ditch and was killed. In an action for the value of the cow,—*Held* (affirming the judgment of the Common Pleas Division), that the defendants were liable to the plaintiff, as the agreement between his landlord and the defendants did not take away his statutory right to have a fence maintained pursuant to the provisions of section 68 of the Railways Clauses Consolidation Act, 1845. *Corry* v. *The Great Western Rail. Co.*, 313 (App.), 386

—— *execution against rolling stock or plant: railway companies act: railway closed for traffic*]—Rolling stock and plant of a railway company, whose railway had fallen into disrepair, and who had been obliged by financial difficulties to close their railway, were seized in execution:—Held, that 30 & 31 Vict. c. 127. s. 4, restricting execution against the rolling stock and plant of a railway company, was not confined to a railway which was open for traffic, but

applied. although the railway had been closed for traffic and it was doubtful whether it would ever be re-opened. *The Midland Waggon Co.* v. *The Potteries, Shrewsbury and North Wales Rail. Co.*, 6

—— *negligence: passenger's luggage: liability apart from contract*]—The G.W.R. issue through tickets from Stourbridge on their line to Euston (*via* Birmingham) on the defendants' line. The journey from Stourbridge to Birmingham is by the G.W.R., and from Birmingham to Euston by the defendant railway. The plaintiff travelled with one of these tickets, and his portmanteau was labelled and carried in the van of the G.W.R. as far as Birmingham. At Birmingham he changed into the defendants' train, and his portmanteau was seen to be transferred into the van of the defendants' train, but at Euston it was not forthcoming, and was not recovered till three months afterwards, when its contents were injured by contact with some perishable articles he had packed inside it. The plaintiff having sued the defendant company for the delay and injury to his goods, it was,—*Held*, that the action was maintainable in accordance with the principle of *Foulkes* v. *The Metropolitan Railway Company* (49 Law J. Rep. C.P. 361; Law Rep. 5 C.P. D. 157), for the defendants, having received the portmanteau to forward it, had committed a breach of duty in neglecting to do so, for which they were responsible, apart from any question of contract. *Hooper* v. *The London and North Western Rail. Co.*, 103

Semble, Mytton v. *The Midland Railway Company* (4 Hurl. & N. 615; 28 Law J. Rep. Exch. 385) is overruled by *Foulkes* v. *The Metropolitan Railway Company* (49 Law J. Rep. C.P. 361; Law Rep. 5 C.P. D. 157). Ibid.

—— by-law, divisibility of: passenger travelling in a first-class carriage with second-class ticket: intention to defraud: 8 Vict. c. 20. ss. 103, 108, 109. *Dyson* v. *The London and North Western Railway Company* (M.C. 78), 494

—— See Corporation. Revenue.

RAILWAY PASSENGER DUTY—*cheap trains act* (7 & 8 *Vict. c.* 85. *ss.* 6 *and* 9): *exemption from duty: third-class passenger*]—To constitute a train complying in other respects with the statutory requirements a cheap train within section 6 of 7 & 8 Vict. c. 85, entitling the railway company to exemption from passenger duty under section 9, no third-class passenger must be charged more than the parliamentary fare. *The Attorney-General* v. *The Metropolitan Rail. Co.*, 573

—— *duty added to fare: extra charge for sleeping accommodation*]—By 5 & 6 Vict. c. 79 duty is payable on all sums received or charged for the hire, fare or conveyance of passengers upon any railway. A private Act fixed the maximum rates to be charged by the defendants for the conveyance of passengers, the tolls for the use of carriages and every other expense incidental to the conveyance aforesaid, except government duty. The defendants added the duty to the fares, which were fixed in some cases at the maximum and in some cases below the maximum rate allowed, and charged passengers the sum total as the price of a ticket. An information having been laid by the Crown claiming duty on the sum so added to the fare,—*Held* (affirming the judgment of the Exchequer Division). that the Crown was entitled to duty upon the sum so added. The Crown, by the same information, claimed duty on sums charged by the defendants to first-class passengers in addition to the ordinary fare, for the use of a sleeping carriage provided with beds, lavatories and attendance, in which such passengers could remain undisturbed till such hour as they might choose to be called, even though they had arrived at their journey's end at an earlier hour. *Held* also (affirming the judgment of the Exchequer Division), that the Crown was entitled to duty upon the sum charged for the extra accommodation. *The Attorney-General* v. *The London and North Western Rail. Co.* (App.), 170

RATING—successive occupation: liability of outgoing occupier: bridge acquired by board of works: liability to rate: beneficial occupation: 32 & 33 Vict. c. 41. s. 16: 40 & 41 Vict. c. xcix. *Hare* v. *The Churchwardens and Overseers of Putney* (App.) (M.C. 81), 535

REALTY—Agreement to devise. See Contract.

REASONABLE FACILITIES. See Railway Commissioners.

RECEIPT AND INVENTORY. See Bill of Sale.

RECEIVER. See Judgment Creditor.

REGISTER. See Ship and Shipping.

REGISTRATION. See Bills of Sale.

REPUTED OWNERSHIP. See Bankruptcy.

RETAINER. See Solicitor.

RETURNING OFFICER. See Municipal Election Petition.

REVENUE—*succession duty: mortgage of base fee: resettlement*]—E. B. being seised in fee, granted estates to trustees to the use of himself for life, with remainder to his sons successively in tail male, remainder to his daughters in tail general.

The grantor died, leaving two sons, Edward (a lunatic) and Reginald, and one daughter, Frances. Reginald conveyed, subject to Edward's estate, to the use of himself in fee, and then mortgaged the base fee thus created to a bank for 124,000*l.*, being more than the fee-simple value of the property. Frances married, having bound herself by ante-nuptial settlement to settle any real property which she should acquire in her own right during the marriage on herself for life, with remainder to her children. Subsequently, by an arrangement between all the persons interested, Reginald, Frances and her husband, with the consent of the Lord Chancellor, as protector of the settlement, conveyed the property to trustees in fee, subject to Edward's estate tail, discharged of the mortgage and Reginald's equity of redemption, upon trust, after the death of Edward, to raise 37,000*l.* by sale, and after paying off the mortgage to convey to the use of other trustees, in trust for Frances for life, with remainder to her husband for life, with remainder to their sons in succession in tail male, with remainders over. Edward died without issue. Frances and her husband died leaving the defendant their eldest son:—*Held* (affirming the judgment of the Exchequer Division), that the defendant, for the purposes of succession duty, derived his succession from his mother and not from Reginald. *The Attorney-General* v. *Dowling* (App.), 192

Revenue (continued)—*succession duty: appointment by donee of general power: predecessor: succession duty: legacy duty*]—A testator bequeathed certain funds in trust for his daughter for life, with remainder to such persons as she should by deed appoint, and in default of appointment to her next-of-kin. The testator died before the passing of the Succession Duty Act, 1853, and legacy duty at the rate of one per cent. was paid on the above trust funds. The daughter, after the passing of the Succession Duty Act, 1853, exercised the power in favour of her nieces, grandchildren of the testator:—*Held*, first, that the nieces were liable to a duty of one per cent. as on a succession derived from the testator, who was the "predecessor" within section 2 of the Succession Duty Act, 1853; secondly, that the payment of the legacy duty had not discharged the nieces from the obligation to pay succession duty. *The Attorney-General* v. *Mitchell*, 406

Riot—felonious demolition of houses: liability of hundred: 7 & 8 Geo. 4. c. 31. s. 2. *Drake* v. *Foottit*. *Drake* v. *Hankin* (M.C. 141), 762

Risk. See Marine Insurance.

Sale of Food and Drugs Acts, 1875, 1879 (38 & 39 Vict. c. 63. s. 14, and 42 & 43 Vict. c. 30. s. 3)—consignor and consignee: adulterated milk in course of transit: no delivery of sample to agent of seller. *Rouch* v. *Hall* (M.C. 6), 277

Sale of Goods—*manufacturer: contract for sale of goods by manufacturer: implied term that goods are of manufacturer's own make: evidence: custom*]—In a contract to supply goods by a firm, who manufacture, but do not otherwise deal in the goods, there is, where no usage or custom to the contrary is shewn, an implied term that the goods shall be of the firm's own make. The plaintiffs, a firm who were manufacturers of, but did not otherwise deal in, iron goods, by a contract in writing agreed to supply to the defendants a quantity of ship-plates of a specified quality and description by monthly deliveries at the defendants' shipyard. The contract was headed with the name of the plaintiffs' works, and had their trade-mark on its margin, and it contained a clause providing that in case of any strike of workmen causing a stoppage of the works, the supply of the plates might be suspended during the continuance of the strike. Before the deliveries were completed the plaintiffs closed their works and proposed to complete the contract by delivering plates of the specified quality and description, but manufactured by other firms. The defendants having refused to accept delivery of these plates, the plaintiffs sued them for breach of contract, and at the trial the defendants tendered evidence of a custom in the iron trade that the buyer of iron plates from a firm of manufacturers of them is, in the absence of any stipulation to the contrary, entitled to require plates to be supplied of the seller's own make:—*Held*, that the evidence of custom did not contradict the written contract, and was therefore admissible. *Held* also (by Brett, L.J., and Cotton, L.J.; Bramwell, L.J., dissenting), that the defendants were entitled to refuse to accept delivery of the plates which were not of the plaintiffs' own manufacture. Judgment of Manisty, J., reversed. *Johnson* v. *Raylton, Dixon & Co.* (App.), 753

—— *successive deliveries: refusal to accept one delivery: right to cancel contract*]—The defendant in October, 1879, sold to the plaintiff 2,000 tons of iron, at 42*s.* per ton free on board—"Delivery, November, 1879, or equally over November, December and January next, at 6*d.* per ton extra." The plaintiff refused to accept any iron in November; the defendant then declared the contract to be cancelled. The plaintiff claimed delivery of one-third of the 2,000 tons in December and one-third in January. The defendant refused to deliver. In an action for non-delivery,—*Held* (by Bramwell, L.J., and Baggallay, L.J., Brett, L.J., dissenting), that the plaintiff's breach of contract in refusing to accept delivery in November entitled the defendant to cancel the contract, and therefore the defendant was not liable. Judgment of Field, J., and Manisty, J., reversed. *Hoare* v. *Rennie* (5 Hurl. & N. 19; 29 Law J. Rep. Exch. 73) approved. *Honck* v. *Muller* (App.), 529

SALVAGE. See Shipping.

SEA—bodies cast on shore: buried by parish: expenses from county: 48 Geo. 3. c. 75. ss. 1, 5, 6. *The Churchwardens of Woolwich* v. *Robertson* (M.C. 87), 544

SEAL, contract not under. See Corporation.

SESSIONS—right of appeal: notice of appeal: time: statutes 11 Geo. 2. c. 19. s. 5, and 12 & 13 Vict. c. 45. s. 1: Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), ss. 31 and 32: practice: regulations and conditions of appeal. *Reg.* v. *The Justices of Salop* (M.C. 72), 569

SET-OFF. See Pleading. Practice.

SHERIFF—*fieri facias: execution: sheriff's fees: sheriff's officer, right of to recover fees from solicitor of execution creditor*]—A sheriff's officer, who has executed a writ of *fieri facias*, cannot maintain an action for his fees against the solicitor of the execution creditor, where the solicitor has done nothing more than deliver the writ to the sheriff for execution. *Mayberry* v. *Mansfield* (9 Q.B. 754; 16 Law J. Rep. Q.B. 102) followed; *Brewer* v. *Jones* (24 Law J. Rep. Exch. 143; 10 Exch. 655) overruled. *Royle* v. *Busby & Sons* (App.), 196

—— *possession of: failure to withdraw sheriff from possession after composition: malice*]—In the absence of malice, no action will lie against a judgment creditor for not withdrawing the sheriff from possession after the judgment creditor has become bound by a composition of the debt. According to the statement of claim, A, having recovered a judgment against B, issued a writ of *fi. fa.*, under which the sheriff entered into possession of B's goods. B filed a petition of insolvency, and A proved for the amount of his judgment against B's estate. Resolutions for a composition were passed and registered. The sheriff refused to withdraw from possession without A's instructions, which were not given by A. No malice was alleged as against A:—*Held*, on demurrer, that in the absence of malice A's failure to instruct the sheriff to retire gave B no right of action against A. *Phillips* v. *The General Omnibus Co.*, 112

—— Sale by. See Bill of Sale.

SHIP AND SHIPPING—*general average: deck cargo: jettison: contribution*]—The defendants, shipowners, contracted with the plaintiff to carry his cattle, on deck, from New York to Portsmouth. No custom to carry cattle on deck existed. During the voyage the ship encountered heavy weather, and the master made a proper and necessary jettison of the cattle:—*Held* (reversing the judgment of the Queen's Bench Division), that the plaintiff was not entitled to contribution from the defendants in respect of his loss either by way of general average on ship, freight and cargo, or as a particular right to contribution from the defendants alone. *Wright* v. *Marwood*. *Gordon* v. *Marwood* (App.), 643

—— *necessaries for ship: authority of part owner to pledge other owner's credit: managing owner: entry on register*]—The Act 39 & 40 Vict. c. 80. s. 36 requires the name and address of the managing owner for the time being of every British ship to be registered at the custom-house of the ship's port of registry. In accordance with this provision W., in 1877, being the registered owner of certain shares in a ship, caused himself to be entered as managing owner. Subsequently, in 1879, the defendant became registered owner of certain other shares in the same ship, and agreed to sell them to W. for cash, informing W. that he had no intention of navigating the ship, and would not take any part in her management. W. thereupon agreed that the vessel should not leave port till the cash was paid. Shortly after, W., without the defendant's knowledge, ordered necessaries for the ship from the plaintiffs, and sent the ship to sea. The defendant had no interest in the adventure, of which he knew nothing, nor was he aware of the entry in the register of W. as managing owner, which still remained uncancelled. The plaintiffs had inspected the register before supplying the necessaries, and found the defendant's name as part owner. W. shortly after went into liquidation. On action brought to recover the price of the necessaries from the defendant,—*Held*, that W. had not in fact authority to bind the defendant, and that the fact of the entry on the register of W. as managing owner remaining uncancelled, was not a holding out by the defendant of W. as his managing owner, or as clothed with authority to bind any other owners than those who had in fact entrusted to him the management of the ship. *Frazer & Co.* v. *Cuthbertson*, 277

—— *pilotage: salvage*]—A ship bound for Barrow-in-Furness was driven by a violent storm to leeward of her port into Morecambe Bay. She could not beat to windward, but was being driven towards dangerous sands. Her captain and crew were ignorant of the locality, and unless guided to some part of the bay where she might take the ground or lie in safety she would inevitably have been lost. Some pilots, seeing her peril, put to sea, at considerable danger to their own lives, and being unable, through the height of the sea, to board the ship, they led her, by preceding her and signalling, to a safe anchorage in the bay. The ship had a pilot signal flying when the pilots put off. No mention was made from the ship of any port to which she should be steered; and she had not suffered any damage to her

The grantor died, leaving two sons, Edward (a lunatic) and Reginald, and one daughter, Frances. Reginald conveyed, subject to Edward's estate, to the use of himself in fee, and then mortgaged the base fee thus created to a bank for 124,000*l.*, being more than the fee-simple value of the property. Frances married, having bound herself by ante-nuptial settlement to settle any real property which she should acquire in her own right during the marriage on herself for life, with remainder to her children. Subsequently, by an arrangement between all the persons interested, Reginald, Frances and her husband, with the consent of the Lord Chancellor, as protector of the settlement, conveyed the property to trustees in fee, subject to Edward's estate tail, discharged of the mortgage and Reginald's equity of redemption, upon trust, after the death of Edward, to raise 37,000*l.* by sale, and after paying off the mortgage to convey to the use of other trustees, in trust for Frances for life, with remainder to her husband for life, with remainder to their sons in succession in tail male, with remainders over. Edward died without issue. Frances and her husband died leaving the defendant their eldest son:—*Held* (affirming the judgment of the Exchequer Division), that the defendant, for the purposes of succession duty, derived his succession from his mother and not from Reginald. *The Attorney-General* v. *Dowling* (App.), 192

Revenue (continued)—*succession duty: appointment by donee of general power: predecessor: succession duty: legacy duty*]—A testator bequeathed certain funds in trust for his daughter for life, with remainder to such persons as she should by deed appoint, and in default of appointment to her next-of-kin. The testator died before the passing of the Succession Duty Act, 1853, and legacy duty at the rate of one per cent. was paid on the above trust funds. The daughter, after the passing of the Succession Duty Act, 1853, exercised the power in favour of her nieces, grandchildren of the testator:—*Held*, first, that the nieces were liable to a duty of one per cent. as on a succession derived from the testator, who was the "predecessor" within section 2 of the Succession Duty Act, 1853; secondly, that the payment of the legacy duty had not discharged the nieces from the obligation to pay succession duty. *The Attorney-General* v. *Mitchell*, 406

Riot—felonious demolition of houses: liability of hundred: 7 & 8 Geo. 4. c. 31. s. 2. *Drake* v. *Foottit*. *Drake* v. *Hankin* (M.C. 141), 762

Risk. See Marine Insurance.

Sale of Food and Drugs Acts, 1875, 1879 (38 & 39 Vict. c. 63. s. 14, and 42 & 43 Vict. c. 30. s. 3)—consignor and consignee: adulterated milk in course of transit: no delivery of sample to agent of seller. *Rouch* v. *Hall* (M.C. 6), 277

Sale of Goods—*manufacturer: contract for s of goods by manufacturer: implied term th goods are of manufacturer's own make: evidenc custom*]—In a contract to supply goods by firm, who manufacture, but do not otherwi deal in the goods, there is, where no usage custom to the contrary is shewn, an impli term that the goods shall be of the firm's ow make. The plaintiffs, a firm who were man facturers of, but did not otherwise deal in, ir goods, by a contract in writing agreed to supp to the defendants a quantity of ship-plates of specified quality and description by month deliveries at the defendants' shipyard. T contract was headed with the name of t plaintiffs' works, and had their trade-mark its margin, and it contained a clause providi that in case of any strike of workmen causing stoppage of the works, the supply of the plat might be suspended during the continuance the strike. Before the deliveries were co pleted the plaintiffs closed their works and pr posed to complete the contract by deliveri plates of the specified quality and descriptio but manufactured by other firms. The defe dants having refused to accept delivery of the plates, the plaintiffs sued them for breac of contract, and at the trial the defendan tendered evidence of a custom in the iron tra that the buyer of iron plates from a firm manufacturers of them is, in the absence of a stipulation to the contrary, entitled to requi plates to be supplied of the seller's own mak —*Held*, that the evidence of custom did n contradict the written contract, and was ther fore admissible. *Held* also (by Brett, L.J., Cotton, L.J.; Bramwell, L.J., dissenting), t the defendants were entitled to refuse to ac delivery of the plates which were not o plaintiffs' own manufacture. Judgmen Manisty, J., reversed. *Johnson* v. *Ra Dixon & Co.* (App.), 753

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Poor Law (continued)—settlement: residence for three years: "parish": 39 & 40 Vict. c. 61. s. 34. *Plomesgate Union* v. *West Ham Union* (M.C. 51), 446

—— settlement: children under sixteen: 39 & 40 Vict. c. 61. s. 35. *Hollingbourne Union* v. *West Ham Union* (M.C. 74), 544

—— settlement: irremovability: penitentiary supported by subscriptions: *bona fide* charitable gift: 54 Geo 3. c. 170. s. 6; 9 & 10 Vict. c. 66. s. 1; 39 & 40 Vict. c. 61. s. 34. *Fulham Union* v. *Isle of Thanet Union* (App.) (M.C. 101), 544

—— settlement: illegitimate children: subsequent marriage of mother: derivative settlement: 39 & 40 Vict. c. 61. s. 35: retrospective effect. *Fulham Union* v. *Portsea Union* (M.C. 144), 779

Postmaster-General. See Telegraphs.

Practice—*action for the recovery of land: pleading: rules of court*]—Under the Rules of Court, Order XIX. rule 15, the mere statement by a defendant to an action for the recovery of land that he is in possession, puts the plaintiff to the proof of his case. So held by the Court of Appeal. *Danford* v. *M'Anulty* (App.), 294

—— appeal: public health act, 1875 (38 & 39 Vict. c. 55), ss. 91, 94, 95, 96, 251: appeal from order of justices to abate nuisance: "criminal cause or matter": the judicature act, 1873, s. 47. *Ex parte Whitchurch; in re An order made by Justices of Nottingham* (M.C. 99), 664

—— *attachment of debts: garnishee order: partnership firm: rules of court*]—A garnishee order will not be granted on partners in the name of their firm. *Walker* v. *Rooke*, 470

—— *award: costs to follow event: meaning of "event"*]—Where costs are to follow the event the word should be read distributively, as if it were "events." Where an action, in which the defendant counter-claimed, and all matters in difference were referred by an order providing that costs should follow the event, unless otherwise ordered, and the arbitrator awarded that a certain balance was due from the plaintiff to the defendant,—*Held* (affirming the judgment of the Queen's Bench Division), that the arbitrator ought to have found the issues specifically, and that the award must be referred back to him for that purpose. *Ellis* v. *Desilva* (App.), 328

—— *bringing in third party: position of third party when the whole matter cannot be disposed of by one trial: judicature act*, 1873, *s.* 24. *sub-s.* 3: *rules of court, order XVI. rules* 17 *and* 18]—In an action against the defendants for breach of contract they served P., as third party, with a notice under rule 18 of Order XVI. The defendants then applied to the Court to give directions as to mode of trial; but the Court held that the matters could not all be decided at one trial, and declined to give any directions. Pleadings having been, by direction of the Queen's Bench Division, delivered between the defendants and the third party, the defendants then gave the third party notice of trial, the action between the plaintiff and the defendants having been already tried:—*Held* (affirming the judgment of the Queen's Bench Division), that as the Court had decided that all the questions could not be determined in one trial, the third party ought to be dismissed from the action, and that the notice of trial should therefore be set aside. *Schneider* v. *Batt & Co. Pawels (third party)*, (App.), 525

—— *costs: claim and counter-claim: rules of court*]—In an action for a liquidated money claim, after trial with a jury, judgment was entered for the plaintiff on his claim, but for the defendants for a balance on a counter-claim for goods sold, the amount of which exceeded that of the claim. The judgment directed that the "plaintiff should recover against the defendants his costs of suit, and that the defendants recover the costs of the counter-claim":—*Held* (reversing the judgment of the Exchequer Division), that the plaintiff was entitled to the general costs of the cause. *Baines* v. *Bromley* (App.), 465

—— *costs: taxation of costs where plaintiff succeeds only on part of his claim: apportionment of costs*]—In an action to recover the price of work done in and about a house the plaintiff claimed for three distinct items of work, and recovered a sum of 37*l.* in respect of one of the items. An order was thereupon made "that the plaintiff recover against the defendant such costs as one of the Masters may find that he has rightly incurred in recovering the above amount to be taxed; and that the defendants recover against the plaintiff such costs as they have rightly incurred in defending themselves on those points on which they have succeeded to be also taxed":—*Held* (reversing the decision of the Common Pleas Division), that upon the true construction of the order the plaintiff was entitled, upon taxation, to be allowed the general costs of the cause, excluding only such costs as were applicable exclusively to the two items on which he failed, and that the defendants were entitled to be allowed such costs only as were incurred exclusively with respect to the two items on which their defence was successful. *Sparrow* v. *Hill* (App.), 675

—— *costs taxed on higher scale: rules of supreme court (costs)*]—Judgment for nominal damages was obtained by the plaintiff in an action for an

alleged trespass on the part of the defendant who sought to justify under a claim of right. An injunction was also claimed and granted. The trial lasted a long time, and involved much expense, and a large body of evidence was adduced as to the title to the property on which the trespass was alleged to have been committed:—*Held*, not a case in which a Court would exercise the discretion given to it by Rules of the Supreme Court (Costs), Order VI. rule 3, and order the costs to be taxed on the higher scale. *Held*, further, that the discretion given by that order is not limited to costs in actions in the Chancery Division or to actions involving matters of equity, but applies to all actions. *The Duke of Norfolk* v. *Arbuthnot*, 384

—— *costs following the event: claim overtopped by counter-claim: costs of the cause: rules of the supreme court*]—In an action for a liquidated money claim, after a trial with a jury, judgment was entered for the plaintiff on his claim, but for the defendants on a similar counter-claim (for goods sold) overtopping the claim. A Master taxed to the defendants the costs of the cause, and to the plaintiff only the costs of witnesses to establish his claim:—*Held*, upon application by the plaintiff to review the taxation, and objection that the plaintiff was entitled to all costs of the cause incurred in respect of the claim, and the defendants only to such costs of the cause as were incurred in respect of the counter-claim, that the taxation was right. *Baines* v. *Bromley*, 129

—— *costs: order depriving of: application for: appeal from: alternative jurisdiction of judge and court: rules of court, order LV.*]—The plaintiffs, after a trial with a jury, recovered 6*l.* beyond 100*l.* paid into Court. The Judge immediately gave judgment for the plaintiffs 105*l.* without costs. Counsel on both sides were present. No application was made, and no cause was shewn. Counsel for the defendants intended to apply to deprive the plaintiffs of costs had not the Judge anticipated him. The Exchequer Division rescinded the order:—*Held* (by the Court of Appeal), that the appeal from the order of the Exchequer Division was not an appeal from an interlocutory order; that the appeal (if any) from the order of the Judge was to the Court of Appeal, and not to the Divisional Court. *Held* also (reversing the judgment of the Exchequer Division), that the jurisdiction given by Order LV. to the Judge or the Court is an alternative and not an appellate jurisdiction, and that the circumstances of the case shewed a substantial compliance with the requirements of Order LV. as to application at the trial. *Marsden* v. *The Lancashire and Yorkshire Rail. Co.* (App.), 318

—— *county courts act: general request to county court judge to take notes: signature of judge: county court rules: adjournment of trial*]—In order to entitle a party to obtain signature of a County Court Judge's notes under section 6 of the County Courts Act, 1875, there should be a request to make a note of the questions of law intended to be raised. A mere general request to the Judge upon a case coming on for hearing to take notes of the evidence is not sufficient. *Morgan* v. *Rees* (App.), 491

The parties to an action in a County Court cannot adjourn the trial by consent, under Order XXXVII. rule 26 of the County Court Rules, 1875, without the leave of the Judge. Ibid.

—— *discovery: inspection of documents: privilege: sufficiency of affidavit*]—An affidavit of documents made pursuant to Order XXXI. rule 12 is conclusive against the party seeking discovery, not only generally, but also in respect of the assertion by the party making the affidavit that certain documents, admitted to be in his possession and to be relevant, relate solely to his own case, and not to the case of the other party, and do not tend to support it, and that to the best of his knowledge, information and belief they do not contain anything impeaching his own case. Where therefore an affidavit claimed privilege from production and inspection for documents on the above ground without any further description of their character,—*Held* (by DENMAN, J., and POLLOCK, B., *dissentiente* WILLIAMS, J.), that, on the authority of *Taylor* v. *Batten* (48 Law J. Rep. Q.B. 73) and *Jones* v. *The Monte Video Gas Company* (49 Law J. Rep. Q.B. 627), inspection of such documents could not be ordered. *Held* (by the Court of Appeal, affirming the decision of the Queen's Bench Division), that, both on principle and on the construction of rule 11 of Order XXXI., inspection ought not to be ordered. *Bewicke* v. *Graham* (App.), 396

—— *incumbents' resignation act*, 1871 (34 & 35 *Vict. c.* 44), *s.* 10: *pension of retired clergyman: set-off: counter-claim*]—In an action brought by a retired clergyman against his successor in the incumbency for arrears of the pension allowed under the Incumbents' Resignation Act, 1871, the defendant claimed to set off against such arrears, and also to recover, by way of counter-claim, a judgment debt due to him from the retired clergyman:—*Held* (reversing the judgment of LORD COLERIDGE, C.J.), that the pension was inalienable, and therefore the defendant's claim could not be set off, and the plaintiff was entitled to a separate and independent judgment for the arrears due. *Held* (by BAGGALLAY, L.J., and LUSH, L.J.), that the defendant's claim was in fact a set-off, and must be dismissed. *Held* (by BRAMWELL, L.J., dissenting), that the defendant's claim was a counter-claim, on which he was entitled to judgment. *Gathercole* v. *Smith* (App.), 681

—— indictment for obstruction of highway: new trial: acquittal of defendant: misdirection on criminal trial. *Reg.* v. *Duncan* (M.C. 95), 522

PRACTICE (continued)—*interpleader issue: mode of trial: "action," meaning of: judicature act: rules of court*]—An interpleader issue having been directed, the issue was drawn up for trial with a jury, and the trial took place before a Judge and a jury. A new trial having been ordered, the plaintiff gave notice of trial before a Judge alone. The defendant did not give a counter notice, but objected at the trial to the jurisdiction of the Judge to try the case without a jury:—*Held*, that it was not competent for the plaintiff to give such notice, and that the issue could not be tried by a Judge without a jury. *Hamlyn* v. *Betteley* (App.), 1

An interpleader issue is not an action within the meaning of section 100 of the Judicature Act, 1873, and the rules of Court made under that Act. Ibid.

——*judicature acts: mortgage: lottery: penalty*]—The time for appealing from an order of a Judge in chambers expired in the long vacation, during which no Divisional Court was sitting:—*Held*, that the time ought to have been enlarged almost as of course, though execution had been levied under the order. The defendant applied to a Judge for an enlargement of time, which was refused. He then appealed against the order to a Divisional Court. By consent the appeal was treated as being also an appeal from the refusal to enlarge the time. The Divisional Court dismissed the appeal on the merits. An appeal to the Court of Appeal was dismissed, on the ground that there was no appeal from the order refusing to enlarge the time:—*Held*, that the Court of Appeal were bound to treat the question of time as open, it having been treated as open in the Court below. In an action by a mortgagee in possession against a mortgagor for the mortgage debt, the writ was specially indorsed for a certain sum. Upon an affidavit that there was no defence, notwithstanding counter affidavits alleging questions of account, an order was made that unless the defendant paid 5,000*l.* into Court by a given day, the plaintiff might sign judgment. Judgment was signed and execution levied under the order:—*Held*, that the defendant ought to have been allowed to defend, for the purpose of taking an account, without any payment into Court, and that judgment ought to have been signed as security only for what should be found due on the account, without power to issue execution except by leave of the Court, the defendant being required as a condition to consent to the immediate taking of such account. *Wallingford* v. *The Mutual Society* (H.L.), 49

A provision in a mortgage making the whole debt due on failure to pay one instalment, is not in the nature of a penalty, but may be enforced. Ibid.

A society formed for making advances to its members, which selects by lot the members who are to receive advances, is not illegal under the Lottery Acts. Ibid.

——*notice to third parties: directions as to mode of trial: judicature act*]—In an action against the defendants for non-delivery of certain iron rods of the quality contracted for, the defendants proceeded to bring in H., a foreigner, as a third party, under Order XVI. rule 18, on the ground that they had contracted with him in respect of the iron rods so supplied and upon the same terms. It was not denied that the clause as to quality was the same as between the plaintiff and the defendants on the one hand and the defendants and H. on the other. The plaintiff, however, relied upon certain admissions made by the defendants as regards the subject-matter of the contract, which shewed that the action was, as between the plaintiff and the defendants, an undefended one. It further appeared that the case had already been set down for trial, and would be reached in a day or two. Upon application made by the defendants, under Order XVI. rule 21, to give directions as to the mode of trial,—*Held*, that the Court had power to consider whether the case was one in which a third party ought to be allowed to come in, and ought to refuse the application where the effect of such third party being introduced would be to embarrass and delay the plaintiff. *Schneider* v. *Batt & Co.* (App.), 389

——*order dismissing action: extension of time for appealing from: jurisdiction: discretion: order*]—A Master having made an order dismissing an action unless the plaintiff filed an answer to interrogatories within seven days, the plaintiff swore his affidavit in answer on the seventh, but did not file it until the eighth day from the date of the order. After taking out intermediate summonses to extend the time for delivering notice of trial, and to rescind the Master's order, the plaintiff took out two summonses—one to extend the time for appealing from that order, the other to vary it by extending the time for answering interrogatories; and a Judge made the order asked for on each of these two summonses:—*Held* (affirming the judgment of the Common Pleas Division), that the Judge had jurisdiction to make the order under rule 6 of Order LVII.; and that no sufficient ground had been shewn for interfering with the discretion exercised. *Carter* v. *Stubbs* (App.), 161

——*parties: bankruptcy of defendant: trustee in bankruptcy: order L. rule* 2]—In an action upon a bill of exchange against a sole defendant, after issue joined, the defendant filed his petition for liquidation, and a trustee was appointed:—*Held* (affirming the judgment of the Queen's Bench Division), that the trustee ought not to be made a defendant under Order L. rule 2. *Barter & Co.* v. *Dubeux & Co.* (App.), 527

——*pleading: embarrassing statement of claim: breach of promise of marriage*]—The statement of claim in an action for breach of promise of

marriage stated the promise and breach, and alleged that "the plaintiff, relying on the said agreement, permitted the defendant to debauch and carnally know her, whereby the defendant infected the plaintiff with a venereal disease": —*Held* (by the Common Pleas Division), that this allegation must be struck out, as tending to prejudice and embarrass the fair trial of the action. *Held* (by the Court of Appeal, reversing the decision of the Common Pleas Division), that the allegation could properly be pleaded under Order XIX. rule 4, and ought not to be struck out under Order XXVII. rule 1. *Millington* v. *Loring* (App.), 214

—— *taxation of costs where plaintiff succeeds only on part of his claim: apportionment of costs which cannot be separated: allowance of those which can: rules of the supreme court*]—Where a plaintiff succeeded on one out of three heads of his claim, and an order was made that "the plaintiff be allowed such costs as one of the Masters may find that he has rightly incurred, in recovering a certain amount, and the defendants be allowed such costs as they have rightly incurred in defending themselves on the points on which they have succeeded," the principle that should be followed in taxing the costs is to allow to each party the costs of such items of the claim as he has succeeded on, so far as they can be separated, and to apportion the general costs of the cause which cannot be separated, and not to give those general costs to the plaintiff because he has partly succeeded on his claim. *Sparrow* v. *Hill*, 410

—— *writ: time from which it dates: issued same day as cause of action: fractions of a day: fiction of law*]—A statement of claim alleged that the cause of action accrued on the 2nd of July, and before the issuing of the writ, which as a fact was issued the same day. Demurrer on the ground that the writ being a judicial act must be taken to date from the earliest moment of the day, and therefore to have been issued before the cause of action accrued:—*Held*, that the doctrine on which the demurrer was founded did not apply, and that the plaintiff was entitled to shew that the cause of action accrued before the issuing of the writ. *Clarke* v. *Bradlaugh*, 678

—— *writ for service out of jurisdiction: slander: publication abroad with damage in England: order II. rule 4; order XI. rule 1*]—Where a charge of misconduct made out of the jurisdiction against an officer of an English vessel to the captain is reported to the owners in England, who dismiss the officer, "the act or thing for which damages are sought to be recovered" is not done within the jurisdiction, so as to admit of a writ in an action for slander against the person making the charge being issued for service out of the jurisdiction under Order XI. rule 1. *Bree* v. *Marescaux* (App.), 676

—— See Chose in Action. County Court. Criminal Law. Municipal Election. Husband and Wife.

PRESCRIPTION. See Lateral Support.

PRINCIPAL AND AGENT—*building society: certified rules: borrowing in excess of authority: liability of society and directors*]—By the certified rules of an unincorporated building society the directors were empowered to borrow money up to a prescribed limit. The course of business was for the treasurer of the society to receive the loan and give the lender a receipt, together with an undertaking on behalf of the directors to give a promissory note of the directors for the amount; and these notes were subsequently exchanged for the receipt. The plaintiffs advanced 100*l.* to the society, paying the amount to the treasurer, and receiving from him a receipt and undertaking. This sum was never paid over to the society, but was appropriated by the treasurer to his own use, and no promissory note for the amount was procured for the plaintiffs. At the time of this loan the society had borrowed in excess of the limit allowed by the rules. The plaintiffs having sued the society and the directors to recover the amount, —*Held*, that the individual directors were personally liable to the plaintiffs for the amount of the loan; but that the society was not so liable. *Chapleo* v. *The Brunswick Benefit Building Society and Smith* (App.), 372

—— *relation of sub-agent to undisclosed principal: consignor and consignee: right to follow proceeds of consignment in the hands of third parties*]—The plaintiffs sent goods to London to M. & T. for sale. M. & T., having no London house, sold the same through the defendants, indorsing to them the bills of lading which the plaintiffs had previously indorsed to M. & T. The defendants paid the proceeds of these sales into their general account at the bank, but kept the result of such sales distinct in their own books. M. & T. had one house at Glasgow and another at Leith. The plaintiffs dealt with the Glasgow house alone; the defendants with both. M. & T. stopped payment at a time when the Glasgow house was not and the Leith house was indebted to the defendants. The plaintiffs sued the defendants to recover a balance, the result of sales of their produce which the defendants had not remitted to M. & T. The jury found that the plaintiffs did not through M. & T. employ the defendants to sell and act for them, but that the defendants knew that M. & T. were acting as agents:—*Held* (reversing the judgment of FIELD, J.), that the plaintiffs could not recover; that there was no privity of contract between the plaintiffs and the defendants, that the defendants were not in a fiduciary position to the plaintiffs, and therefore that the plaintiffs could not follow the identified

proceeds of their goods in the hands of the defendants. *The New Zealand and Australian Land Co.* v. *Watson* (App.), 433

—— See Bankruptcy.

PRIORITY. See Bills of Sale.

PRISONERS—maintenance of insane: by whom expenses to be paid: 3 & 4 Vict. c. 54. s. 2: 27 & 28 Vict. c. 29: 40 & 41 Vict. c. 21. ss. 4 and 57. *Reg.* v. *Oastler and Mews, Justices of Surrey* (App.) (M.C. 4), 103

—— See Justice of the Peace.

PRIVILEGE. See Defamation.

'PROFITS." See Income-Tax.

PROHIBITION—*mayor's court of London: foreign attachment: corporation garnishee*]—Process of foreign attachment cannot be enforced by distress against the garnishee, but only by arrest of his person. It cannot, therefore, be enforced at all against a corporation aggregate, which is by its nature incapable of being arrested. *The Mayor and Aldermen of the City of London* v. *The London Joint-Stock Bank* (H.L.), 594

—— See Ecclesiastical Court. Railway Clauses Act.

PROMISSORY NOTE. See Stamp Act.

PUBLIC HEALTH — *urban sanitary authority: street, subsidence of, raising of: rights of owner of premises abutting*]—The plaintiffs were owners of houses abutting on the High Street in the town of Northwich. Northwich is situate on a bed of rock salt, and in consequence of the exhaustion of the salt by natural and other causes, the surface of the ground from time to time subsides to a considerable extent. In 1870 the surface of High Street had subsided; it was then raised to what was estimated to have been its former level, and the plaintiffs' houses were built at the same time. In 1876 the surface of the High Street, together with the plaintiffs' houses, had again subsided. The defendants, a local board, acting under the Public Health Act, 1875, restored the road to the level it was in 1870—a height which was found, having regard to the obstruction caused by occasional floods, to be reasonably necessary for the ordinary traffic, but putting floods out of the question, and having regard only to the inconvenience caused to the ordinary traffic in times other than the times of flood, was not necessary to so great an extent. The plaintiffs raised their houses to the same level by means of expensive machinery, and sought by arbitration proceedings under sections 179 and 180 of the Public Health Act, 1875, to recover from the defendants the expenses thereby incurred: —*Held*, that the plaintiffs could not recover from the defendants, for that they possessed no rights which the defendants had infringed; nor had the plaintiffs any right to compensation under section 308 of the Public Health Act, 1875, for that the acts done by the defendants were not "an exercise of any of the powers of the Act," but a fulfilment of their duty as surveyors of highways conferred on them by section 144. *Burgess and Another* v. *The Northwich Local Board*, 219

—— (38 & 39 Vict. c. 55), s. 150—sewering of streets: recovery of expenses incurred by local board: notice not in accordance with statute: private improvement expenses: summary procedure before justices. *Gould and Others* v. *The Bacup Local Board* (M.C. 44), 421

—— See Corporation. Landlord and Tenant.

PUBLIC WORSHIP REGULATION ACT—*disobedience to inhibition: power to signify for contempt: jurisdiction of court of arches: form of requisition, monition and inhibition: authority of forms given by rules and orders: official principal appointed by public worship regulation act, not bound by 127th canon: writ de contumace capiendo: costs*]—A representation under the Public Worship Regulation Act, 1874, having been made by the churchwardens against the incumbent of a parish to the Bishop of the diocese, as the Bishop and the Archbishop of the province were both interested in the patronage of the living, another Bishop, namely, the Bishop of E., was appointed by sign manual to act for the Bishop and Archbishop in the matter of the representation under section 16. The Bishop of E. having considered the representation and communicated with the parties in accordance with section 9, sent a requisition to the Judge to hear the case in London or Westminster, or within the diocese. The requisition, with the exception of an alteration, rendered necessary by the double patronage, followed the form given by the Rules and Orders of 1875. Though reciting that the parties had failed within the prescribed time to state their willingness to submit to the Bishop's directions, it did not allege that a copy of the representation had been sent to the incumbent, or that he had been required to state whether he would submit to the Bishop's directions in the matter of the representation:—*Held*, on objection to the requisition as conferring no jurisdiction on the Judge, that it was valid; because, first, the Bishop of E. was properly appointed within the meaning of section 16 to act for both Archbishop and Bishop; second, the requisition suffi-

ciently shewed that all preliminaries had been complied with; third, the incumbent could not object to the form of the requisition if the facts essential to the jurisdiction existed; fourth, the requisition need not name the particular place of hearing, only the limits within which the hearing is to be. The Rules, Orders and Forms issued by Her Majesty in Council, with the advice of certain persons, under section 19 of the Public Worship Regulation Act, 1874, for regulating the procedure under the Act, being sanctioned by Parliament, are of statutory authority, and proceedings which follow such Rules and Orders and the forms thereby prescribed cannot be impeached. Lord Penzance, when appointed under section 7 of that Act as "the Judge of the Provincial Courts of Canterbury and York," became, on the occurrence of a vacancy, *ex officio* Official Principal of those Courts, and was therefore under no obligation to take the oath or subscribe the articles as required of every "chancellor, commissary and official" by the 127th of the Canons of 1603–4. Such Judge on becoming Official Principal of the Provincial Court of Canterbury (the Court of Arches) was not thereby constituted a new Court with a new jurisdiction, but succeeded to and his Court was merged in the old Court of Arches, with all the jurisdiction and authorities inherent in that Court, and with such additional jurisdiction as is conferred by the Act. A monition, commanding an incumbent to abstain from certain specified unlawful practices and other practices and matters of a like nature, is good in form; and on proceedings taken against the incumbent for disregarding the monition in respect of matters alleged to be of a like nature with those specifically named, it is a question of fact, to be determined by the Judge or Bishop who issued the monition, whether the matters complained of are of a like nature, and from his finding an appeal will lie. The Petty Bag Office and Enrolment Amendment Act, 1849 (12 & 13 Vict. c. 109), s. 26, repeals so much of the 5 Eliz. c. 23. s. 3, and 53 Geo. 3. c. 127. s. 1, as requires the writ *de contumace capiendo* to be issued in term time, but does not repeal so much of the same Acts as requires that writ to be brought into Court and opened in the presence of the Justices. By the 13th section of the Public Worship Regulation Act, 1874, obedience to a monition under the Act is to be enforced by an order of inhibition, and in certain events the living is to become void, but the section does not point out how obedience to the inhibition is to be enforced. An incumbent having disregarded an order of inhibition issued against him under the 13th section of the Act, the Judge issued a *significavit* against the incumbent for contempt, and a writ *de contumace capiendo* was issued under which the incumbent was arrested and imprisoned. The writ was issued and made returnable, and was enrolled and delivered of record in the Crown Office out of term, and was not brought into or opened in Court. On writ of *habeas corpus* by the incumbent to be discharged from custody on the ground (amongst others) that the Judge had no power to signify, and that the formalities required by 5 Eliz. c. 23, and 53 Geo. 3. c. 127, had not been complied with,—*Held*, that the Judge in the exercise of his general jurisdiction had power to signify, and that the writ had been properly issued; but *Held*, that as the writ had not been brought into Court and opened in the presence of the Justices, the arrest thereunder was bad, and that the incumbent was entitled to his discharge. *Held* also, that the proceedings in respect of which the incumbent was arrested being civil and not criminal, he was entitled to his costs under the writ of *habeas corpus*. *In re the Rev. T. P. Dale. The Queen* v. *Lord Penzance. In re the Rev. R. W. Enraght. The Queen* v. *Lord Penzance*, 234

RAILWAYS CLAUSES CONSOLIDATION ACT—1863 (26 & 27 *Vict. c.* 92), *s.* 27: *revision of working agreement: regulation of railways act*, 1873, *s.* 10: *jurisdiction of railway commissioners: prohibition*]—In 1858 two railway companies entered into a working agreement under a special Act, which enabled them so to do, with this proviso, "That no such agreement shall be valid until the same has been approved, both as to the period of its continuance and in other respects, by the Board of Trade." The 17th clause of the agreement empowered the Board of Trade once in every ten years "to cause this agreement to be revised, but in the interest of the public only." In 1873 the powers and duties of the Board of Trade "under any special Act with respect to the approval of working agreements between railway companies" were transferred to the Railway Commissioners:—*Held*, that the power given under clause 17 of the agreement to the Board of Trade was a power with respect to the approval of a working agreement, and was also a power under a special Act, so that the Railway Commissioners had power to revise the agreement, and to consider it in the interest of the public. *The Corporation and the Chamber of Commerce of Huddersfield* v. *The Great Northern Rail. Co., and the Manchester, Sheffield and Lincolnshire Rail. Co.* 587

RAILWAY COMMISSIONERS—*jurisdiction of: regulation of railways act: railway company: duty of, under railway and canal traffic act: prohibition: demurrer*]—The 2nd section of the Railway and Canal Traffic Act (17 & 18 Vict. c. 31) requires every railway and canal company to afford, according to their respective powers, all reasonable facilities for the receiving, forwarding and delivering of traffic upon and from their railways and canals. Section 3 empowers any company or person complaining of anything done or any omission made in violation or contravention of the Act by such companies, to apply for relief to the Court of Common

Pleas. The Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), transferred to the Railway Commissioners all the jurisdiction of the Court of Common Pleas in the above-mentioned matters. A complaint was made to the Railway Commissioners pursuant to the provisions of these Acts by the Corporation of H. as to the condition of the stations of the S. E. Railway Company at H. and L., and application was made for an order requiring the railway company to enlarge the station at H., to provide better booking-office, waiting-room, refreshment-room and general accommodation therein; to alter the existing platforms and to provide new ones; to improve the warehouse and cattle accommodation; and at L. to enlarge the platform and to provide a new road of approach. The commissioners delivered a judgment setting out the order which they proposed to make. This order, the operation of which was suspended for a named time, required the railway company to extend the platform accommodation at H. according to a specified plan, to cover over the platforms and part of the carriage yard, to add four waiting-rooms of a specified size, to reserve a portion of the station for refreshments, to increase the accommodation for the delivery of tickets, and to increase and improve the accommodation for cattle. With respect to the station at L. the order required the company to increase and improve the platform and waiting-room accommodation, to cover over the bridge, to make fresh openings into and to widen the road of approach to that station. The railway company declared generally in prohibition on the ground that the commissioners had no jurisdiction to hear the application or any part thereof. The commissioners demurred generally to the whole of the declaration:—*Held* (reversing the judgment of the Queen's Bench Division), that the subject-matter of the complaint and application was not beyond the scope of the jurisdiction of the commissioners, but that the commissioners had no power peremptorily to order particular works to be executed according to a specified plan. (By LORD SELBORNE, L.C., and LORD COLERIDGE, C.J.), that the orders with respect to the platforms and goods yard at H., and the approach road at L., were in excess of jurisdiction; that the orders as to refreshment accommodation and the covering over of platforms, carriage yard and bridge, were not "facilities" within the statute; but that the orders as to booking-office, waiting-room and cattle accommodation were such facilities, and that the demurrer ought to be allowed generally. (By BRETT, L.J.), that all the orders except those relating to the cattle accommodation and the delivery of tickets at the booking-office, were in excess of jurisdiction, that the judgment on the demurrer should be distributive, and that the demurrer should be overruled as to all the orders except two. *The South Eastern Rail. Co.* v. *The Railway Commissioners and the Mayor and Corporation of Hastings* (App.), 201

RAILWAY COMMISSIONERS (continued)—*jurisdiction of: charge by railway in excess of parliamentary limit: reasonable facilities: railway and canal traffic act: regulation of railways act*]—A complaint having been made to the railway commissioners of fares demanded by a railway company which exceeded by a small amount the sum fixed for such fares by Act of Parliament,—*Held* (affirming the judgment of the Queen's Bench Division), that the railway commissioners had no jurisdiction to entertain the application, and that a writ of prohibition ought to issue; for that, although the sums demanded for fares were in excess of the statutory limit, still there was no allegation that the sums were so fixed and so demanded with a view to prevent passengers from travelling or trains from running, nor was there any allegation or evidence that the fares so fixed and demanded did in fact have that effect. *The Great Western Rail. Co.* v. *The Railway Commissioners; in re Brown* (App.), 483

—— See Railway Clauses Act.

RAILWAY COMPANY—*duty to erect and maintain fences: protection for owners of adjoining lands: release by owner of right of protection: effect on right of occupier: railways clauses consolidation act*]—The plaintiff was in 1846, and continued to the time of action brought, tenant from year to year of certain lands, part of which the defendants acquired in 1847 for the purposes of their line. The defendants then paid the landlord of the plaintiff compensation for his statutory right to have his land fenced off from the railway, and he released them from all obligation to fence. The defendants planted a hedge, with posts and rails on either side, and made a ditch between their line and the land occupied by the plaintiff. This fence was not kept in repair, in consequence of which a cow belonging to the plaintiff fell into the ditch and was killed. In an action for the value of the cow,—*Held* (affirming the judgment of the Common Pleas Division), that the defendants were liable to the plaintiff, as the agreement between his landlord and the defendants did not take away his statutory right to have a fence maintained pursuant to the provisions of section 68 of the Railways Clauses Consolidation Act, 1845. *Corry* v. *The Great Western Rail. Co.*, 313 (App.), 386

—— *execution against rolling stock or plant: railway companies act: railway closed for traffic*]—Rolling stock and plant of a railway company, whose railway had fallen into disrepair, and who had been obliged by financial difficulties to close their railway, were seized in execution:—*Held*, that 30 & 31 Vict. c. 127. s. 4, restricting execution against the rolling stock and plant of a railway company, was not confined to a railway which was open for traffic, but

applied, although the railway had been closed for traffic and it was doubtful whether it would ever be re-opened. *The Midland Waggon Co.* v. *The Potteries, Shrewsbury and North Wales Rail. Co.*, 6

—— *negligence: passenger's luggage: liability apart from contract*]—The G.W.R. issue through tickets from Stourbridge on their line to Euston (*via* Birmingham) on the defendants' line. The journey from Stourbridge to Birmingham is by the G.W.R., and from Birmingham to Euston by the defendant railway. The plaintiff travelled with one of these tickets, and his portmanteau was labelled and carried in the van of the G.W.R. as far as Birmingham. At Birmingham he changed into the defendants' train, and his portmanteau was seen to be transferred into the van of the defendants' train, but at Euston it was not forthcoming, and was not recovered till three months afterwards, when its contents were injured by contact with some perishable articles he had packed inside it. The plaintiff having sued the defendant company for the delay and injury to his goods, it was,—*Held*, that the action was maintainable in accordance with the principle of *Foulkes* v. *The Metropolitan Railway Company* (49 Law J. Rep. C.P. 361; Law Rep. 5 C.P. D. 157), for the defendants, having received the portmanteau to forward it, had committed a breach of duty in neglecting to do so, for which they were responsible, apart from any question of contract. *Hooper* v. *The London and North Western Rail. Co.*, 103

Semble, Mytton v. *The Midland Railway Company* (4 Hurl. & N. 615; 28 Law J. Rep. Exch. 385) is overruled by *Foulkes* v. *The Metropolitan Railway Company* (49 Law J. Rep. C.P. 361; Law Rep. 5 C.P. D. 157). Ibid.

—— by-law, divisibility of: passenger travelling in a first-class carriage with second-class ticket: intention to defraud: 8 Vict. c. 20. ss. 103, 108, 109. *Dyson* v. *The London and North Western Railway Company* (M.C. 78), 494

—— See Corporation. Revenue.

RAILWAY PASSENGER DUTY—*cheap trains act* (7 & 8 *Vict. c.* 85. *ss.* 6 *and* 9): *exemption from duty: third-class passenger*]—To constitute a train complying in other respects with the statutory requirements a cheap train within section 6 of 7 & 8 Vict. c. 85, entitling the railway company to exemption from passenger duty under section 9, no third-class passenger must be charged more than the parliamentary fare. *The Attorney-General* v. *The Metropolitan Rail. Co.*, 573

—— *duty added to fare: extra charge for sleeping accommodation*]—By 5 & 6 Vict. c. 79 duty is payable on all sums received or charged for the hire, fare or conveyance of passengers upon any railway. A private Act fixed the maximum rates to be charged by the defendants for the conveyance of passengers, the tolls for the use of carriages and every other expense incidental to the conveyance aforesaid, except government duty. The defendants added the duty to the fares, which were fixed in some cases at the maximum and in some cases below the maximum rate allowed, and charged passengers the sum total as the price of a ticket. An information having been laid by the Crown claiming duty on the sum so added to the fare,—*Held* (affirming the judgment of the Exchequer Division), that the Crown was entitled to duty upon the sum so added. The Crown, by the same information, claimed duty on sums charged by the defendants to first-class passengers in addition to the ordinary fare, for the use of a sleeping carriage provided with beds, lavatories and attendance, in which such passengers could remain undisturbed till such hour as they might choose to be called, even though they had arrived at their journey's end at an earlier hour. *Held* also (affirming the judgment of the Exchequer Division), that the Crown was entitled to duty upon the sum charged for the extra accommodation. *The Attorney-General* v. *The London and North Western Rail. Co.* (App.), 170

RATING—successive occupation: liability of outgoing occupier: bridge acquired by board of works: liability to rate: beneficial occupation: 32 & 33 Vict. c. 41. s. 16: 40 & 41 Vict. c. xcix. *Hare* v. *The Churchwardens and Overseers of Putney* (App.) (M.C. 81), 535

REALTY—Agreement to devise. See Contract.

REASONABLE FACILITIES. See Railway Commissioners.

RECEIPT AND INVENTORY. See Bill of Sale.

RECEIVER. See Judgment Creditor.

REGISTER. See Ship and Shipping.

REGISTRATION. See Bills of Sale.

REPUTED OWNERSHIP. See Bankruptcy.

RETAINER. See Solicitor.

RETURNING OFFICER. See Municipal Election Petition.

REVENUE—*succession duty: mortgage of base fee: resettlement*]—E. B. being seised in fee, granted estates to trustees to the use of himself for life, with remainder to his sons successively in tail male, remainder to his daughters in tail general.

The grantor died, leaving two sons, Edward (a lunatic) and Reginald, and one daughter, Frances. Reginald conveyed, subject to Edward's estate, to the use of himself in fee, and then mortgaged the base fee thus created to a bank for 124,000*l.*, being more than the fee-simple value of the property. Frances married, having bound herself by ante-nuptial settlement to settle any real property which she should acquire in her own right during the marriage on herself for life, with remainder to her children. Subsequently, by an arrangement between all the persons interested, Reginald, Frances and her husband, with the consent of the Lord Chancellor, as protector of the settlement, conveyed the property to trustees in fee, subject to Edward's estate tail, discharged of the mortgage and Reginald's equity of redemption, upon trust, after the death of Edward, to raise 37,000*l.* by sale, and after paying off the mortgage to convey to the use of other trustees, in trust for Frances for life, with remainder to her husband for life, with remainder to their sons in succession in tail male, with remainders over. Edward died without issue. Frances and her husband died leaving the defendant their eldest son:—*Held* (affirming the judgment of the Exchequer Division), that the defendant, for the purposes of succession duty, derived his succession from his mother and not from Reginald. *The Attorney-General* v. *Dowling* (App.), 192

Revenue (continued)—*succession duty: appointment by donee of general power: predecessor: succession duty: legacy duty*]—A testator bequeathed certain funds in trust for his daughter for life, with remainder to such persons as she should by deed appoint, and in default of appointment to her next-of-kin. The testator died before the passing of the Succession Duty Act, 1853, and legacy duty at the rate of one per cent. was paid on the above trust funds. The daughter, after the passing of the Succession Duty Act, 1853, exercised the power in favour of her nieces, grandchildren of the testator:—*Held*, first, that the nieces were liable to a duty of one per cent. as on a succession derived from the testator, who was the "predecessor" within section 2 of the Succession Duty Act, 1853; secondly, that the payment of the legacy duty had not discharged the nieces from the obligation to pay succession duty. *The Attorney-General* v. *Mitchell*, 406

Riot—felonious demolition of houses: liability of hundred: 7 & 8 Geo. 4. c. 31. s. 2. *Drake* v. *Foottit*. *Drake* v. *Hankin* (M.C. 141), 762

Risk. See Marine Insurance.

Sale of Food and Drugs Acts, 1875, 1879 (38 & 39 Vict. c. 63. s. 14, and 42 & 43 Vict. c. 30. s. 3)—consignor and consignee: adulterated milk in course of transit: no delivery of sample to agent of seller. *Rouch* v. *Hall* (M.C. 6), 277

Sale of Goods—*manufacturer: contract for sale of goods by manufacturer: implied term that goods are of manufacturer's own make: evidence: custom*]—In a contract to supply goods by a firm, who manufacture, but do not otherwise deal in the goods, there is, where no usage or custom to the contrary is shewn, an implied term that the goods shall be of the firm's own make. The plaintiffs, a firm who were manufacturers of, but did not otherwise deal in, iron goods, by a contract in writing agreed to supply to the defendants a quantity of ship-plates of a specified quality and description by monthly deliveries at the defendants' shipyard. The contract was headed with the name of the plaintiffs' works, and had their trade-mark on its margin, and it contained a clause providing that in case of any strike of workmen causing a stoppage of the works, the supply of the plates might be suspended during the continuance of the strike. Before the deliveries were completed the plaintiffs closed their works and proposed to complete the contract by delivering plates of the specified quality and description, but manufactured by other firms. The defendants having refused to accept delivery of these plates, the plaintiffs sued them for breach of contract, and at the trial the defendants tendered evidence of a custom in the iron trade that the buyer of iron plates from a firm of manufacturers of them is, in the absence of any stipulation to the contrary, entitled to require plates to be supplied of the seller's own make:—*Held*, that the evidence of custom did not contradict the written contract, and was therefore admissible. *Held* also (by Brett, L.J., and Cotton, L.J.; Bramwell, L.J., dissenting), that the defendants were entitled to refuse to accept delivery of the plates which were not of the plaintiffs' own manufacture. Judgment of Manisty, J., reversed. *Johnson* v. *Raylton, Dixon & Co.* (App.), 753

—— *successive deliveries: refusal to accept one delivery: right to cancel contract*]—The defendant in October, 1879, sold to the plaintiff 2,000 tons of iron, at 42*s.* per ton free on board—"Delivery, November, 1879, or equally over November, December and January next, at 6*d.* per ton extra." The plaintiff refused to accept any iron in November; the defendant then declared the contract to be cancelled. The plaintiff claimed delivery of one-third of the 2,000 tons in December and one-third in January. The defendant refused to deliver. In an action for non-delivery,—*Held* (by Bramwell, L.J., and Baggallay, L.J., Brett, L.J., dissenting), that the plaintiff's breach of contract in refusing to accept delivery in November entitled the defendant to cancel the contract, and therefore the defendant was not liable. Judgment of Field, J., and Manisty, J., reversed. *Hoare* v. *Rennie* (5 Hurl. & N. 19; 29 Law J. Rep. Exch. 73) approved. *Honck* v. *Muller* (App.), 529

SALVAGE. See Shipping.

SEA—bodies cast on shore: buried by parish: expenses from county: 48 Geo. 3. c. 75. ss. 1, 5, 6. *The Churchwardens of Woolwich* v. *Robertson* (M.C. 87), 544

SEAL, contract not under. See Corporation.

SESSIONS—right of appeal: notice of appeal: time: statutes 11 Geo. 2. c. 19. s. 5, and 12 & 13 Vict. c. 45. s. 1: Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), ss. 31 and 32: practice: regulations and conditions of appeal. *Reg.* v. *The Justices of Salop* (M.C. 72), 569

SET-OFF. See Pleading. Practice.

SHERIFF—*fieri facias: execution: sheriff's fees: sheriff's officer, right of to recover fees from solicitor of execution creditor*]—A sheriff's officer, who has executed a writ of *fieri facias*, cannot maintain an action for his fees against the solicitor of the execution creditor, where the solicitor has done nothing more than deliver the writ to the sheriff for execution. *Mayberry* v. *Mansfield* (9 Q.B. 754; 16 Law J. Rep. Q.B. 102) followed; *Brewer* v. *Jones* (24 Law J. Rep. Exch. 143; 10 Exch. 655) overruled. *Royle* v. *Busby & Sons* (App.), 196

—— *possession of: failure to withdraw sheriff from possession after composition: malice*]—In the absence of malice, no action will lie against a judgment creditor for not withdrawing the sheriff from possession after the judgment creditor has become bound by a composition of the debt. According to the statement of claim, A, having recovered a judgment against B, issued a writ of *fi. fa.*, under which the sheriff entered into possession of B's goods. B filed a petition of insolvency, and A proved for the amount of his judgment against B's estate. Resolutions for a composition were passed and registered. The sheriff refused to withdraw from possession without A's instructions, which were not given by A. No malice was alleged as against A:—*Held*, on demurrer, that in the absence of malice A's failure to instruct the sheriff to retire gave B no right of action against A. *Phillips* v. *The General Omnibus Co.*, 112

—— Sale by. See Bill of Sale.

SHIP AND SHIPPING—*general average: deck cargo: jettison: contribution*]—The defendants, shipowners, contracted with the plaintiff to carry his cattle, on deck, from New York to Portsmouth. No custom to carry cattle on deck existed. During the voyage the ship encountered heavy weather, and the master made a proper and necessary jettison of the cattle:—*Held* (reversing the judgment of the Queen's Bench Division), that the plaintiff was not entitled to contribution from the defendants in respect of his loss either by way of general average on ship, freight and cargo, or as a particular right to contribution from the defendants alone. *Wright* v. *Marwood*. *Gordon* v. *Marwood* (App.), 643

—— *necessaries for ship: authority of part owner to pledge other owner's credit: managing owner: entry on register*]—The Act 39 & 40 Vict. c. 80. s. 36 requires the name and address of the managing owner for the time being of every British ship to be registered at the custom-house of the ship's port of registry. In accordance with this provision W., in 1877, being the registered owner of certain shares in a ship, caused himself to be entered as managing owner. Subsequently, in 1879, the defendant became registered owner of certain other shares in the same ship, and agreed to sell them to W. for cash, informing W. that he had no intention of navigating the ship, and would not take any part in her management. W. thereupon agreed that the vessel should not leave port till the cash was paid. Shortly after, W., without the defendant's knowledge, ordered necessaries for the ship from the plaintiffs, and sent the ship to sea. The defendant had no interest in the adventure, of which he knew nothing, nor was he aware of the entry in the register of W. as managing owner, which still remained uncancelled. The plaintiffs had inspected the register before supplying the necessaries, and found the defendant's name as part owner. W. shortly after went into liquidation. On action brought to recover the price of the necessaries from the defendant,—*Held*, that W. had not in fact authority to bind the defendant, and that the fact of the entry on the register of W. as managing owner remaining uncancelled, was not a holding out by the defendant of W. as his managing owner, or as clothed with authority to bind any other owners than those who had in fact entrusted to him the management of the ship. *Frazer & Co.* v. *Cuthbertson*, 277

—— *pilotage: salvage*]—A ship bound for Barrow-in-Furness was driven by a violent storm to leeward of her port into Morecambe Bay. She could not beat to windward, but was being driven towards dangerous sands. Her captain and crew were ignorant of the locality, and unless guided to some part of the bay where she might take the ground or lie in safety she would inevitably have been lost. Some pilots, seeing her peril, put to sea, at considerable danger to their own lives, and being unable, through the height of the sea, to board the ship, they led her, by preceding her and signalling, to a safe anchorage in the bay. The ship had a pilot signal flying when the pilots put off. No mention was made from the ship of any port to which she should be steered; and she had not suffered any damage to her

hull, spars or sails:—*Held*, that the services rendered by the pilots were salvage, and not pilotage, services. *Akerblom* v. *Price, Potter, Walker & Co.* (App.), 629

SHIP AND SHIPPING (continued)—*registration: written agreement to transfer: merchant shipping act: merchant shipping act amendment act*]—An agreement in writing to transfer a ship does not require to be registered under the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 55, nor need the special description of the ship sold required by that section to be inserted in a bill of sale transferring the ship be contained in such agreement. The plaintiff agreed in writing with the defendant to sell, and the defendant agreed to purchase, a yacht belonging to the plaintiff for the sum of 2,600*l.*, whereof the plaintiff was the registered owner, on condition that the defendant should be at liberty to rescind the said agreement should the yacht prove unsound. The defendant refused to carry out his part of the agreement, and the plaintiff brought an action against the defendant for specific performance, or, in the alternative, 2,600*l.*, and for damages for breach of contract. The defendant pleaded that the agreement, if any was made, was not a bill of sale, nor was it registered, nor did it contain a sufficient description of the yacht, as required by the Merchant Shipping Act, 1854. The plaintiff demurred:—*Held*, that section 55 of the Merchant Shipping Act, 1854, applies to the actual instrument by which the ship is to be transferred and not to an agreement to transfer. *Batthyany* v. *Bouch*, 421

—— *supply of apprentice by unlicensed person: "crimping": merchant shipping act*, 1854 (17 & 18 *Vict. c.* 104), *s.* 147: *owner of ship: contract for purchase of share in ship: equitable part owner of ship: merchant shipping amendment act*, 1862 (25 & 26 *Vict. c.* 63), *s.* 3]—A. made a *bona fide* contract for the purchase of one sixty-fourth share in a British ship and paid a deposit thereon. Subsequently, and before any transfer of the share, he supplied an apprentice to the ship, not being licensed under section 146 of the Merchant Shipping Act, 1854. The Board of Trade summoned him for a penalty under section 147:—*Held*, that he was not liable, as he was "owner" within the exception in sub-section 1 of section 147, which by virtue of section 3 of the Merchant Shipping Amendment Act, 1862, was to be read as including equitable owner. *Hughes* v. *Sutherland*, 567

SHORTHAND NOTES. See Costs.

SIMONY. See Church and Clergy.

SLANDER. See Practice.

SOLICITOR—*negligence: breach of duty: double retainer: conflicting interests*]—A employed B as his solicitor in an action against C. The learned Judge on the trial reserved his judgment, intimating that there would certainly be a verdict for A as regarded part of his claim, but as to the balance he would consider the matter. In the interval and before judgment actually given, D, a former client of B's, consulted him professionally whether he could safely leave in C's possession property bought by him of C, which was nearly all C's property, and on B's advice a bill of sale was executed by C in D's favour. When judgment was given, C filed a petition for liquidation of his affairs, and in consequence of the bill of sale A only received a dividend under the liquidation proceedings on his judgment:—*Held* (on appeal by Special Case), that there was a right of action on the ground of negligence if B acted in ignorance of his duty; or on the ground of misconduct and breach of duty if he were aware of it. *Barber* v. *Stone*, 297

—— *rights of London agent: privity of contract: wrongful detainer of money: summary jurisdiction*]—J., a London solicitor, received, as agent for R., a country solicitor, certain moneys for debt and costs recovered under a writ of *fi. fa.*, and belonging to a client of R. At the time of receiving the moneys R. was indebted to J. for costs incurred as his London agent, in a sum equal to the amount so recovered:—*Held*, that J. was, nevertheless, not entitled to retain this amount in satisfaction of his claim against R., but was bound to pay over the sum to R.'s client. *In re Johnson (a solicitor); ex parte Edwards*, 541

—— See Bills of Sale. Costs. Sheriff.

STAMP ACT, 1870 (33 & 34 *Vict. c.* 97), *s.* 49: *denomination of instrument: debenture or promissory note*]—Instruments were issued by a company, not under seal, and headed "debentures," by which the company undertook to pay at a specified date "one hundred pounds, the amount of this debenture," to A, or order, and interest in the meantime at a given rate "to the holder of this debenture," upon presentation and delivery of the coupons which were annexed to the instrument:—*Held*, that such instruments were liable to be stamped as debentures under 33 & 34 Vict. c. 97, and not as promissory notes. *The British India Steam Nav. Co.* v. *The Com. of Inland Revenue*, 517

STATUTE—*construction of: consolidation act: incorporation with special act: lands clauses consolidation act: costs of arbitration: action for costs before taxation*]—By a private Act of Parliament a special tribunal was provided for arbitration in respect of claims for compensation for injury to land by the works of a railway

but no provision was made as to costs. The same Act incorporated the Lands Clauses Consolidation Act, 1845, "except where expressly varied" by the special Act:—*Held*, that the provisions of section 34 of the Lands Clauses Consolidation Act, 1845, were not "expressly varied" by the section of the special Act, which provided a different tribunal of arbitration; but that those provisions applied to arbitrations under the section of the special Act. The assessment of costs by a Master under section 1 of the Lands Clauses Consolidation Act, 1869, is not a condition precedent to the claimant's right to bring an action for such costs where the right to costs is disputed. *The Metropolitan District Rail. Co.* v. *Sharpe* (H.L.), 14

STATUTORY DUTY—*duty to be enforced by injunction: remedy by action for injury caused by breach of duty created by statute: Forest of Dean act* (1 & 2 *Vict. c.* 43. *s.* 29)*: mines: mortgagor and mortgagee: liability of mortgagee for injury done by mortgagor in possession to adjoining mine*]—The statute 1 & 2 Vict. c. 43, and the rules made under it, regulate the use of adjoining gales in the Forest of Dean. By section 29 compliance with the rules may be enforced "by or on behalf of Her Majesty, her heirs or successors, or by any other person or persons, by injunction of Her Majesty's Court of Exchequer or otherwise, in such manner as the said Court shall, on application, think fit." The plaintiffs brought an action for damages against the defendants, as owners of adjoining gales in the Forest of Dean for injury sustained by the plaintiffs through the stopping of the engines in the defendants' gale contrary to one of the rules. Some of the defendants were mortgagors in possession of and working the gale. The other defendants were mortgagees who had never been in possession of or worked it:—*Held* (affirming the judgment of the Exchequer Division), that, with respect to the defendants who were mortgagors, the specific remedy given by section 29, for enforcing compliance with the rules, did not exclude the plaintiffs' right to recover damages for injuries caused to them by an antecedent breach of the rules. *Held* also (reversing the judgment of the Exchequer Division), that the mortgagees were not liable in the action. *Ross* v. *Rugge-Price* (45 Law J. Rep. Exch. 777; Law Rep. 1 Ex. D. 269) approved and followed. *Brain* v. *Thomas* (App.), 662

STREET. See Public Health.

SUCCESSION DUTY. See Revenue.

SURFACE—damage to. See Mines.

TAXATION. See Parliament.

TAXATION OF COSTS. See Practice.

TELEGRAPHS—*telegraph act: exclusive privilege of the postmaster-general: telephones*]—A telephone, communicating the sound of the voice from the transmitting to the receiving end, by means of a wire carrying an electric current, is a telegraph within the meaning of sections 3 and 4 of the Telegraph Act, 1869, whereby an exclusive privilege of transmitting communications by telegraph is given to the Postmaster-General. The subscribers to a telephone exchange company paying a rent to the company for the convenience of any two of them being put into communication together through the medium of various centres, are not within the exceptions in favour of private owners engrafted in the exclusive privilege of the Postmaster-General by sections 4 and 5 of the Telegraph Act, 1869. *The Attorney-General* v. *The Edison Telephone Co. of London* (*Lim.*), 145

TELEGRAPH COMPANY. See Income-Tax.

TELEPHONES. See Telegraphs.

TERM, ENLARGEMENT OF. See Landlord and Tenant.

THIRD PARTY. See Practice.

TIME. See Appeal.

TIME OF ISSUING WRIT. See Practice.

TITHE RENT-CHARGE. See Money Paid.

TRAMWAYS ACT—*user of colourable patent: flanged wheels*]—The appellant made use of a patent whereby a lever, when set in motion, raised or lowered a movable small revolving disc at the inner side of the two front wheels of an omnibus, which disc acted like a flange in the ordinary tramway-car wheel when lowered, but when it was raised the omnibus could travel on the roadway apart from the tramway:—*Held*, that this combination of open wheel and flanged wheel was an arrangement within section 54 of the Tramways Act, 1854. *Cottam* v. *Guest*, 174

TRESPASS—*several oyster fishery: navigable river: grant subject to exception in favour of free inhabitants of ancient tenements*]—The plaintiffs, a corporation by royal charter of a borough, claimed to be possessed of a several fishery in a tidal navigable river. The defendants claimed as subjects of the realm a general right to dredge for and to dispose of oysters in the river in question, and they also claimed a right as free inhabitants of ancient tenements in the borough to dredge for oysters in the same river, from the 2nd of February to Easter Eve in each year:—*Held* (by the Court of Appeal—*dissentients* BAGGALLAY, L.J.—affirming the judgment

of the Common Pleas Division), that the defendants were liable in an action of trespass, brought by the corporation, for that there was evidence from charters of re-grant, from leases, and from immemorial user, of a grant to the predecessors of the plaintiffs of a several fishery as early as Henry 2, and that there was no evidence of any exception out of that grant in favour of the defendants. *The Mayor and Free Burgesses of the Borough of Saltash* v. *Goodman* (App.), 508

TRIAL, Mode of. See Practice.

TRICYCLE. See Locomotive.

TRUST. See Bankruptcy. Company.

TRUSTEE IN BANKRUPTCY. See Bankruptcy. Damages, measure of. Practice.

ULTRA VIRES. See Principal and Agent.

UNDUE INFLUENCE—*confidential relation: patient and medical man: revocable gift*]—At the trial of an action by the executors of G. to recover the amount of a gift of money made by G. to her medical man, it was admitted that, when the gift was made, the relation of patient and medical man existed between G. and the defendant, and that G. had no independent advice of any kind. In answer to questions left to them by the Judge, the jury found that there had been no undue influence in fact, or fraud, on the part of the defendant; and that, after the relation of patient and medical man had come to an end between G. and the defendant, and after any effect produced by it had been removed, she intentionally abode by what she had done. The Judge was not asked to leave, and did not leave, to the jury the question whether G., when she made the gift, or subsequently, knew that it was revocable, and he entered judgment for the defendant upon the findings:—*Held*, that as the effect of the findings was that G., after the relation and influence had ceased, deliberately determined she would not revoke the gift, whether or not it was revocable, the judgment was rightly entered. *Mitchell* v. *Homfray* (App.), 460

VALUED POLICY. See Marine Insurance.

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WILD BIRDS PROTECTION ACT, 1880 (43 & 44 Vict. c. 35), s. 3: foreign bird: exemption from penalties. *Taylor* v. *Rogers* (M.C. 132), 762

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ERRATA.—Page 196, second column, tenth line from the bottom, for debtors *read* creditors; and page 197, first column, fourteenth line from the top, for Stavely Coal and Iron Company *read* W. & J. Garfield (Limited).

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